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SENATE BILL 5909

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State of Washington                      62nd Legislature                      2011 Regular Session

By Senators Holmquist Newbry, Honeyford, Schoesler, and Hatfield

Read first time 03/28/11. Referred to Committee on Environment, Water & Energy.

1            AN ACT Relating to granting the authority to make final water right  
2 decisions to conservancy boards; amending RCW 90.80.055, 90.80.070,  
3 90.80.080, 90.80.090, and 90.80.120; reenacting and amending RCW  
4 43.21B.110 and 43.21B.110; creating a new section; providing an  
5 effective date; and providing an expiration date.

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

7            NEW SECTION.    **Sec. 1.** The legislature intends to ensure that the  
8 state's water resource management program is administered to maximize  
9 administrative efficiency, accountability, and financial self-  
10 sufficiency. The legislature intends to eliminate unnecessary  
11 duplication, delay, and costs in processing water right transfers by  
12 reducing the role of the department of ecology while fully preserving  
13 the rights of affected parties to obtain review of water conservancy  
14 board decisions. The legislature finds that expedited administrative  
15 review of water right transfers by water conservancy boards, subject to  
16 appeal by aggrieved parties or the department of ecology and review by  
17 the pollution control hearings board, will result in more efficient  
18 reallocation of water supplies, encourage water conservation efforts,

1 and facilitate development while reducing costs to the state general  
2 fund.

3 **Sec. 2.** RCW 43.21B.110 and 2010 c 210 s 7 and 2010 c 84 s 2 are  
4 each reenacted and amended to read as follows:

5 (1) The hearings board shall only have jurisdiction to hear and  
6 decide appeals from the following decisions of the department, the  
7 director, local conservation districts, water conservancy boards  
8 established pursuant to chapter 90.80 RCW, the air pollution control  
9 boards or authorities as established pursuant to chapter 70.94 RCW,  
10 local health departments, the department of natural resources, the  
11 department of fish and wildlife, and the parks and recreation  
12 commission:

13 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,  
14 70.105.080, 70.107.050, 76.09.170, 77.55.291, 78.44.250, 88.46.090,  
15 90.03.600, 90.46.270, 90.48.144, 90.56.310, 90.56.330, and 90.64.102.

16 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,  
17 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,  
18 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

19 (c) A final decision by the department or director made under  
20 chapter 183, Laws of 2009.

21 (d) Except as provided in RCW 90.03.210(2), the issuance,  
22 modification, or termination of any permit, certificate, or license by  
23 the department or any air authority in the exercise of its  
24 jurisdiction, including the issuance or termination of a waste disposal  
25 permit, the denial of an application for a waste disposal permit, the  
26 modification of the conditions or the terms of a waste disposal permit,  
27 or a decision to approve or deny an application for a solid waste  
28 permit exemption under RCW 70.95.300.

29 (e) Decisions of local health departments regarding the grant or  
30 denial of solid waste permits pursuant to chapter 70.95 RCW.

31 (f) Decisions of local health departments regarding the issuance  
32 and enforcement of permits to use or dispose of biosolids under RCW  
33 70.95J.080.

34 (g) Decisions of the department regarding waste-derived fertilizer  
35 or micronutrient fertilizer under RCW 15.54.820, and decisions of the  
36 department regarding waste-derived soil amendments under RCW 70.95.205.

1 (h) Decisions of local conservation districts related to the denial  
2 of approval or denial of certification of a dairy nutrient management  
3 plan; conditions contained in a plan; application of any dairy nutrient  
4 management practices, standards, methods, and technologies to a  
5 particular dairy farm; and failure to adhere to the plan review and  
6 approval timelines in RCW 90.64.026.

7 (i) Any other decision by the department or an air authority which  
8 pursuant to law must be decided as an adjudicative proceeding under  
9 chapter 34.05 RCW.

10 (j) Decisions of the department of natural resources, the  
11 department of fish and wildlife, and the department that are reviewable  
12 under chapter 76.09 RCW, and the department of natural resources'  
13 appeals of county, city, or town objections under RCW 76.09.050(7).

14 (k) Forest health hazard orders issued by the commissioner of  
15 public lands under RCW 76.06.180.

16 (l) Decisions of the department of fish and wildlife to issue,  
17 deny, condition, or modify a hydraulic project approval permit under  
18 chapter 77.55 RCW.

19 (m) Decisions of the department of natural resources that are  
20 reviewable under RCW 78.44.270.

