

EHB 1653: “An act related to clarifying the integration of SMA policies with the GMA”

- Ecology/Commerce request legislation: failed in 2009, adopted in 2010 thanks to Kitsap County, WSAC, and diverse stakeholder interests
- Clarifies that CAOs apply in shoreline areas until Ecology approves new SMPs. Retroactive to July 27, 2003.
- Resolves confusion created by “Anacortes” Hearings Board and Supreme Court decisions.

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ENVIRONMENTALISTS GET A WIN IN THE LEGISLATURE

What Simpson's bill does is **wonky, but important**: It clarifies a 2003 law setting shoreline protection standards that the state Supreme Court recently weakened with a 2008 ruling that opened the law to local challenges.

EHB 1653: Broad support from diverse interests



“Somewhere out in the world little piglets are sprouting wings” – *Sen. Pridemore, at Senate hearing on EHB 1653*

Bill effective upon Governor’s signature: March 18, 2010

Background: regulation of shoreline critical areas

2003: Legislature adopts **ESHB 1933**, amends GMA to require shoreline critical areas be protected through SMPs. Ecology/Commerce: “handoff” from CAO>SMP takes place according to the SMP update schedule.

- 2005: **Western Hearings Board** finds new CAOs must be adopted by Ecology as SMP amendments before they can be effective in shoreline areas. Agencies appeal.
- 2006: **Thurston Superior Court** overturns Western Board decision.
- 2008: **State Supreme Court** reinstates Anacortes Hearings Board in confusing 4-1-4 split decision. “Lead opinion” interpreted by some as holding of the court.

Sec. 1: Intent is to clarify 2003 law

- A 2003 law (*ESHB 1933*) was intended to create greater **operational clarity** between SMA and GMA.



2003 law said shift to SMA sole jurisdiction when Ecology approved under “applicable guidelines.” Timing was not clear.

- ESHB 1933 was the subject of **contrary legal opinions.**



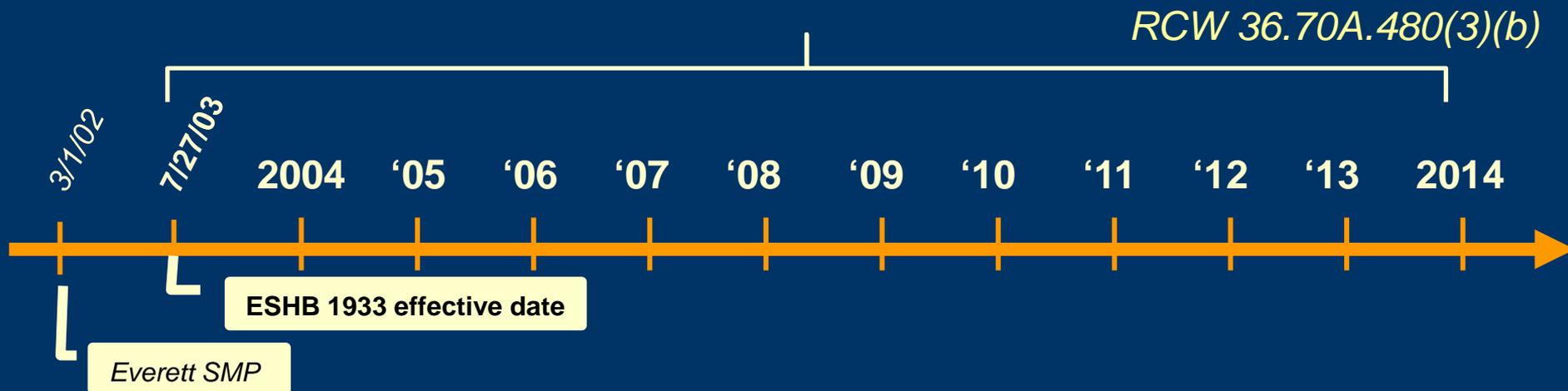
The Anacortes Supreme Court case left gov’ts and lower courts still unsure when the “handoff” takes place. (KAPO and Kailin Court of Appeals cases, several Growth Board decisions)

Sec 1 EHB 1653: Intent (*continued*)

- CAO adopted under the GMA apply within shorelines of the state.  *Refutes the “lead opinion” of Anacortes Supreme Court Case.*
- Adopting or updating a CAO is not automatically an SMP update that needs Ecology approval.  *Overturns this holding of the Western Growth Board that was reinstated by Supreme Court.*
- Bill is remedial and curative, retroactive to July 27, 2003.  *This was effective date of ESHB 1933. Clarifies status of past CAO adoptions and decisions.*

