

HOUSE BILL REPORT

E2SHB 1117

As Passed House:

January 26, 2022

Title: An act relating to promoting salmon recovery through revisions to the state's comprehensive planning framework.

Brief Description: Promoting salmon recovery through revisions to the state's comprehensive planning framework.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Lekanoff, Fitzgibbon, Bateman, Simmons, Ramel, Peterson, Goodman, Ryu, Kloba, Chopp, Pollet, Macri and Davis).

Brief History:

Committee Activity:

Environment & Energy: 1/21/21, 1/28/21, 2/4/21 [DPS];

Appropriations: 2/16/21, 2/22/21 [DP2S(w/o sub ENVI)].

Floor Activity:

Passed House: 3/2/21, 58-38.

Passed House: 1/26/22, 57-40.

Brief Summary of Engrossed Second Substitute Bill

- Adds a goal of salmon recovery to the listed goals of the Growth Management Act (GMA).
- Requires the land use element of comprehensive plans adopted under the GMA to include a strategy that achieves net ecological gain of salmon habitat.
- Requires the capital facilities element and transportation element of comprehensive plans adopted under the GMA to include a schedule for the elimination of all identified fish passage barriers.
- Requires the Department of Fish and Wildlife (WDFW) to adopt rules

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that establish criteria for net ecological gain and consistency with applicable regional salmon recovery plans that certain counties and cities must meet through the adoption of comprehensive plans.

- Requires development regulations that protect critical areas to apply certain mitigation requirements.
- Requires the WDFW to monitor the progress that certain counties and cities have made toward achieving net ecological gain.
- Requires the WDFW to provide a report of its monitoring to the Governor, the Legislature, and local governments.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Fitzgibbon, Chair; Duerr, Vice Chair; Berry, Fey, Harris-Talley, Ramel, Shewmake and Slatter.

Minority Report: Do not pass. Signed by 5 members: Representatives Dye, Ranking Minority Member; Klicker, Assistant Ranking Minority Member; Abbarno, Boehnke and Goehner.

Staff: Robert Hatfield (786-7117).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Environment & Energy. Signed by 21 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chandler, Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Harris, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

Minority Report: Without recommendation. Signed by 12 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Dye, Hoff, Jacobsen, Rude, Schmick and Steele.

Staff: Dan Jones (786-7118).

Background:

Growth Management Act.

The Growth Management Act (GMA) is the comprehensive land use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, the GMA establishes land use designation and environmental protection requirements for all Washington counties and cities. The GMA also establishes a significantly wider array of planning duties for 28 counties, and the cities within those counties, that are obligated to satisfy all planning requirements of the GMA. These jurisdictions are sometimes referred to as "fully planning" under the GMA.

The GMA directs fully planning jurisdictions to adopt internally consistent comprehensive land use plans. Comprehensive plans are implemented through locally adopted development regulations, and both the plans and the local regulations are subject to review and revision requirements prescribed in the GMA. Comprehensive plans must contain certain required elements, including a transportation element, a land use element, and a capital facilities plan element, among others. In developing their comprehensive plans, counties and cities must consider various goals set forth in statute, including, for example, urban growth, housing, and economic development.

Growth Management Act—Comprehensive Plan Updates.

Counties and cities are required to review and, if needed, revise their comprehensive plans and development regulations every eight years. Counties, and the cities within them, are grouped into four different year classes for purposes of when the obligation to review and revise their comprehensive plans commences. The next round of required comprehensive plan updates begins with King, Kitsap, Snohomish, and Pierce counties, and the cities within those counties, in 2024.

Regional Salmon Recovery Plans.

Recovery plans are developed and adopted under the federal Endangered Species Act when a species has been listed as threatened or endangered. Recovery plans are developed with the input of multiple parties, including federal, state, and tribal governments. Recovery plans for salmon and steelhead are published by the National Oceanic and Atmospheric Administration—Fisheries. Regional salmon recovery plans have been adopted for multiple regions within Washington, including Puget Sound. The Puget Sound Salmon Recovery Plan includes individual recovery plans for individual watersheds within the broader Puget Sound region.

Aquatic Resources Mitigation Act.

Under state and federal law, a project proponent whose action would impact aquatic resources must first attempt to avoid and minimize that impact. For unavoidable impacts, compensatory mitigation is required to replace the loss of aquatic resource function. The Aquatic Resources Mitigation Act sets forth a number of mitigation options that project

proponents may select in complying with mitigation requirements.

Shoreline Management Program.