21 (n) Decisions of a state agency that is an authorized public entity  
22 under RCW 79.100.010 to take temporary possession or custody of a  
23 vessel or to contest the amount of reimbursement owed that are  
24 reviewable under RCW 79.100.120.

25 (o) Decisions of water conservancy boards to approve or deny  
26 applications under chapter 90.80 RCW.

27 (2) The following hearings shall not be conducted by the hearings  
28 board:

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

31 (b) Hearings conducted by the department pursuant to RCW 70.94.332,  
32 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

33 (c) Appeals of decisions by the department under RCW 90.03.110 and  
34 90.44.220.

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

37 ~~((e) Appeals of decisions by the department as provided in chapter~~  
38 ~~43.211 RCW.))~~

1 (3) Review of rules and regulations adopted by the hearings board  
2 shall be subject to review in accordance with the provisions of the  
3 administrative procedure act, chapter 34.05 RCW.

4 **Sec. 3.** RCW 43.21B.110 and 2010 c 210 s 8 and 2010 c 84 s 3 are  
5 each reenacted and amended to read as follows:

6 (1) The hearings board shall only have jurisdiction to hear and  
7 decide appeals from the following decisions of the department, the  
8 director, local conservation districts, water conservancy boards  
9 established pursuant to chapter 90.80 RCW, the air pollution control  
10 boards or authorities as established pursuant to chapter 70.94 RCW,  
11 local health departments, the department of natural resources, the  
12 department of fish and wildlife, and the parks and recreation  
13 commission:

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15 70.105.080, 70.107.050, 76.09.170, 77.55.291, 78.44.250, 88.46.090,  
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18 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,  
19 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

20 (c) Except as provided in RCW 90.03.210(2), the issuance,  
21 modification, or termination of any permit, certificate, or license by  
22 the department or any air authority in the exercise of its  
23 jurisdiction, including the issuance or termination of a waste disposal  
24 permit, the denial of an application for a waste disposal permit, the  
25 modification of the conditions or the terms of a waste disposal permit,  
26 or a decision to approve or deny an application for a solid waste  
27 permit exemption under RCW 70.95.300.

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

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31 and enforcement of permits to use or dispose of biosolids under RCW  
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33 (f) Decisions of the department regarding waste-derived fertilizer  
34 or micronutrient fertilizer under RCW 15.54.820, and decisions of the  
35 department regarding waste-derived soil amendments under RCW 70.95.205.

36 (g) Decisions of local conservation districts related to the denial  
37 of approval or denial of certification of a dairy nutrient management

1 plan; conditions contained in a plan; application of any dairy nutrient  
2 management practices, standards, methods, and technologies to a  
3 particular dairy farm; and failure to adhere to the plan review and  
4 approval timelines in RCW 90.64.026.

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

8 (i) Decisions of the department of natural resources, the  
9 department of fish and wildlife, and the department that are reviewable  
10 under chapter 76.09 RCW, and the department of natural resources'  
11 appeals of county, city, or town objections under RCW 76.09.050(7).

12 (j) Forest health hazard orders issued by the commissioner of  
13 public lands under RCW 76.06.180.

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16 chapter 77.55 RCW.

17 (l) Decisions of the department of natural resources that are  
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19 (m) Decisions of a state agency that is an authorized public entity  
20 under RCW 79.100.010 to take temporary possession or custody of a  
21 vessel or to contest the amount of reimbursement owed that are  
22 reviewable under RCW 79.100.120.

23 (n) Decisions of water conservancy boards to approve or deny  
24 applications under chapter 90.80 RCW.

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31 (c) Appeals of decisions by the department under RCW 90.03.110 and  
32 90.44.220.

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

35 ~~((e) Appeals of decisions by the department as provided in chapter~~  
36 ~~43.211 RCW.))~~

37 (3) Review of rules and regulations adopted by the hearings board

1 shall be subject to review in accordance with the provisions of the  
2 administrative procedure act, chapter 34.05 RCW.

3 **Sec. 4.** RCW 90.80.055 and 2001 c 237 s 9 are each amended to read  
4 as follows:

5 (1) Except as provided in subsection (2) of this section, a board  
6 shall operate on a countywide basis or on an areawide basis in the case  
7 of a board with jurisdiction in more than one county or water resource  
8 inventory area, and have the following powers, in addition to any other  
9 powers granted in this chapter:

10 (a) Except as provided in subsection (2) of this section, a board  
11 may act upon applications for the same kinds of transfers that the  
12 department itself is authorized to act upon, including an application  
13 to establish a trust water right under chapter 90.38 or 90.42 RCW. A  
14 board may not act upon an application for the type of transfer within  
15 an irrigation district as described in RCW 90.03.380(3). If a board  
16 receives an application for a transfer between two irrigation districts  
17 as described in RCW 90.03.380(2), the board must, before publication of  
18 notice of the application, receive the concurrence specified in that  
19 section.