Sect 2 (GMA): Clarify handoff from CAO to SMP

- CAOs apply within shorelines until Ecology approves either:
 - a “**comprehensive**” SMP amendment; *or*
 - a “**segment**” (*partial*) SMP update that was adopted to specifically address critical areas; *or*
 - SMPs approved “on or after **March 1, 2002**” (*applies only to Everett*)
- Adopting or updating a CAO is *not* a comprehensive or segment SMP update



Sect 2 (GMA): Grandfathered uses may continue

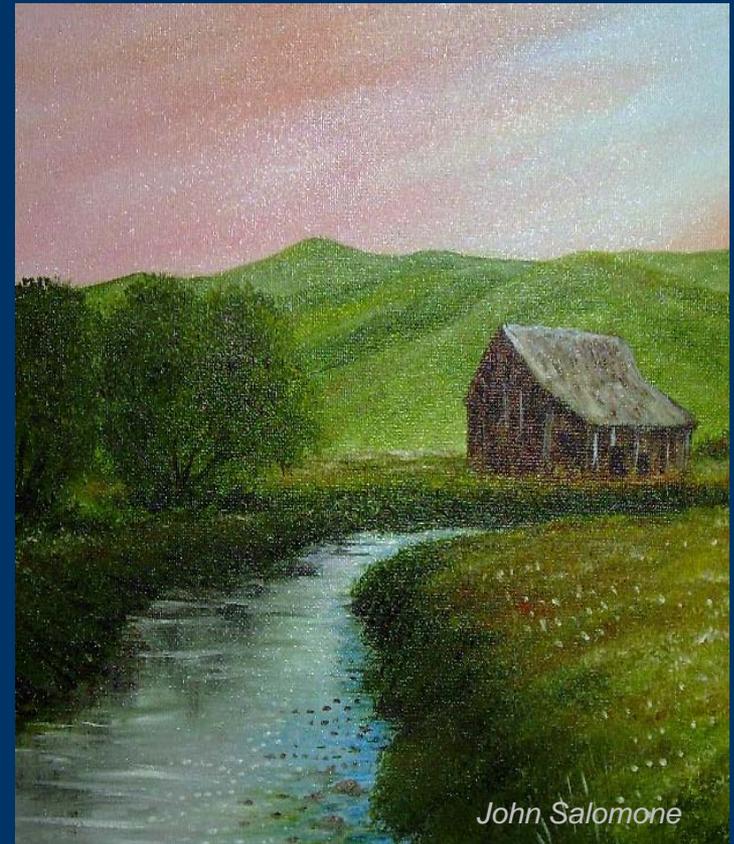
During “interim period” before SMPs take over from CAO:

- A use or structure legally located within shorelines that was either established or vested before a CAO was adopted may continue as a conforming use
- Such uses or structures may be **redeveloped** or **modified** *if*:
 - The modification is consistent with the SMP; **and**
 - The local government determines the modification will result in no net loss of ecological functions (*i.e., they can require mitigation*)
- A local government may waive this requirement if the redevelopment or modification is consistent with the SMP *and* the CAO

Sect 2 (GMA): Grandfathered agriculture activity

Before SMPs take over from the
CAO:

- An *agricultural activity* that doesn't expand the area being used for ag activity is not considered "redevelopment or modification," (*and so do not need to meet the new tests*).
- "*Agricultural activities*" = the definition in the Shoreline Act (*i.e., existing and ongoing uses, practices, and facilities*)



RCW 36.70A.480(3)(c)(ii)

Sect 2 (GMA): SMP test for critical areas = “no net loss”

When Ecology is approving an SMP...

- The test for level of protection to critical areas is that they assure “no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by Ecology guidelines.”
- Bill deletes the “no-backsliding” language of ESHB 1933 (SMP protections "at least equal to those provided by the CAO"). Avoids axle-winding about proving this is met.

GMA: RCW 36.70A.480(4)

Other provisions

- **Section 3 (SMA):** Add definition of a “comprehensive” SMP update (“fully achieves the procedural and substantive requirements of Ecology guidelines effective January 2004.”) Added to definition of “Master Program.”
- **Section 4 (SMA):** New section that points to the GMA planning requirements for Shorelines (RCW 36.70A.480).
- **Section 5:** The bill is retroactive to the effective date of ESHB 1933 (July 2003). This was necessary to address the confusion created by the bill.
- **Section 6:** The bill takes immediate effect (upon Governor’s signature). Governor signed bill on March 18, 2010.