The Shoreline Management Act (SMA) involves a cooperative regulatory approach between local governments and the state. The Department of Ecology and local governments are authorized to adopt necessary and appropriate rules for implementing the provisions of the SMA. At the local level, SMA regulations are developed in local shoreline master programs (master programs). All counties and cities with shorelines of the state are required to adopt master programs that regulate land-use activities in shoreline areas of the state.

Summary of Engrossed Second Substitute Bill:

Growth Management Act—Goals.

Salmon recovery is added as a goal under the Growth Management Act (GMA). Under the salmon recovery goal, it is a goal of the GMA to support the recovery and enhancement of salmon and steelhead stocks through the achievement of net ecological gain from planning under the GMA in accordance with rules adopted pursuant to the GMA in order to fulfill Washington's tribal treaty obligations, support nontribal commercial and recreational fisheries, and achieve the delisting and recovery of threatened or endangered salmon and steelhead runs under the federal Endangered Species Act.

Growth Management Act—Definitions.

The following terms are added as defined terms within the GMA: net ecological gain, compensatory mitigation ratio, and mitigation hierarchy requirement.

"Compensatory mitigation ratio" is defined as a measurement of the size, temporal duration, or quality of mitigation required by a permitting agency in order to ensure that impacts to regulated aspects of the environment from an activity subject to a permit are fully mitigated over the life of the activity or project subject to the permit.

"Mitigation hierarchy requirement" means that a proponent must first avoid impacts where feasible, must then minimize impacts where avoidance is not feasible, and must then mitigate any remaining impacts where avoidance and minimization are not feasible.

"Net ecological gain" means a standard for a comprehensive plan adopted under this chapter in which the ecological integrity within each water resource inventory area (WRIA) or independent natural drainage that flows directly into marine waters of the planning area is improved and enhanced during the planning period as a result of the measures adopted by the planning body, including no net loss of ecological function with respect to the permitting of individual projects in order to advance salmon recovery and other

environmental benefits. The advancement of ecological function and achievement of net ecological gain within each WRIA or independent natural drainage that flows directly into marine waters will occur through the appropriate selection and implementation of publicly funded projects, including voluntary grant programs, salmon recovery projects, ecological improvements made through the municipal stormwater permit process, and investments made as a result of the capital facilities element and transportation element of the comprehensive plan.

"Watershed" means a water resource inventory area, or WRIA, established consistent with the Watershed Planning Act or an independent natural drainage that flows directly into marine waters.

Comprehensive Plans—Net Ecological Gain.

Beginning with plan updates adopted after January 1, 2024, the land use element of comprehensive plans must, in accordance with rules adopted pursuant to the GMA, include a strategy that, through a combination of regulatory and nonregulatory programs, achieves net ecological gain of in-water and upland habitats, vegetation, water quantity, water quality, and other natural features that contribute to anadromous fish habitat on a watershed basis, including applicable elements of salmon recovery plans adopted pursuant to the federal Endangered Species Act.

This strategy must be developed after providing notice and an opportunity to consult to each federally recognized Indian tribe with property, tribal reservation land, or usual and accustomed fishing areas in, adjacent to, or directly affected by the planning jurisdiction. The achievement of net ecological gain may rely on activities or mitigation carried out by a jurisdiction that are physically located outside the jurisdiction if still within the same watershed.

Development regulations adopted pursuant to the net ecological gain requirement may not require individual private projects to achieve net ecological gain. Development regulations adopted pursuant to the net ecological gain requirement must require that projects owned by public entities including, but not limited to, state agencies, counties, cities, towns, public utilities districts, schools, libraries, and transportation agencies, achieve net ecological gain.

The capital facilities element and transportation element of comprehensive plans must include a schedule for the elimination of all identified fish passage barriers, consistent with the prioritization schedule identified by the Fish Passage Barrier Removal Board.

Criteria for Net Ecological Gain.

Through early and continuous consultation with each federally recognized Indian tribe with property, tribal reservation land, or usual and accustomed fishing areas in, adjacent to, or directly affected by the planning jurisdiction, and with local governments, the Department

of Fish and Wildlife (WDFW), with recommendations from the Washington State Academy of Sciences, must adopt rules to establish criteria for net ecological gain and consistency with the applicable portions of applicable regional salmon recovery plans that counties and cities fully planning under the GMA must meet through adoption of their comprehensive plans in order to support salmon recovery.

The net ecological gain rules adopted by the WDFW must account for the impact of the heat island effect on ecological function.

The rules adopted by the WDFW must ensure that, where appropriate, the interjurisdictional coordination process required by the GMA addresses the issue of salmon recovery.

The rules adopted by the WDFW may not require or assume that the proponents of individual private projects will be responsible for achieving net ecological gain. Rules adopted by the WDFW must ensure that individual private projects achieve no net loss of ecological function, and that net ecological gain is achieved through the appropriate selection of publicly funded projects, and voluntary projects whose purpose is salmon recovery but which may receive funding from either public or private sources.

