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ENGROSSED SUBSTITUTE SENATE BILL 5273

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State of Washington

55th Legislature

1997 Regular Session

By Senate Committee on Agriculture & Environment (originally sponsored by Senators Morton, Fraser, Swecker, Prentice, Strannigan and Haugen)

Read first time 02/14/97.

1 AN ACT Relating to compensatory mitigation; adding a new section to  
2 chapter 75.20 RCW; adding a new section to chapter 90.48 RCW; and  
3 adding a new chapter to Title 90 RCW.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that the state lacks  
6 a central policy relating to the mitigation of wetlands and aquatic  
7 habitat for necessary or unavoidable development. This causes  
8 development proposals that rely upon advanced compensatory mitigation  
9 or off-site mitigation to take an unreasonably long period of time to  
10 develop and implement and to be subject to a great deal of regulatory  
11 and permitting uncertainty.

12 The legislature further finds that mitigation for wetlands and  
13 aquatic habitat can be most beneficial for the resource if it is  
14 planned before the project's environmental impacts. Advanced  
15 compensatory mitigation and off-site mitigation are approaches to  
16 providing wetlands and aquatic habitat compensation that offer benefits  
17 for natural resources while reducing permitting delays and uncertainty.  
18 These resource benefits result from early implementation of wetlands  
19 and aquatic habitat improvement actions and from increased flexibility

1 to address wetlands and aquatic habitat from a landscape, watershed, or  
2 bay-wide perspective. This approach also offers opportunities to  
3 increase biological functions by combining or connecting wetlands and  
4 aquatic habitat into blocks of larger size or complexity.

5 It shall be the policy of the state to encourage, as an option,  
6 advanced compensatory mitigation and off-site mitigation that will  
7 result in greater environmental benefits than other mitigation options,  
8 be appropriate as a means of addressing the impacts of a development  
9 project, and provide a means of accommodating necessary or unavoidable  
10 development in wetland and aquatic habitat areas. Public  
11 infrastructure projects, in particular, could benefit from this type of  
12 option.

13 This chapter does not require the project proponent to use advanced  
14 compensatory mitigation or off-site mitigation nor does it change a  
15 project proponent's opportunity to pursue project-specific mitigation  
16 proposals outside of the context of a mitigation plan.

17 The legislature authorizes local governments to accommodate the  
18 goals of sections 1 through 3 of this act. It is the intent of the  
19 legislature that each mitigation plan be consistent with plans and  
20 development regulations adopted under the growth management act,  
21 chapter 36.70A RCW, and the shoreline management act, chapter 90.58  
22 RCW, and local governments are encouraged to incorporate the goals of  
23 this chapter into their development regulations and critical area  
24 ordinances.

25 This chapter shall not be construed to create new authorities for  
26 regulating wetlands or aquatic habitat.

27 NEW SECTION. **Sec. 2.** The definitions in this section apply  
28 throughout this chapter unless the context clearly requires otherwise.

29 (1) "Advanced compensatory mitigation" means providing compensatory  
30 mitigation in advance of known, unavoidable impacts of planned  
31 development projects.

32 (2) "Compensatory mitigation" means the restoration, creation,  
33 enhancement, or preservation of uplands, wetlands, or other aquatic  
34 resources for the purposes of compensating for unavoidable adverse  
35 impacts that remain after all appropriate and practicable avoidance and  
36 minimization has been achieved.

37 (3) "Mitigation" means sequentially avoiding impacts, minimizing  
38 impacts, and compensating for remaining unavoidable impacts.

1 (4) "Mitigation plan" means a document or set of documents  
2 developed through joint discussions between a project proponent and  
3 environmental regulatory agencies that describe the unavoidable wetland  
4 or aquatic resource impacts of the proposed development, and the  
5 proposed compensatory mitigation for those impacts.

6 (5) "Necessary and unavoidable development" means an action that is  
7 critical for the maintenance or expansion of an existing infrastructure  
8 feature such as a highway, rail line, airport, marine terminal, utility  
9 corridor, harbor area, or hydroelectric facility, and is consistent  
10 with a land use planning process. This planning process may include  
11 the growth management act, chapter 36.70A RCW, or the shoreline  
12 management act, chapter 90.58 RCW, in areas covered by those chapters.

13 (6) "Project proponent" means a public or private entity  
14 responsible for preparing a mitigation plan.

15 (7) "Watershed" means an area identified as a state of Washington  
16 water resource inventory area under WAC 173-500-040 as it exists on the  
17 effective date of this section.

