

# HOUSE BILL REPORT

## HB 2815

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### As Reported by House Committee On:

Local Government

Appropriations

**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:** Representatives Simpson, Jarrett, Springer and Lantz; by request of Department of Community, Trade, and Economic Development.

### Brief History:

#### Committee Activity:

Local Government: 1/26/06, 2/1/06 [DPS];

Appropriations: 2/4/06 [DPS(LG)].

### Brief Summary of Substitute Bill

- Requires a Growth Management Hearings Board (Board) to adopt procedures and requirements for retaining scientific and other experts for the purpose of reviewing Growth Management Act (GMA) petitions relating to critical areas.
- Requires that in the development of critical areas policies and regulations, local governments must consider the best available science and create a record showing other specified factors underlying the policies and regulations adopted.
- Authorizes the Department of Community, Trade and Economic Development (Department) to collaborate with other state agencies in order to create written management recommendations that may be used by cities and counties in protecting critical areas.
- Requires that the critical areas management recommendations adopted by the Department be approved through a specified process that includes technical review, public notice, public comment, official publication, and the opportunity to petition for review by the Board.
- Authorizes the Board to hear certain petitions alleging that the critical area management recommendations developed by the Department do not comply with pertinent GMA regulations.

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## HOUSE COMMITTEE ON LOCAL GOVERNMENT

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Simpson, Chair; Clibborn, Vice Chair; B. Sullivan and Takko.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Schindler, Ranking Minority Member; Ahern, Assistant Ranking Minority Member and Woods.

**Staff:** Thamas Osborn (786-7129).

### **Background:**

#### **Growth Management Act Planning Requirements**

The Growth Management Act (GMA) establishes a comprehensive land use planning framework for county and city governments in Washington. Counties and cities meeting specific population and growth criteria are required to comply with the major requirements of the GMA. Counties not meeting these criteria may choose to plan under the GMA. Twenty-nine of 39 counties, and the cities within those 29 counties, are required or have chosen to comply with the major requirements of the GMA.

#### **Critical Areas and Best Available Science**

In addition to other GMA requirements, all local governments must designate and protect critical areas. Critical areas are defined by statute to include wetlands, aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas. Each county and city must include the "best available science" in developing policies and development regulations to protect the functions and values of critical areas. The GMA does not define "best available science."

#### **Growth Management Hearings Boards**

The GMA established three regional Growth Management Hearings Boards (Boards) to review compliance with statutory deadlines, and the sufficiency of plans and development regulations adopted by cities and counties pursuant to the GMA. The Boards are limited to hearing only those petitions alleging that a city, county, or state agency has not complied with the goals and requirements of the GMA, and related provisions of the Shoreline Management Act, and the State Environmental Policy Act.

#### **Public Participation in the GMA Process**

The statutory provisions controlling the GMA planning process contain many public notice provisions and explicitly require that GMA planning jurisdictions encourage public participation in the planning process. One of the key GMA planning goals is to ensure citizen participation. The GMA explicitly requires that each participating county and city "...broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans."

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## **Summary of Substitute Bill:**

### **Consultation of Scientific Experts by the Board**

The Boards are directed to adopt procedures and requirements for retaining scientific and other experts for the purpose of reviewing GMA petitions relating to critical areas.

### **Formal Record of the Critical Areas Ordinance Development Process**

In the development of critical areas policies and regulations, cities and counties must create a record showing that the best available science was considered and identify the sources of scientific information underlying the decision making process. The record must also include any other information considered during the process of developing the policies and regulations.

### **Development and Adoption of Critical Areas Management Recommendations**

The Department of Community, Trade and Economic Development (Department) is authorized to collaborate with other pertinent state agencies to create written management recommendations that *may* be used by cities and counties in protecting designated critical areas. In developing these management recommendations, the Department and participating state agencies must create a record demonstrating the consideration of the best available science and other specified factors and that the appropriate application of the recommendations in protecting critical areas was considered.

Before they may be adopted by the Department, the management recommendations must be approved through a formal process that includes:

- technical review by scientists and other qualified professionals with relevant expertise and which results in a written report that is made available to the public;
- public notice of the proposed management recommendations, including public access to the complete text;
- a public comment period that lasts for at least 60 days following the publication of the proposed management recommendations;
- formal consideration by the Department of the public comments prior to its preliminary adoption of the proposed management recommendations;
- publication of the proposed management recommendations following the technical review, the public comment period, and the preliminary adoption of the recommendations by the Department; and
- an opportunity for individuals to challenge the proposed management recommendations through a petition filed with the Board, in which case the final adoption of the proposed regulations are delayed until the petition is resolved.

The Department is required to review its management recommendations at least once every five years and, if necessary, update the recommendations by incorporating newly developed best available science. Such updates are subject to procedural requirements analogous to those required for the adoption of the original management recommendations.

## **Standard of Review and the Utilization of the Department's Management**

### **Recommendations**

A county or city that formally adopts the Department's management recommendations in the development of its critical areas policies and regulations is subject to a special standard of review if such policies or regulations are subject to legal challenge before a Board or a court. In such a case, the only issue considered by the Board or reviewing court is whether the policies and regulations are consistent with the management recommendations. If so, the Board or court must affirm the validity of the policy or regulation at issue.

However, a city or county need not adopt the Department's management recommendations in order to meet the requisite legal standards regarding critical areas protection and best available science. A county or city that chooses to not adopt these management recommendations is subject to review under general GMA standards regarding the use of best available science and the protection of critical areas.

