

# HOUSE BILL REPORT

## EHB 1653

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### As Passed Legislature

**Title:** An act relating to clarifying the integration of shoreline management act policies with the growth management act.

**Brief Description:** Clarifying the integration of shoreline management act policies with the growth management act.

**Sponsors:** Representative Simpson; by request of Department of Ecology and Department of Community, Trade and Economic Development.

**Brief History:**

**Committee Activity:**

Local Government & Housing: 2/11/09, 2/12/09 [DP].

**Floor Activity:**

Passed House: 2/15/10, 58-39.

Passed Senate: 3/2/10, 35-10.

Passed Legislature.

#### Brief Summary of Engrossed Bill

- Modifies provisions in the Growth Management Act (GMA) pertaining to the integration of the GMA and the Shoreline Management Act.
- Establishes new provisions in the GMA pertaining to the regulation and protection of critical areas that are located within shorelines of the state.
- Declares an emergency and establishes a July 27, 2003 application date.

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### HOUSE COMMITTEE ON LOCAL GOVERNMENT & HOUSING

**Majority Report:** Do pass. Signed by 7 members: Representatives Simpson, Chair; Nelson, Vice Chair; Miloscia, Springer, Upthegrove, White and Williams.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Angel, Ranking Minority Member; Ericksen, Assistant Ranking Minority Member; Cox.

**Staff:** Ethan Moreno (786-7386).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

### Growth Management Act - Introduction.

The Growth Management Act (GMA or Act) is the comprehensive land use planning framework for county and city governments in Washington. Enacted in 1990 and 1991, the GMA establishes numerous requirements for local governments obligated by mandate or choice to fully plan under the Act (planning jurisdictions) and a reduced number of directives for all other counties and cities. Twenty-nine of Washington's 39 counties, and the cities within those counties, are planning jurisdictions.

Directives applying to all counties and cities require the designation and protection of critical areas, a term defined in statute to include the following areas and ecosystems:

- wetlands;
- areas with a critical recharging effect on aquifers used for potable water;
- fish and wildlife habitat conservation areas;
- frequently flooded areas; and
- geologically hazardous areas.

The protection of critical areas is accomplished through mandatory development regulations enacted by counties and cities. These development regulations are often referred to as "critical area ordinances."

### Comprehensive Land Use Plans, Development Regulations, and Selected Elements.

The GMA directs planning jurisdictions to adopt internally consistent comprehensive land use plans that are generalized, coordinated land use policy statements of the governing body. Comprehensive plans must address specified planning elements, each of which is a subset of a comprehensive plan. The implementation of comprehensive plans occurs through development regulations mandated by the GMA.

### Planning Goals.

The GMA establishes 14 planning goals in a non-prioritized list that must be used exclusively for guiding the development and adoption of comprehensive plans and development regulations. Examples of planning goals include the following:

- *urban growth* - encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner;
- *transportation* - encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans; and
- *environment* - protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

### Shoreline Management Act.

The Shoreline Management Act (SMA) governs uses of state shorelines. The SMA enunciates state policy to provide for shoreline management by planning for and fostering "all reasonable and appropriate uses." The SMA prioritizes public shoreline access and

enjoyment, and creates preference criteria, listed in prioritized order, that must be used by state and local governments in regulating shoreline uses.

The SMA involves a cooperative regulatory approach between local governments and the state. At the local level, the SMA regulations are developed in local shoreline master programs (master programs). All counties and cities with shorelines of the state, a term defined in the SMA, are required to adopt master programs that regulate land use activities in shoreline areas of the state. Counties and cities are also required to enforce master programs within their jurisdictions. Master programs must be consistent with guidelines adopted by the Department of Ecology (DOE), and the programs, and segments of or amendments to, become effective when approved by the DOE.

The DOE must approve the segment of a master program relating to critical areas if the master program segment is consistent with specific requirements of the SMA and applicable shoreline guidelines, and if the segment provides a level of protection of critical areas that is at least equal to that provided by the local government's adopted and amended critical areas ordinances.

### Policy Integration.

In 1995 the Legislature enacted environmental regulatory reform legislation that implemented recommendations of the Governor's Task Force on Regulatory Reform. The legislation added the goals and policies of the SMA as an additional goal to the 13 planning goals of the GMA. The legislation also specified that the goals and policies of a master program required by the SMA were deemed an element of a planning jurisdiction's comprehensive plan.

### 2003 Legislation.

Legislation adopted in 2003 (*i.e.*, ESHB 1933, enacted as chapter 321, Laws of 2003) in response to a 2003 decision of the Central Puget Sound Growth Management Hearings Board, established new provisions pertaining to the jurisdiction, implementation, and partial integration of the GMA and the SMA. Among other provisions, the legislation specified that as of the date the DOE approves a local government's master program adopted under applicable shoreline guidelines, the protection of critical areas within shorelines of the state must be accomplished only through the local government's master program and, with limited exceptions, must not be subject to the procedural and substantive requirements of the GMA.

The 2003 legislation also specified that critical areas within shorelines of the state that have been identified as meeting the definition of critical areas and are subject to a master program adopted under applicable shoreline guidelines must not be subject to the procedural and substantive requirements of the GMA. Limited exceptions to this directive were established in ESHB 1933.

Furthermore, ESHB 1933 specified that master programs must provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's adopted and amended critical area ordinances.

### Recent Supreme Court Action.

On July 31, 2008, the Washington Supreme Court (Supreme Court) ruled in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242; 189 P.3d 161, that a superior court erred when it reversed a decision of the Western Washington Growth Management Hearings Board and held that the GMA controls procedures inside shorelines *until* new SMA plans are formulated and approved.