20 (b) A board may act upon an application to transfer a water right  
21 claim filed under chapter 90.14 RCW. In acting upon such an  
22 application, the board must make a tentative determination as to the  
23 validity and extent of the right, if any, embodied in the claim and may  
24 only issue a record of decision regarding a transfer of such a claim to  
25 the extent it is tentatively determined to be valid. ~~((Neither))~~ The  
26 board's tentative determination~~((, nor the director's acceptance of~~  
27 ~~such a tentative determination,))~~ does not constitute~~((s))~~ an  
28 adjudication of the right under RCW 90.03.110 through 90.03.240 or  
29 90.44.220, and such a determination does not preclude or prejudice a  
30 subsequent challenge to the validity, priority, or quantity of the  
31 right in a general adjudication under those sections.

32 (c) A board may establish a water right transfer information  
33 exchange through which all or part of a water right may be listed for  
34 sale or lease. The board may also accept and post notices in the  
35 exchange from persons interested in acquiring or leasing water rights  
36 from willing sellers.

1 (d) The director shall assign a representative of the department to  
2 provide technical assistance to each board. If requested by the board,  
3 the representative shall work with the board as it reviews applications  
4 for formal acceptance, prepares draft records of decision, and  
5 considers other technical or legal factors affecting the board's  
6 development of a final record of decision. A board may request and  
7 accept additional technical assistance from the department. A board  
8 may also request and accept assistance and support from the county  
9 government or governments of the county or counties in which it  
10 operates.

11 (2) The jurisdiction of a board shall not apply within the  
12 boundaries of a federal Indian reservation or to lands held in trust  
13 for an Indian band, tribe, or nation by the federal government.

14 **Sec. 5.** RCW 90.80.070 and 2004 c 10 s 4 are each amended to read  
15 as follows:

16 (1) A person proposing a transfer of a water right may elect to  
17 file an application with a water conservancy board, if a board has been  
18 established for the geographic area where the water is or would be  
19 diverted, withdrawn, or used. If the person has already filed an  
20 application with the department, the person may request that the  
21 department convey the application to the conservancy board with  
22 jurisdiction and the department must promptly forward the application.  
23 A board is not required to process an application filed with the board.  
24 If a board decides that it will not process an application, it must  
25 return the application to the applicant and must inform the applicant  
26 that the application may be filed with the department. An application  
27 to the board for a transfer shall be made on a form provided by the  
28 department. A board may require an applicant to submit within a  
29 reasonable time additional information as may be required by the board  
30 in order to review and act upon the application. At a minimum, the  
31 application shall include information sufficient to establish to the  
32 board's satisfaction that a right to the quantity of water being  
33 transferred exists, and a description of any applicable limitations on  
34 the right to use water, including the point of diversion or withdrawal,  
35 place of use, source of supply, purpose of use, quantity of use  
36 permitted, time of use, period of use, and the place of storage.

1 (2) The applicant for any proposed water right transfer may apply  
2 to a board for a record of decision on a transfer if the water proposed  
3 to be transferred is currently diverted, withdrawn, or used within the  
4 geographic area in which the board has jurisdiction, or would be  
5 diverted, withdrawn, or used within the geographic area in which the  
6 board has jurisdiction if the transfer is approved. In the case of a  
7 proposed water right transfer in which the water is currently diverted  
8 or withdrawn or would be diverted or withdrawn outside the geographic  
9 boundaries of the county or the water resource inventory area where the  
10 use is proposed to be made, the board shall hold a public hearing in  
11 the county of the diversion or withdrawal or proposed diversion or  
12 withdrawal. The board shall provide for prominent publication of  
13 notice of the hearing in a newspaper of general circulation published  
14 in the county in which the hearing is to be held for the purpose of  
15 affording an opportunity for interested persons to comment upon the  
16 application. If an application is for a transfer of water out of the  
17 water resource inventory area that is the source of the water, the  
18 board shall consult with the department regarding the application.