### **Board Review of the Department's Management Recommendations**

The Board is granted the authority to hear petitions challenging the legal validity of the Department's actions regarding critical areas management recommendations. Such petitions may allege either that: (1) the development of the recommendations fails to meet specified substantive and procedural requirements; or (2) that the Department failed to properly update the recommendations. The Board must apply the "clearly erroneous" standard in ruling on any petition challenging the legality of the Department's actions relating to the adoption or updating of its management recommendations.

Only those persons who formally submitted comments during the public review period preceding the adoption of the management recommendations have standing to file a petition challenging the validity of the Department's management recommendations.

The Board's review of petitions relating to the management recommendations adopted by the Department is governed by specific procedural requirements. These procedures include provisions relating to: (1) time limitations on the filing of petitions; and (2) requirements regarding the issuance of final orders by the Board.

### **Substitute Bill Compared to Original Bill:**

The substitute bill adds the following provisions to the original bill:

- The Board must consult with cities and counties in developing procedures and criteria for the hiring of scientific experts to assist in the review of petitions relating to critical areas.
- In the development of critical areas management recommendations, the Department must create a record demonstrating the consideration of the best available science and other specified factors and that the appropriate application of the recommendations in protecting critical areas was considered.

- In the event that the Department's proposed management recommendations are subject to legal challenge via a petition for review prior to their formal adoption, the recommendations may still be used for purposes other than that of providing a guideline for local governments in regulating critical areas.
- A Board must use the "clearly erroneous" standard in ruling on any petition challenging the legality of the Department's actions relating to the adoption or updating of its management recommendations.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** (In support of original bill) The preservation of critical areas is a vital environmental issue and the provisions of this bill will provide a useful tool for local governments in creating policies and regulations regarding critical areas. Among the key goals of the bill is to provide greater clarity to local governments in determining the best available science that can be applied to critical area planning. Essentially, the bill has three parts: (1) requiring local governments to demonstrate how best available science and other factors play a role in the planning process; (2) the creation of procedures for establishing management recommendations for the determination of best available science; and (3) allowing local governments the option of using the management recommendations and thus insulate themselves from certain legal challenges. Local governments are not required to follow the management recommendations, but have the option of doing so. Cities need a standard they can refer to in developing the best available science and this bill is a step towards developing such a standard. The management recommendations will be very helpful to small cities with respect to the critical areas planning process. "Best available science" is very hard to define and the bill makes real progress in assisting local governments in wrestling with this issue. The bill provides a greater degree of certainty for both developers and local governments regarding critical areas planning issues. The provision in the bill providing a "safe harbor" for small jurisdictions who follow the management recommendations is a very good idea.

(With concerns on original bill) The management recommendations should not be treated as a minimum standard against which the adequacy of all critical areas planning should be judged. The bill lacks clarity with respect to: (1) the procedures for technical review of the management recommendations; (2) how the management recommendations are to be considered during the process of legal review; and (3) how the public may be involved in developing the management recommendations. The public should be directly involved in the development of the recommendations and the process should be more open. Local governments should not be allowed to pick and choose what constitutes best available science. The procedural requirements are too complex and are subject to excessive,

centralized control by state agencies in Olympia. The process should allow for more local input.

**Testimony Against:** The procedural requirements of the bill are too complex and extensive. The bill also does not account for the fact that different types of science are required for the management of different types of critical area environments. The management recommendations threaten to become a minimum standard that will be applied to all jurisdictions and it is unclear what legal status the boards and the courts will give to these recommendations. Too much centralized decision making is allowed under the bill and it creates an approach where one state agency dictates policy to local jurisdictions. Local officials should be allowed to determine what best available science should be applied locally.

**Persons Testifying:** (In support) Representative Simpson, prime sponsor; Leonard Baur, Department of Community Trade and Economic Development; Eric B. Johnson, Washington Association of Counties; Susan Kyle, Eve Johnson, League of Women Voters; Martin Loesch, Swinomish Tribe; Leah MrKeirnan, Jerry Smedes, NorthWest Environmental Business Council; Dave Williams, Association of Washington Cities; Kaleen Cottingham, Futurewise; and Heath Packard, Audobon.

(With concerns) Chris McCabe, Association of Washington Business.

(Opposed) Timothy Harris, Building Industry Association of Washington; and Eric D. Johnson, Washington Public Ports Association.

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

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The substitute bill by Committee on Local Government be substituted therefor and the substitute bill do pass. Signed by 18 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Cody, Conway, Darneille, Dunshee, Grant, Haigh, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, Miloscia, Priest, Schual-Berke and P. Sullivan.

**Minority Report:** Do not pass. Signed by 12 members: Representatives Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; McDonald, Assistant Ranking Minority Member; Armstrong, Bailey, Buri, Chandler, Clements, Hinkle, Pearson, Talcott and Walsh.

**Staff:** Alicia Paatsch (786-7178).

### **Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Local Government:**

No new changes were recommended.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** The Governor asked us to support this bill as part of her land use agenda. Local governments must have access to the latest science in land use decisions. The Governor asked agencies to begin with absorbing the costs this biennium and then we will come back next biennium for funding. We do need the bill because it does several things as it will allow us to update our existing guidelines. Many cities and counties have outdated scientific information in their plans and this bill would give them the information to update them. The bill requires government agencies to show their work, which includes showing the economic impact.

**Testimony Against:** None.

**Persons Testifying:** Marie Sullivan, Department of Community Trade and Economic Development.

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