

# SENATE BILL REPORT

## SB 5380

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As Passed Senate, March 19, 2003

**Title:** An act relating to clarifying the definition of ordinary high water mark.

**Brief Description:** Clarifying the definition of ordinary high water mark.

**Sponsors:** Senators Stevens, Honeyford and Schmidt.

**Brief History:**

**Committee Activity:** Land Use & Planning: 2/13/03, 3/3/03 [DP, DNP].

Passed Senate: 3/19/03, 28-19.

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### SENATE COMMITTEE ON LAND USE & PLANNING

**Majority Report:** Do pass.

Signed by Senators Mulliken, Chair; McCaslin, Morton and T. Sheldon.

**Minority Report:** Do not pass.

Signed by Senator Kline.

**Staff:** Genevieve Pisarski (786-7488)

**Background:** The Shoreline Management Act (SMA) defines the ordinary high water mark (OHWM) based on where the bed and banks of the waters are common and usual. In the event the OHWM cannot be found, it is defined on the basis of the mean high tide for salt water or as the line of mean high water for fresh water.

There are concerns that under the current statutory definition of the ordinary high water mark in the Shoreline Management Act, the definition fails to consider how the OHWM relates to land used for agricultural purposes. In 1991 a Ninth Circuit Court of Appeals found, based on interpretations of earlier Washington State case law, that "lands periodically submerged but still useful for agricultural purposes are thus above the ordinary high water line."

**Summary of Bill:** In recognition of the existing state case law, the Ninth Circuit's definition of the ordinary high water mark is incorporated into the Shoreline Management Act in order to clarify how the definition relates to agricultural land and to provide consistency between the case law and the statute. The definition provides that if land is occasionally submerged, if such land is nonetheless still useful for agricultural purposes, it will be deemed to be above the ordinary high water mark.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** The bill makes the definition in statute consistent with state case law and clarifies that the Department of Ecology (DOE) should follow case law in setting the ordinary high water mark (OHWM) for agricultural land. This clarification would aid the Skykomish River avulsion barrier project where the DOE set the OHWM back so far that the majority of the owners' property was considered to be within shoreline jurisdiction.

**Testimony Against:** The OHWM is the point for establishing shoreline jurisdiction. This definition adds confusion because DOE will have to determine whether land is useful for agriculture. The Ninth Circuit case was based on federal law, not state law and the court refers to ordinary high water line, not mark.

**Testified:** Gordon White, Department of Ecology (con); Dale Reiner, Farmer, member of WSFB and WCA (pro); Bill Clarke, Mentor Law Group (pro); Hertha Lund, Washington Farm Bureau (pro).