No Change: Non-SMP-related Critical Areas

EHB 1653 does not clarify an intent to transfer the regulation of those critical area types that are actually addressed by SMPs

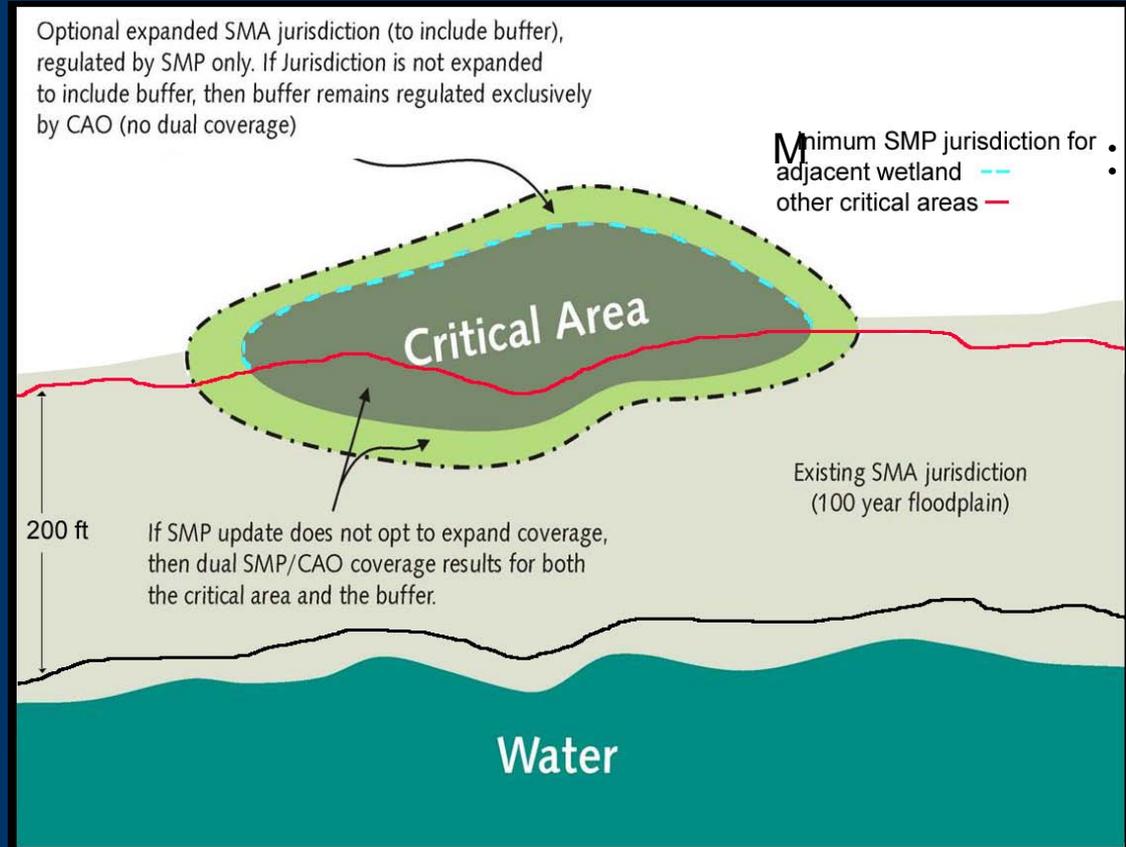
Some critical areas *not addressed at all by SMP guidelines*

- Some geologically hazardous areas (lahar zones, seismic)
- Critical aquifer recharge areas

Statute doesn't address this, and assumes 100% match between CAO topics and SMP topics.

No change: “Land necessary for buffers”

If a new SMP doesn't include optional expanded SMA jurisdiction to include land necessary for buffers for critical areas, then the local jurisdiction shall continue to regulate those critical areas and their required buffers under GMA as well as SMP (*i.e.*, dual coverage continues).



GMA: RCW 36.70A.480(6)

Summary of EHB 1653: Key results

- **Ends confusion** created by conflicting court interpretations of a 2003 law: CAOs *do* apply in shoreline jurisdiction, until Ecology approves a comprehensive SMP. Bill is retroactive to July 27, 2003.
- **Provides certainty** for grandfathered uses and structures: they may continue as conforming uses in shorelines and may be modified (with limitations).
- Test for new SMPs: protection for critical areas must achieve **no net loss** of ecological functions. No longer need to show new SMPs provide “equal or better” protection as CAO.

Next steps

Long-term:

- Update Commerce/Ecology rules (WACs)

Near-term:

- Monitor appeals. KAPO appeal of Div 2 Appeals Court decision to State Supreme Court, arguing retroactive application of EHB 1653 violates separation of powers doctrine and impairs vested rights.
- **Gather local government questions.** If many questions arise over interpretation, update joint Commerce/Ecology web guidance after review by key interest groups involved in discussions over EHB 1653.