19 (3) After an application for a transfer is filed with the board,  
20 the board shall publish notice of the application and send notice to  
21 state agencies in accordance with the requirements of RCW 90.03.280.  
22 In addition, the board shall send notice of the application to any  
23 Indian tribe with reservation lands that would be, but for RCW  
24 90.80.055(2), within the area in which the board has jurisdiction. The  
25 board shall also provide notice of the application to any Indian tribe  
26 that has requested that it be notified of applications. Any person may  
27 submit comments and other information to the board regarding the  
28 application. The comments and information may be submitted in writing  
29 or verbally at any public meeting of the board to discuss or decide on  
30 the application. The comments must be considered by the board in  
31 making its record of decision.

32 (4) If a majority of the board determines that the application is  
33 complete, and that the transfer is in accordance with RCW 90.03.380,  
34 90.03.390, or 90.44.100, the board must issue a record of decision  
35 approving the transfer(~~(, subject to review by the director)~~). In  
36 making its record of decision, the board must consider among other  
37 things whether the proposed transfer can be made without detriment or  
38 injury to existing water rights, including rights established for



1 instream flows. The board must include in its record of decision any  
2 conditions that are deemed necessary for the transfer to qualify for  
3 approval under the applicable laws of the state. The basis for the  
4 record of decision of the board must be documented in a report of  
5 examination. The board's (~~proposed~~) approval must clearly state that  
6 the applicant is not permitted to proceed to effect the proposed  
7 transfer until ~~((a final decision is made by the director))~~ the  
8 expiration of thirty days following the date of receipt of the record  
9 of decision. ~~((In making its record of decision, the board must~~  
10 ~~consider among other things whether the proposed transfer can be made~~  
11 ~~without detriment or injury to existing water rights, including rights~~  
12 ~~established for instream flows.))~~

13 (5) If a majority of the board determines that the application  
14 cannot be approved under the applicable laws of the state of  
15 Washington, the board must make a record of decision denying the  
16 application together with its report of examination documenting its  
17 record of decision. ~~((The board's record of decision is subject to~~  
18 ~~review by the director under RCW 90.80.080.))~~

19 (6) When alternates appointed under the provisions of RCW  
20 90.80.050(3) are serving as commissioners on a board, a majority vote  
21 of the board must include at least one commissioner appointed under the  
22 provisions of RCW 90.80.050(1).

23 (7) An alternate when serving as a commissioner in the review of an  
24 application before the board shall:

25 (a) Review the written record before the board and any exhibits  
26 provided for the review or provided at the hearing if a hearing was  
27 held;

28 (b) Review any audio or video recordings made of the proceedings on  
29 the application; and

30 (c) Conduct a site visit if a site visit by other commissioners  
31 acting on the application has been previously conducted.

32 (8) An alternate serving as a commissioner shall be guided by the  
33 conflict of interest standards applicable to all commissioners under  
34 RCW 90.80.120. The board shall provide notice of an alternate sitting  
35 as a commissioner to the applicant and other participants in  
36 proceedings before the board in a timely manner to provide sufficient  
37 time for any challenges for conflict of interest to be made prior to  
38 the board's decision on the application.

1       **Sec. 6.** RCW 90.80.080 and 2001 c 237 s 12 are each amended to read  
2 as follows:

3       (1) The board must provide a copy of its record of decision and  
4 report of examination to the applicant and the department. (~~The board~~  
5 ~~shall submit its record of decision on the transfer application to the~~  
6 ~~department for review. The board shall also submit its report of~~  
7 ~~examination to the department summarizing factual findings on which the~~  
8 ~~board relied in reaching its record of decision and a copy of the files~~  
9 ~~and records upon which the board's record of decision is based.)) The  
10 board shall also promptly transmit notice by mail to any person who  
11 objected to the transfer or who requested notice of the board's record  
12 of decision.~~

13       (2) Upon receipt of a board's record of decision, the department  
14 shall promptly post the text of the record of decision transmittal form  
15 on the department's internet site. (~~The director shall review each~~  
16 ~~record of decision made by a board for compliance with applicable state~~  
17 ~~water law.))~~

18       (3) Any (~~party to a transfer, third party who alleges his or her~~  
19 ~~water right will be impaired by the proposed transfer, or other person~~  
20 ~~may file a letter of concern or support with the department and the~~  
21 ~~department may consider the concern or support expressed in the letter.~~  
22 ~~Such letters must be received by the department within thirty days of~~  
23 ~~the department's receipt of the board's record of decision)) person  
24 aggrieved by the board's approval or denial of an application under  
25 this chapter may seek review from the pollution control hearings board  
26 by filing a written notice of appeal with the pollution control  
27 hearings board within thirty days from the date of receipt of the  
28 decision as provided in RCW 43.21B.230.~~