The WDFW, in consultation with affected local governments and federally recognized Indian tribes, must establish current environmental baseline conditions within counties and cities fully planning under the GMA, and must then monitor progress toward salmon recovery goals in those jurisdictions. The WDFW must monitor parameters that affect salmonid health, including but not limited to, stream temperatures, impervious surfaces, and tree canopy cover. When monitoring progress that individual jurisdictions have made toward salmon recovery goals, the WDFW must monitor, where appropriate, the efforts made by counties and cities to address the effect of urban heat islands on salmonid health. The WDFW must submit a report of its monitoring to the Governor, the Legislature, and affected local governments beginning in 2022 and every other year thereafter.

Mitigation Hierarchy Requirements and Compensatory Mitigation Requirements.

Development regulations that protect critical areas must apply mitigation hierarchy requirements and compensatory mitigation requirements. Before utilizing a lower level in the mitigation hierarchy, project proponents must demonstrate that it is not possible to mitigate environmental impacts through actions taken consistent with higher levels of the mitigation hierarchy. Mitigation imposed under both the Aquatic Resources Mitigation Act and the Shoreline Management Act (SMA) must also apply mitigation hierarchy requirements and compensatory mitigation requirements.

Interaction with other Environmental Laws.

Nothing in the act is intended to reduce mitigation requirements under other applicable state and federal environmental laws.

Funding.

The obligation of local governments to comply with specified provisions in the act is contingent on the provision of state funding to local governments for the specific purpose of complying with these requirements. The obligation of local governments to comply with these provisions takes effect two years after the date the Legislature appropriates state funding to provide to local governments for the purpose of complying with these requirements.

The provisions of the act contingent on funding are:

- amendments to the goals of the GMA;
- amendments to critical areas protection requirements of the GMA;
- amendments to comprehensive plan requirements under the GMA;
- amendments to the Aquatic Resources Mitigation Act;
- rules related to net ecological gain; and
- mitigation requirements imposed pursuant to the SMA.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Environment & Energy):

(In support) Ecological improvements are coming too slowly for species like salmon. Cities were involved in developing salmon recovery plans, so it is important to be consistent with those plans. The bill addresses past takings concerns by clarifying that net ecological gain cannot come through private projects. It is important there be flexibility in how net ecological gain is achieved. Historically, there has been concern about adding to liability regarding appeals under the Growth Management Act (GMA). This bill is different; it is contingent on funding and relies on guidelines adopted by the Department of Fish and Wildlife. The bill should be modified to provide that funding must be sufficient to cover local government implementation costs.

There are two reasons to include salmon recovery in the GMA: salmon are a historic underpinning of the economy in Washington and they are an indicator of overall ecological health. This is the right thing to do for environmental reasons and for the state's responsibility to tribes. Declining fish populations have motivated many landowners to work on salmon recovery. Making good long-term planning a financial hardship does not make sense; bills that recognize those financial constraints are helpful. Government needs to be a leader in environmental progress, and this bill makes that possible.

This bill implements a key recommendation of the Orca Recovery Task Force. Salmon are in crisis, teetering on extinction. It is time to link salmon recovery needs to obligations under the GMA using pragmatic approaches that use existing structures. It is important to make clear that implementation is dependent on funding, but not a full null and void clause. The bill will lead to a collaborative, holistic approach to salmon recovery. It is important to come together with local government to turn the tide on salmon recovery.

Ten out of 14 major wild salmon populations are either not keeping pace with recovery goals or are in crisis. Only two populations are meeting recovery goals. Significant change is needed to achieve salmon recovery. Incorporating salmon recovery into planning under the GMA is imperative.

(Opposed) There are some parts of the bill to like, such as specifying that private projects do not have to achieve net ecological gain, which avoids takings issues. There is concern that future legislators could expand net ecological gain to include private projects. The compensatory mitigation ratios in the bill are an impossibly high standard to reach. The bill will likely open up new opportunities for litigation. The bill could significantly increase the cost of transportation projects. There needs to be a tighter definition of net ecological gain. The bill includes several significant expansions of authority. It is unclear how this bill interacts with the Voluntary Stewardship Program (VSP); there is concern that this bill could interfere with the good work taking place under the VSP.

The GMA has 13 balanced goals, and this bill destabilizes that balance. It adds very strict regulatory outcomes, unlike other elements and goals. The constitutional concerns that apply to private projects also apply to some public projects. There is support for more integration in the approach to the removal of fish passage barriers. There are a lot of housing needs that are not addressed in the bill. It is important to focus salmon recovery dollars in effective ways. There are concerns that the bill may conflict with existing law, such as Clean Water Act certifications. The bill also may require public utilities to engage in unconstitutional gifts of public funds.