In its 2008 trial court reversal, the Supreme Court held that the provision of ESHB 1933 specifying that *as of the date the DOE approves a local government's master program adopted under applicable shoreline guidelines, the protection of critical areas within shorelines of the state must be accomplished only through the local government's master program*, is curative and immediate, not prospective. The Supreme Court further held that a prospective interpretation of ESHB 1933 would change the effective date of the ESHB 1933 from July 27, 2003, to a much later date based upon the DOE's processing and approving of master programs, and that a prospective interpretation would, in part, contradict the clear language and intent of the Legislature in ESHB 1933.

### **Summary of Engrossed Bill:**

With limited exceptions, development regulations adopted under the GMA to protect critical areas within shorelines of the state apply within shorelines of the state until the DOE approves one of the following:

- a comprehensive master program update, a term defined to mean a master program that fully achieves the procedural and substantive requirements of guidelines adopted by the DOE, and subsequent amendments, that are effective January 17, 2004;
- a segment of a master program relating to critical areas; or
- a new or amended master program, provided the master program is approved by the DOE on or after March 1, 2002.

The adoption or update of development regulations to protect critical areas under the GMA prior to the DOE approval of a master program update is not a comprehensive or segment update to a master program.

Until the DOE approves a master program or segment thereof as provided above, a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified if the redevelopment or modification is consistent with the local government's master program, and the local government determines that the proposed action will result in no net loss of shoreline ecological functions. The local government may waive this determination requirement if the redevelopment or modification is consistent with the master program and the local government's development regulations to protect critical areas. An agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification.

Upon approval by the DOE of a master program or critical area segment of a master program, critical areas within shorelines of the state are protected under the SMA and, with limited exceptions, are not subject to the procedural and substantive requirements of the GMA.

Master programs must provide a level of protection to critical areas within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.

A specific provision of the GMA that is amended in the legislation is expressly identified as governing the relationship between master programs and regulations to protect critical areas that are adopted under the GMA.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on February 10, 2009.

**Effective Date:** The bill contains an emergency clause and takes effect immediately. The bill also applies retroactively to July 27, 2003.

**Staff Summary of Public Testimony:**

(In support, 2009 testimony) This bill addresses the SMA, the land use regulations that the DOE is responsible for, and the GMA, the land use regulations that the Department of Community, Trade and Economic Development (DCTED) is responsible for. There are three reasons for bringing this bill forward: (1) there is confusion over which regulations apply in shoreline areas, and this needs to be resolved; (2) habitat protection - many shoreline regulations are old, but critical area ordinances are new and offer great protections; and (3) local governments are already engaged in updating their master programs. This bill doesn't affect the relationship between agricultural activities and critical area ordinances. The July 2008 decision of the Supreme Court put 178 legally adopted critical area ordinances into question. The goal of this legislation is to ensure that critical area ordinances apply until old master programs are updated. This bill seeks to establish clarity and certainty. Substitute language is being developed.

The state hasn't integrated the GMA and the SMA effectively; they are different acts with different structures. Merging the concepts and critical area ordinances with shoreline area requirements is difficult. Water dependent uses must be protected and critical area ordinances play a role in doing so. This bill is trying to clarify how the handoff between the GMA and the SMA works and is a good faith effort to untangle the jurisdiction of those acts.

The City of Anacortes has been involved in the drafting of this bill and supports the current language, but will work to carefully craft a substitute. The Supreme Court decision should not be overturned. This bill allows us to move forward, not backward. King County has old master programs that are not adequate to protect shorelines, but it has updated critical area ordinances. Requests are being made to evaluate permit applications under the master programs. This bill is an attempt to return to the provisions of ESHB 1933 and to add clarity to that bill. This bill divides the jurisdiction of the GMA and the SMA accurately. This bill

came to you because of the City of Anacortes. The city thought it was doing the right thing, but it became entangled in legal issues. Updates required by the SMA are underway. Cities cannot afford to have confusion about shoreline jurisdiction issues. Words that are added to heavily litigated laws matter and should be very clear.

The Supreme Court decision was a plurality with differing opinions. This bill doesn't impose new requirements, but rather it aligns the law with current practices and interpretations of the past six years. The stakeholder group that worked on ESHB 1933 had a clear and common intent. That group did not get the wording correct, so this is an attempt to remedy the wording.

(Opposed, 2009 testimony) Concerns exist about unintended consequences and how this bill might affect non-conforming uses. The business community is continuing to work with the DOE on this bill. Jefferson County uses habitat buffers. Some buffer requirements are flexible, but others are 'no-build' zones. In Jefferson County, proposed development projects in Port Hadlock and Pleasant Harbor are governed by the SMA. This bill will lock out those projects and lock in prohibitive regulations. A 'safe-harbor' provision, drafted with ports and the DCTED, would be a good addition to this bill. Does the Legislature intend to stop development and redevelopment in shoreline areas through buffer requirements? This legislation is unnecessary: the Supreme Court decision was clear and should be left intact. The Supreme Court stated that critical areas in shoreline areas are governed by the SMA and all others are governed by the GMA. This bill, as written, may invoke buffer requirements under the GMA that affect agricultural operations. The agricultural community is willing to work with the DOE on this bill.

**Persons Testifying:** (In support) Tom Clingman, Department of Ecology; Tim Gates, Department of Community, Trade and Economic Development; Eric Johnson, Washington Ports Association; Richard Frank; Mike Ryherd, City of Anacortes; Harry Reinert, King County; Brynn Brady, Pierce County; April Putney, Futurewise; Bruce Wishart, People for Puget Sound; and Dave Williams, Association of Washington Cities.

(Opposed) Chris McCabe, Association of Washington Business; Sandy Mackie, Perkins Coie; Julie Nichols, Building Industry Association of Washington; and Dan Wood, Washington Farm Bureau.

**Persons Signed In To Testify But Not Testifying:** None.