29       (4) The (~~director shall review the record of decision of the board~~  
30 ~~and shall affirm, reverse, or modify the action of the board within~~  
31 ~~forty five days of receipt. The forty five day time period may be~~  
32 ~~extended for an additional thirty days by the director or at the~~  
33 ~~request of the board or applicant. If the director fails to act within~~  
34 ~~the prescribed time period, the board's record of decision becomes the~~  
35 ~~decision of the department and is appealable as provided by RCW~~  
36 ~~90.80.090. If the director acts within the prescribed time period, the~~  
37 ~~director's decision to affirm, modify, or reverse is appealable as~~  
38 ~~provided by RCW 90.80.090, and the director's decision to remand is~~

1 ~~appealable as provided by RCW 90.80.120(2)(b))~~ department may obtain  
2 review of a board's approval or denial of an application under this  
3 chapter by filing a written notice of appeal with the pollution control  
4 hearings board within thirty days from the date of receipt of the  
5 decision as provided in RCW 43.21B.230.

6 **Sec. 7.** RCW 90.80.090 and 2001 c 237 s 13 are each amended to read  
7 as follows:

8 The decision of the director to approve or deny an action to create  
9 a board(~~(, or to approve, deny, or modify a water right transfer either~~  
10 ~~by action or inaction)) is appealable in the same manner as other water~~  
11 right decisions made pursuant to chapters 90.03 and 90.44 RCW.

12 **Sec. 8.** RCW 90.80.120 and 2004 c 10 s 5 are each amended to read  
13 as follows:

14 (1) A commissioner of a water conservancy board shall not engage in  
15 any act which is in conflict with the proper discharge of the official  
16 duties of a commissioner. A commissioner is deemed to have a conflict  
17 of interest if he or she:

18 (a) Has an ownership interest in a water right subject to an  
19 application for approval before the board;

20 (b) Receives or has a financial interest in an application  
21 submitted to the board or a project, development, or venture related to  
22 the approval of the application; or

23 (c) Solicits, accepts, or seeks anything of economic value as a  
24 gift, gratuity, or favor from any person, firm, or corporation involved  
25 in the application.

26 (2) In the event of a recusal of an appointed commissioner, an  
27 alternate may serve as a commissioner on a board and may act upon the  
28 official board business for which the conflict of interest exists.

29 (3) The department shall (~~return a record of decision to a~~  
30 ~~conservancy board without action)) promptly notify a water conservancy  
31 board where the department determines that any member of ((a)) the  
32 board has violated subsection (1) of this section or should be  
33 disqualified to avoid a violation of subsection (1) of this section.~~

34 (a) If a person seeking to rely on this section to disqualify a  
35 commissioner knows of the basis for disqualification before the time  
36 the board issues a record of decision, the person must request the

1 board to have the commissioner recuse himself or herself from further  
2 involvement in processing the application, or be barred from later  
3 raising that challenge.

4 (b) If the commissioner does not recuse himself or herself or if  
5 the person becomes aware of the basis for disqualification after the  
6 board issues a record of decision (~~((but within the time period under  
7 RCW 90.80.080(3) for filing objections with the department, the person  
8 must raise the challenge with the department. If the department  
9 determines that the commissioner should be disqualified under this  
10 section, the director must remand the record of decision to the board  
11 for reconsideration and resubmission of a record of decision. The  
12 disqualified commissioner shall not participate in any further board  
13 review of the application. The department's decision on whether to  
14 remand a record of decision under this section may only be appealed at  
15 the same time and in the same manner as an appeal of the department's  
16 decision to affirm, modify, or reverse the record of decision after  
17 remand.~~

18 ~~(c) If the person becomes aware of the basis for disqualification  
19 after the time for filing objections with the department, the person  
20 may raise the challenge in an appeal of the department's final decision  
21 under RCW 90.80.090)), the person may raise the challenge in an appeal  
22 of the board's decision under RCW 90.80.080.~~

23 NEW SECTION. **Sec. 9.** Section 2 of this act expires June 30, 2019.

24 NEW SECTION. **Sec. 10.** Section 3 of this act takes effect June 30,  
25 2019.

--- END ---