
SENATE BILL 5380

State of Washington

58th Legislature

2003 Regular Session

By Senators Stevens, Honeyford and Schmidt

Read first time 01/23/2003. Referred to Committee on Land Use & Planning.

1 AN ACT Relating to clarifying the definition of ordinary high water
2 mark; amending RCW 90.58.030; creating a new section; and declaring an
3 emergency.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that inconsistent
6 ordinary high water mark determinations for agricultural lands have
7 been issued by state agencies and local governments. The legislature
8 finds that this inconsistency is unnecessary and should be clarified by
9 relying on recent court interpretation of the term ordinary high water
10 mark. It is the intent of the legislature to clarify the definition of
11 ordinary high water mark in the shoreline management act so that the
12 definition is consistent with existing court decisions and provides a
13 clear standard to state agencies, local governments, and private
14 landowners.

15 **Sec. 2.** RCW 90.58.030 and 2002 c 230 s 2 are each amended to read
16 as follows:

17 As used in this chapter, unless the context otherwise requires, the
18 following definitions and concepts apply:

1 (1) Administration:

2 (a) "Department" means the department of ecology;

3 (b) "Director" means the director of the department of ecology;

4 (c) "Local government" means any county, incorporated city, or town
5 which contains within its boundaries any lands or waters subject to
6 this chapter;

7 (d) "Person" means an individual, partnership, corporation,
8 association, organization, cooperative, public or municipal
9 corporation, or agency of the state or local governmental unit however
10 designated;

11 (e) "Hearing board" means the shoreline hearings board established
12 by this chapter.

13 (2) Geographical:

14 (a) "Extreme low tide" means the lowest line on the land reached by
15 a receding tide;

16 (b) "Ordinary high water mark" on all lakes, streams, and tidal
17 water is that mark that will be found by examining the bed and banks
18 and ascertaining where the presence and action of waters are so common
19 and usual, and so long continued in all ordinary years, as to mark upon
20 the soil a character distinct from that of the abutting upland, in
21 respect to vegetation as that condition exists on June 1, 1971, as it
22 may naturally change thereafter, or as it may change thereafter in
23 accordance with permits issued by a local government or the department:
24 PROVIDED, That in any area where the ordinary high water mark cannot be
25 found, the ordinary high water mark adjoining salt water shall be the
26 line of mean higher high tide and the ordinary high water mark
27 adjoining fresh water shall be the line of mean high water: PROVIDED
28 FURTHER, That lands periodically submerged but still useful for
29 agricultural purposes shall be deemed above the ordinary high water
30 mark;

31 (c) "Shorelines of the state" are the total of all "shorelines" and
32 "shorelines of statewide significance" within the state;

33 (d) "Shorelines" means all of the water areas of the state,
34 including reservoirs, and their associated shorelands, together with
35 the lands underlying them; except (i) shorelines of statewide
36 significance; (ii) shorelines on segments of streams upstream of a
37 point where the mean annual flow is twenty cubic feet per second or

1 less and the wetlands associated with such upstream segments; and (iii)
2 shorelines on lakes less than twenty acres in size and wetlands
3 associated with such small lakes;

4 (e) "Shorelines of statewide significance" means the following
5 shorelines of the state:

6 (i) The area between the ordinary high water mark and the western
7 boundary of the state from Cape Disappointment on the south to Cape
8 Flattery on the north, including harbors, bays, estuaries, and inlets;

9 (ii) Those areas of Puget Sound and adjacent salt waters and the
10 Strait of Juan de Fuca between the ordinary high water mark and the
11 line of extreme low tide as follows:

- 12 (A) Nisqually Delta--from DeWolf Bight to Tatsolo Point,
- 13 (B) Birch Bay--from Point Whitehorn to Birch Point,
- 14 (C) Hood Canal--from Tala Point to Foulweather Bluff,
- 15 (D) Skagit Bay and adjacent area--from Brown Point to Yokeko Point,
- 16 and
- 17 (E) Padilla Bay--from March Point to William Point;

18 (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and
19 adjacent salt waters north to the Canadian line and lying seaward from
20 the line of extreme low tide;

21 (iv) Those lakes, whether natural, artificial, or a combination
22 thereof, with a surface acreage of one thousand acres or more measured
23 at the ordinary high water mark;