18 NEW SECTION. **Sec. 3.** (1) Project proponents may use a mitigation  
19 plan to propose advanced compensatory mitigation and off-site  
20 mitigation within the watershed. A mitigation plan shall:

21 (a) Contain provisions that guarantee the long-term viability of  
22 the created, restored, enhanced, or preserved habitat, including  
23 assurances for protecting any essential biological and hydrological  
24 functions defined in the mitigation plan;

25 (b) Contain provisions for long-term monitoring of any created,  
26 restored, or enhanced mitigation site; and

27 (c) Be consistent with the local comprehensive land use plan in  
28 counties or cities planning under chapter 36.70A RCW, and any other  
29 applicable planning process in effect for the development area, such as  
30 an adopted subbasin or watershed plan.

31 (2) The departments of ecology and fish and wildlife may not limit  
32 the scope of options in a mitigation plan to areas on or near the  
33 project site, or to habitat types of the same type as contained on the  
34 project site. The departments of ecology and fish and wildlife shall  
35 fully review and give due consideration to compensatory mitigation  
36 proposals, including advanced compensatory mitigation and off-site  
37 mitigation, that improve the overall biological functions and values of

1 the watershed or bay and accommodate the mitigation needs of  
2 unavoidable or necessary development.

3 The departments of ecology and fish and wildlife are not required  
4 to grant approval to a mitigation plan that the departments find does  
5 not provide equal or better biological functions and values within the  
6 watershed or bay.

7 (3) When making a finding under this chapter regarding whether a  
8 mitigation plan provides equal or better biological functions and  
9 values than those that will be lost as a result of necessary or  
10 unavoidable development, the departments of ecology and fish and  
11 wildlife shall consider whether the mitigation plan provides equal or  
12 better biological functions and values, compared to the existing  
13 conditions, for the target resources or species identified in the  
14 mitigation plan. This consideration shall be based upon the following  
15 factors:

16 (a) The relative value of the mitigation for the target resources,  
17 in terms of the quality and numbers of biological functions provided;

18 (b) The compatibility of the proposal with the intent of broader  
19 resource management and habitat management objectives and plans, such  
20 as existing resource management plans, watershed plans, critical areas  
21 ordinances, and shoreline master programs;

22 (c) The relative scarcity of different habitat types in the  
23 landscape addressed by the mitigation plan;

24 (d) The benefits of the proposal for the entire habitat landscape,  
25 considering the benefits of connecting various habitat units or  
26 providing population-limiting habitats or functions for target species;

27 (e) The benefits of early implementation of habitat mitigation for  
28 projects involving advanced compensatory mitigation; and

29 (f) The significance of any negative impacts to nontarget species  
30 or resources.

31 (4) A mitigation plan may be approved through a memorandum of  
32 agreement between the project proponent and either the department of  
33 ecology or department of fish and wildlife, or both.

34 NEW SECTION. **Sec. 4.** The legislature recognizes that many of the  
35 aquatic areas of the state contain levels of pollution in the sediments  
36 that require remediation through state and federal cleanup laws and  
37 programs such as the state model toxics control act, chapter 70.105D  
38 RCW, or the federal comprehensive environmental response, compensation

1 and liability act (42 U.S.C. Sec. 9601 et seq.). When cleanup actions  
2 are undertaken in contaminated aquatic areas, the habitat function of  
3 the aquatic area may be substantially improved. For this reason it is  
4 the policy of the state to not require habitat mitigation for the  
5 cleanup of hazardous substances under federal or state cleanup laws  
6 where the cleanup action plan ensures that the cleanup actions will  
7 result in a cleaner aquatic environment and equal or better habitat  
8 functions and values. This section shall not be construed to require  
9 habitat mitigation for navigation and maintenance dredging of existing  
10 channels and berthing areas.

11 NEW SECTION. **Sec. 5.** (1) In making regulatory decisions relating  
12 to wetland or aquatic resource mitigation, the departments of ecology  
13 and fish and wildlife shall, at the request of the project proponent,  
14 follow the guidance of sections 1 through 4 of this act.

15 (2) If the department of ecology or the department of fish and  
16 wildlife receives multiple requests for review of mitigation plans,  
17 each department may schedule its review of these proposals to conform  
18 to available budgetary resources.

19 NEW SECTION. **Sec. 6.** A new section is added to chapter 75.20 RCW  
20 to read as follows:

21 When reviewing a mitigation plan under RCW 75.20.100 or RCW  
22 75.20.103, the department shall, at the request of the project  
23 proponent, follow the guidance contained in sections 1 through 4 of  
24 this act.

25 NEW SECTION. **Sec. 7.** A new section is added to chapter 90.48 RCW  
26 to read as follows:

27 When exercising its powers under RCW 90.48.260, the department  
28 shall, at the request of the project proponent, follow the guidance  
29 contained in sections 1 through 4 of this act.

30 NEW SECTION. **Sec. 8.** Sections 1 through 5 of this act constitute  
31 a new chapter in Title 90 RCW.

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