(Other) The state is going to miss basically all of its 2020 salmon recovery goals. The problem is that the state has not committed to making salmon recovery a priority. There needs to be more funding to do the work that is needed on the ground. It is important to find out why the current system is not working. Simply overlaying the policy of this bill this on top of current the GMA framework doesn't get at the problem. It is important to push power down to local communities to give them greater local control.

Some parts of the bill overlook existing environmental efforts and investments. There is concern the bill as written might call for the elimination of some hydroelectric facilities. There are concerns with uncertainties in the bill, such as the rulemaking process for establishing net ecological gain.

Staff Summary of Public Testimony (Appropriations):

(In support) An investment in salmon health contributes to human health. Efforts have been underway in Washington to recover salmon for over two decades. There have been significant public and private investments made in salmon recovery, but they have not been enough. Many wild salmon populations continue to show declines. The policy in this bill is needed to avoid another lost decade in salmon recovery efforts.

Cities want to participate in salmon restoration, not just stop the bleeding. The various pieces of the bill will call for significant additional planning, potentially between \$20 and \$40 million for Washington's cities.

(Opposed) The bill includes the concept of net ecological gain, which would increase the costs of infrastructure. There is concern that the burden of compliance will increase permitting costs.

There are strong concerns about the added costs of achieving net ecological gain. Applying salmon recovery costs to new uses is constitutionally questionable. The state is in a housing crisis, and this bill will add to the cost and complication of adding new housing.

(Other) There is support for the intent of the bill to improve salmon populations and not go backward. Much more work needs to be done. There are some concerns with the bill. Appropriate levels of funding need to be allocated.

There is support for out-of-kind mitigation as long as there is net ecological gain overall. There is a concern with the current definition of net ecological gain; it may be too broad, and it may lead to out-of-kind or out-of-time mitigation. There is concern that the bill lacks clear enforceable sideboards. There is also a concern that state agencies will not have the proper resources to ensure that net ecological gain is achieved.

There are policy and fiscal concerns with the bill. The funding mechanism for the bill is concerning. The Governor's budget proposes a cut to the enforcement budget for the Department of Fish and Wildlife, but this bill would require additional enforcement resources.

The changes made in the substitute version of the bill will increase costs. There is support for the funding contingency language. Local government costs are hard to determine, since there is much uncertainty with regard to what will happen during the rulemaking process. It is not unreasonable to think that the cost for counties to comply with this bill could range between \$10 and \$15 million.

Persons Testifying (Environment & Energy): (In support) Representative Lekanoff, prime sponsor; Carl Schroeder, Association of Washington Cities; Paul Jewell, Association of Washington Counties; Cynthia Stewart, League of Women Voters of Washington; Kate

Dean, Jefferson County; Mindy Roberts, Washington Environmental Council; Jeff Davis, Department of Fish and Wildlife; Richard May; and Alexei Calambokidis, Trout Unlimited.

(Opposed) Tom Davis, Washington Farm Bureau; Bill Clarke, Washington Realtors; Jan Himebaugh, Building Industry Association of Washington; Nicolas Garcia, Washington Public Utility Districts Association; and Mike Ennis, Association of Washington Business.

(Other) Todd Myers, Washington Policy Center; Clark McIsaac, Snohomish County Public Utility District; and Dave Arbaugh, Chelan Public Utility District.

Persons Testifying (Appropriations): (In support) Representative Lekanoff, prime sponsor; Jeff Davis, Washington Department of Fish and Wildlife; and Carl Schroeder, Association of Washington Cities.

(Opposed) Mike Ennis, Association of Washington Business; and Jan Himebaugh, Building Industry Association of Washington.

(Other) Davor Gjurasic, Nisqually Indian Tribe; Jim Hedrick, Muckleshoot Indian Tribe; Alanna-Janelle Dotzauer, Tulalip Tribes of Washington; and Paul Jewell, Washington State Association of Counties.

Persons Signed In To Testify But Not Testifying (Environment & Energy): Darrell Johnson; Michele Woodhouse; Stephanie Solien, Puget Sound Partnership Leadership Council; Margen Carlson, Department of Fish and Wildlife; David Troutt, Nisqually Indian Tribe; Jason Callahan, Washington Forest Protection Association; Gerald G.I. James, Lummi Nation; Bryce Yadon, Futurewise; Dave Andersen, Department of Commerce; and Denise Clifford, Department of Ecology.

Persons Signed In To Testify But Not Testifying (Appropriations): None.