24 (v) Those natural rivers or segments thereof as follows:

25 (A) Any west of the crest of the Cascade range downstream of a
26 point where the mean annual flow is measured at one thousand cubic feet
27 per second or more,

28 (B) Any east of the crest of the Cascade range downstream of a
29 point where the annual flow is measured at two hundred cubic feet per
30 second or more, or those portions of rivers east of the crest of the
31 Cascade range downstream from the first three hundred square miles of
32 drainage area, whichever is longer;

33 (vi) Those shorelands associated with (i), (ii), (iv), and (v) of
34 this subsection (2)(e);

35 (f) "Shorelands" or "shoreland areas" means those lands extending
36 landward for two hundred feet in all directions as measured on a
37 horizontal plane from the ordinary high water mark; floodways and
38 contiguous floodplain areas landward two hundred feet from such

1 floodways; and all wetlands and river deltas associated with the
2 streams, lakes, and tidal waters which are subject to the provisions of
3 this chapter; the same to be designated as to location by the
4 department of ecology. Any county or city may determine that portion
5 of a one-hundred-year-flood plain to be included in its master program
6 as long as such portion includes, as a minimum, the floodway and the
7 adjacent land extending landward two hundred feet therefrom;

8 (g) "Floodway" means those portions of the area of a river valley
9 lying streamward from the outer limits of a watercourse upon which
10 flood waters are carried during periods of flooding that occur with
11 reasonable regularity, although not necessarily annually, said floodway
12 being identified, under normal condition, by changes in surface soil
13 conditions or changes in types or quality of vegetative ground cover
14 condition. The floodway shall not include those lands that can
15 reasonably be expected to be protected from flood waters by flood
16 control devices maintained by or maintained under license from the
17 federal government, the state, or a political subdivision of the state;

18 (h) "Wetlands" means areas that are inundated or saturated by
19 surface water or ground water at a frequency and duration sufficient to
20 support, and that under normal circumstances do support, a prevalence
21 of vegetation typically adapted for life in saturated soil conditions.
22 Wetlands generally include swamps, marshes, bogs, and similar areas.
23 Wetlands do not include those artificial wetlands intentionally created
24 from nonwetland sites, including, but not limited to, irrigation and
25 drainage ditches, grass-lined swales, canals, detention facilities,
26 wastewater treatment facilities, farm ponds, and landscape amenities,
27 or those wetlands created after July 1, 1990, that were unintentionally
28 created as a result of the construction of a road, street, or highway.
29 Wetlands may include those artificial wetlands intentionally created
30 from nonwetland areas to mitigate the conversion of wetlands.

31 (3) Procedural terms:

32 (a) "Guidelines" means those standards adopted to implement the
33 policy of this chapter for regulation of use of the shorelines of the
34 state prior to adoption of master programs. Such standards shall also
35 provide criteria to local governments and the department in developing
36 master programs;

37 (b) "Master program" shall mean the comprehensive use plan for a
38 described area, and the use regulations together with maps, diagrams,

1 charts, or other descriptive material and text, a statement of desired
2 goals, and standards developed in accordance with the policies
3 enunciated in RCW 90.58.020;

4 (c) "State master program" is the cumulative total of all master
5 programs approved or adopted by the department of ecology;

6 (d) "Development" means a use consisting of the construction or
7 exterior alteration of structures; dredging; drilling; dumping;
8 filling; removal of any sand, gravel, or minerals; bulkheading; driving
9 of piling; placing of obstructions; or any project of a permanent or
10 temporary nature which interferes with the normal public use of the
11 surface of the waters overlying lands subject to this chapter at any
12 state of water level;

13 (e) "Substantial development" shall mean any development of which
14 the total cost or fair market value exceeds five thousand dollars, or
15 any development which materially interferes with the normal public use
16 of the water or shorelines of the state. The dollar threshold
17 established in this subsection (3)(e) must be adjusted for inflation by
18 the office of financial management every five years, beginning July 1,
19 2007, based upon changes in the consumer price index during that time
20 period. "Consumer price index" means, for any calendar year, that
21 year's annual average consumer price index, Seattle, Washington area,
22 for urban wage earners and clerical workers, all items, compiled by the
23 bureau of labor and statistics, United States department of labor. The
24 office of financial management must calculate the new dollar threshold
25 and transmit it to the office of the code reviser for publication in
26 the Washington State Register at least one month before the new dollar
27 threshold is to take effect. The following shall not be considered
28 substantial developments for the purpose of this chapter:

29 (i) Normal maintenance or repair of existing structures or
30 developments, including damage by accident, fire, or elements;

31 (ii) Construction of the normal protective bulkhead common to
32 single family residences;

33 (iii) Emergency construction necessary to protect property from
34 damage by the elements;

35 (iv) Construction and practices normal or necessary for farming,
36 irrigation, and ranching activities, including agricultural service
37 roads and utilities on shorelands, and the construction and maintenance
38 of irrigation structures including but not limited to head gates,

1 pumping facilities, and irrigation channels. A feedlot of any size,
2 all processing plants, other activities of a commercial nature,
3 alteration of the contour of the shorelands by leveling or filling
4 other than that which results from normal cultivation, shall not be
5 considered normal or necessary farming or ranching activities. A
6 feedlot shall be an enclosure or facility used or capable of being used
7 for feeding livestock hay, grain, silage, or other livestock feed, but
8 shall not include land for growing crops or vegetation for livestock
9 feeding and/or grazing, nor shall it include normal livestock wintering
10 operations;

11 (v) Construction or modification of navigational aids such as
12 channel markers and anchor buoys;

13 (vi) Construction on shorelands by an owner, lessee, or contract
14 purchaser of a single family residence for his own use or for the use
15 of his or her family, which residence does not exceed a height of
16 thirty-five feet above average grade level and which meets all
17 requirements of the state agency or local government having
18 jurisdiction thereof, other than requirements imposed pursuant to this
19 chapter;

20 (vii) Construction of a dock, including a community dock, designed
21 for pleasure craft only, for the private noncommercial use of the
22 owner, lessee, or contract purchaser of single and multiple family
23 residences. This exception applies if either: (A) In salt waters, the
24 fair market value of the dock does not exceed two thousand five hundred
25 dollars; or (B) in fresh waters, the fair market value of the dock does
26 not exceed ten thousand dollars, but if subsequent construction having
27 a fair market value exceeding two thousand five hundred dollars occurs
28 within five years of completion of the prior construction, the
29 subsequent construction shall be considered a substantial development
30 for the purpose of this chapter;

31 (viii) Operation, maintenance, or construction of canals,
32 waterways, drains, reservoirs, or other facilities that now exist or
33 are hereafter created or developed as a part of an irrigation system
34 for the primary purpose of making use of system waters, including
35 return flow and artificially stored ground water for the irrigation of
36 lands;

37 (ix) The marking of property lines or corners on state owned lands,

1 when such marking does not significantly interfere with normal public
2 use of the surface of the water;

3 (x) Operation and maintenance of any system of dikes, ditches,
4 drains, or other facilities existing on September 8, 1975, which were
5 created, developed, or utilized primarily as a part of an agricultural
6 drainage or diking system;

7 (xi) Site exploration and investigation activities that are
8 prerequisite to preparation of an application for development
9 authorization under this chapter, if:

10 (A) The activity does not interfere with the normal public use of
11 the surface waters;

12 (B) The activity will have no significant adverse impact on the
13 environment including, but not limited to, fish, wildlife, fish or
14 wildlife habitat, water quality, and aesthetic values;

15 (C) The activity does not involve the installation of a structure,
16 and upon completion of the activity the vegetation and land
17 configuration of the site are restored to conditions existing before
18 the activity;

19 (D) A private entity seeking development authorization under this
20 section first posts a performance bond or provides other evidence of
21 financial responsibility to the local jurisdiction to ensure that the
22 site is restored to preexisting conditions; and

23 (E) The activity is not subject to the permit requirements of RCW
24 90.58.550;

25 (xii) The process of removing or controlling an aquatic noxious
26 weed, as defined in RCW 17.26.020, through the use of an herbicide or
27 other treatment methods applicable to weed control that are recommended
28 by a final environmental impact statement published by the department
29 of agriculture or the department jointly with other state agencies
30 under chapter 43.21C RCW.

31 NEW SECTION. **Sec. 3.** This act is necessary for the immediate
32 preservation of the public peace, health, or safety, or support of the
33 state government and its existing public institutions, and takes effect
34 immediately.

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