

SENATE BILL REPORT

SHB 2815

As Reported By Senate Committee On:
Government Operations & Elections, February 23, 2006

Title: An act relating to clarifying the best available science requirements to protect critical areas.

Brief Description: Clarifying the best available science requirements to protect critical areas.

Sponsors: House Committee on Local Government (originally sponsored by Representatives Simpson, Jarrett, Springer and Lantz; by request of Department of Community, Trade, and Economic Development).

Brief History: Passed House: 2/13/06, 57-41.

Committee Activity: Government Operations & Elections: 2/20/06, 2/23/06 [DPA, DNP].
Ways & Means: 2/27/06.

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: Do pass as amended.

Signed by Senators Kastama, Chair; Berkey, Vice Chair; Fairley, Haugen, Kline and Pridemore.

Minority Report: Do not pass.

Signed by Senators Roach, Ranking Minority Member; Benton and Mulliken.

Staff: Genevieve Pisarski (786-7488)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Kirstan Arestad (786-7708)

Background: Under the Growth Management Act (GMA), as amended in 1995, all counties and cities must "include" the best available science in adopting policies and development regulations to protect the functions and values of critical areas. Critical areas are defined as wetlands, aquifer recharge areas, fish and wildlife habitat areas, flood plains, and geologically hazardous areas. Special consideration must also be given to measures that preserve or enhance anadromous fisheries.

Summary of Amended Bill: In fulfilling GMA requirements to designate and protect critical areas, cities and counties will show on the record that best available science was included by indicating the specific policies and regulations and the sources of scientific information. They will also show what other information was included.

Cities and counties will have the option of using management recommendations adopted by the Department of Community, Trade, and Economic Development (CTED), together with

other state agencies, using the best available science, demonstrating that use on the record, and giving consideration both to regional differences and to appropriate application of the recommendations.

If a city or county uses all or part of these management recommendations, the use will be subject to review by a Growth Management Hearings Board (Board) or court only for consistency with the corresponding portion of the recommendations. The recommendations will not be treated as the only means for complying with requirements to protect critical areas or as a minimum standard.

Management recommendations developed by CTED and state agencies will receive technical review by scientists and other experts with the results summarized and published on CTED's website. Notice will then be published both in the state register and on the web and remain available for review and comment for 60 days. Comments will be considered and will be posted as well. After that, notice of adoption will be posted. If no petition for review is filed at the end of 60 days, a notice of final adoption will be published. If a petition is filed, final adoption will be delayed until the petition is resolved. Use of the management recommendations for any other purposes will not be affected by the filing of a petition for review.

The management recommendations will be updated at least every 5 years to incorporate best available science that has become available or otherwise comply with the GMA. Notice of a proposed update or decision not to update will be published in the state register and on the web. The same procedures for adoption and appeal as apply to initial management recommendations will apply to updates. A decision not to update will be appealable only on the grounds that it is clearly erroneous.

Appeals of management recommendations or updates will be filed only by those who have submitted comments and will be reviewed under the "clearly erroneous" standard. Appeals will be heard by a panel that includes at least 2 members of each of the 3 boards. A final order will be issued within 270 days of the appeal or, in the case of multiple appeals, within 180 days of the last one to be consolidated, subject to existing provisions for extension. The boards will adopt procedures and criteria for their use of scientific and other experts in consultation with cities and counties.

Critical areas regulations may not prohibit legal pre-existing uses. For these uses, regulations must use voluntary measures, incentives, and educational programs to the extent these can be effective and existing regulatory measures that are outside the GMA.

Amended Bill Compared to Original Bill: A specific federal standard for scientific review is added. The provisions regarding pre-existing uses are added.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For (Government Operations & Elections): The recent natural disasters around the country have shown the need for protection of critical areas, those that flood or are

geologically hazardous, for example. Some of the proposed provisions have been administrative rules for some time, such as the way that local governments can demonstrate inclusion of best available science, but will gain the authority of statute. The optional management recommendations will provide additional protection from appeal and additional tools, while clearly not establishing an exclusive or a minimum standard. They share the cost between local government and the state. Pre-existing uses are not excluded from critical areas protection requirements in this draft; the Governor will address them over the interim. Excluding pre-existing uses would have unintended consequences, such as interfering with local ordinances that make federal flood insurance available. Local governments lack expertise and resources to do best available science and need help. The management recommendations move the debate over best available science from the local to the state level where it belongs; appeals should be directed at the state agencies, instead of having the state challenging local governments or other challengers using state information against local governments. This is an improvement but not the best solution. Environmental science is not exact, and local circumstances can make a big difference; flexibility is needed. Because local governments don't have the resources to address local circumstances, the management recommendations could become minimum standards.

Testimony Against (Government Operations & Elections): This is a start but doesn't go far enough. The applicability of best available science requirements to pre-existing uses is a fundamental issue; Skagit County and Clallam County are now in court over the ambiguity on this point. Growth Management Hearings Boards shouldn't use their own experts; the facts should be brought out through an adversarial process. There is no actual clarification of what best available science is. Land use decisions are being moved to state agencies who aren't politically accountable. No one knows what "protect," "critical," and "science" are supposed to mean. Does "protect" include "enhance?" The best available science requirement results in a long, expensive, bureaucratic procedure, but centralizing it in the state is a "top down" approach that is contrary to the intent of the GMA. It will result in defacto minimum standards. None of the changes recognize the need to depart from best available science, say how it should be done, or establish a clear standard of deference to local decisions. Pre-existing uses have to be excluded from critical areas requirements. The management recommendations provisions should be eliminated and replaced with the language in the existing administrative rules.

Testimony Other (Government Operations & Elections): Adaptive management is not included and must be. Protection of critical areas has not been that successful; there has to be a process to make needed changes. Tribes have a lot of scientific expertise and make it available to local governments.

Who Testified (Government Operations & Elections): PRO: Kaleen Cottingham, Futurewise; Leonard Bauer, CTED; Jerry Smedes, NW Environmental Business Council.

CON: Clayton Hill, BIAW; Sandy Mackie, NAIOP; Perkins Coie, citizen; Chris McCabe, AWB; Eric B. Johnson, WSAC; Eric D. Johnson, WPPA.

OTHER: Steve Robinson, Northwest Indian Fisheries Commission.

Testimony For (Ways & Means): (From SB 6569) Local programs to protect critical areas are very important, as illustrated by all the flooding and landslides this winter. This proposal

will help local governments demonstrate that they have used best available science and give them options. Cities have asked for the management recommendations; they don't have the expertise or the funds to do this. It's also important that the state agencies will work together to eliminate inconsistencies in their positions. The GMA was intended to deal with changes to existing conditions, and this needs to be clarified. Some clarification should be added that appeals of management recommendations won't prevent the information from being used for other purposes, clearly erroneous, and that the standard of review is the one used elsewhere in the GMA.

Testimony Against (Ways & Means): (From SB 6569) The management recommendations introduce a "top down" approach that is contrary to the scheme of the GMA. Although they are optional, they will be treated as the standard, just like the CTED model ordinances are now. Land is taken out of productive economic use.

Testimony Other (Ways & Means): (From SB 6569) Although their purpose is a good one, the management recommendations raise concerns about their legal significance and their potential for generating disagreement.

Who Testified (Ways & Means): (From SB 6569) PRO: Dave Williams, AWC; Leonard Bauer, CTED

CON: Timothy Harris, BIAW; Chris McCabe, AWB; Dan Wood, Farm Bureau.

OTHER: Eric D. Johnson, WPPA.

Signed in, Unable to Testify& Submitted Written Testimony: Kaleen Cottingham, Futurewise.