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SECOND SUBSTITUTE HOUSE BILL 2320

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State of Washington

58th Legislature

2004 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Linville, Schoesler, Sump, Grant and Rockefeller; by request of Commissioner of Public Lands)

READ FIRST TIME 02/09/04.

1 AN ACT Relating to the department of natural resources' authority  
2 for compensatory mitigation management on state-owned aquatic lands;  
3 reenacting and amending RCW 43.79A.040; and adding a new chapter to  
4 Title 79 RCW.

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

6 NEW SECTION. **Sec. 1.** (1) The legislature finds that the existing  
7 state and federal regulatory framework for wetland and aquatic resource  
8 mitigation is an important tool used to offset impacts to aquatic  
9 lands.

10 (2) The legislature further finds that because impacts to wetlands  
11 and aquatic resources often affect state-owned aquatic lands, the  
12 department should work within established state and federal regulatory  
13 mitigation processes to ensure that individual compensatory mitigation  
14 sites and mitigation bank sites on state-owned aquatic lands are  
15 properly planned for and protected over the long term.

16 (3) The intent of this chapter is to establish the proprietary  
17 mechanisms for the department, on state-owned aquatic lands, to: Serve  
18 as the long-term manager of compensatory mitigation sites; utilize in-

1 lieu fee mitigation funds for habitat improvement projects; and  
2 develop, implement, and manage mitigation banks.

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

5 (1) "Compensatory mitigation" means the process of restoring,  
6 creating, enhancing, or, in exceptional circumstances, preserving  
7 uplands, wetlands, or other aquatic resources for the purposes of  
8 compensating for the unavoidable adverse environmental impacts of a  
9 project that remain after all appropriate and practicable avoidance and  
10 minimization has been achieved.

11 (2) "Credit" means a unit of trade representing the increase in the  
12 ecological value of a site due to improvements made to the habitat  
13 conditions of the site, as measured by acreage, functions, or values,  
14 or by some other assessment method.

15 (3) "Department" means the department of natural resources.

16 (4) "In-lieu compensatory mitigation" means payment from a sponsor  
17 to a natural resource management entity for the purpose of designing,  
18 implementing, and managing compensatory mitigation projects to offset  
19 unavoidable impacts from a project.

20 (5) "Mitigation" means the sequential process of avoiding impacts,  
21 minimizing impacts, and compensating for the remaining unavoidable  
22 impacts of a project.

23 (6) "Mitigation bank" means a site where either wetlands or aquatic  
24 resources, or both, are restored, created, enhanced, or in exceptional  
25 circumstances, preserved expressly for the purpose of providing  
26 compensatory mitigation in advance of authorized project impacts to  
27 similar resources.

28 (7) "Mitigation banking agreement" means a legal agreement between  
29 the department and a public or private entity under which the parties  
30 to the agreement agree to jointly develop, implement, and manage a  
31 mitigation bank that is located on state-owned aquatic lands and is  
32 approved through state or federal regulatory mitigation processes.

33 (8) "Mitigation partners" means public or private entities with  
34 which the department has entered into mitigation banking agreements  
35 under section 4 of this act.

36 (9) "Project" means a physical construction project that develops

1 or redevelops land in a way that creates unavoidable adverse  
2 environmental impacts that remain after all appropriate and practicable  
3 avoidance and minimization has been achieved.

4 (10) "Site" means a mitigation bank site, or a site where  
5 compensatory mitigation has or will occur.

6 (11) "Sponsor" means the person or entity that is proposing,  
7 financing, designing, or constructing a project.

8 NEW SECTION. **Sec. 3.** (1) The department may create an endowment  
9 for the purpose of generating funds that are to be used for the long-  
10 term monitoring, maintenance, and management of proprietary  
11 compensatory mitigation sites and mitigation bank sites.

12 (2) Any endowment created by the department may accept money from  
13 public or private entities. However, the department may only accept  
14 money for an endowment that will fund compensatory mitigation sites and  
15 compensatory mitigation bank sites that are:

16 (a) Developed by the public or private entities that donate the  
17 money;

18 (b) Are located on state-owned aquatic lands; and

19 (c) Are approved through state or federal regulatory mitigation  
20 processes.

21 (3)(a) Before the department may assume management responsibility  
22 for a site, the amount of money necessary to establish an endowment  
23 that will adequately cover the costs of long-term monitoring,  
24 maintenance, and management must be determined by the department and  
25 approved through state or federal regulatory mitigation processes.

26 (b) The amount of money necessary to establish an endowment must be  
27 based on the specific conditions of the compensatory mitigation site or  
28 mitigation bank site being considered by the department, and the long-  
29 term management plan for the site, as approved through state or federal  
30 regulatory mitigation processes.

31 (c) Moneys collected by the department to establish an endowment  
32 must be deposited into the aquatic lands compensatory mitigation  
33 endowment account established in section 6 of this act.

34 (4)(a) The department may accept in-lieu fee payments, from public  
35 or private entities, for the purpose of designing, implementing, and  
36 managing in-lieu compensatory mitigation projects that are located on

1 state-owned aquatic lands and approved through state or federal  
2 regulatory mitigation processes.

3 (b) In-lieu fee payments collected by the department must be  
4 deposited into the aquatic lands compensatory mitigation management  
5 account established in section 7 of this act.

6 (5)(a) The department shall keep separate accounting records of all  
7 moneys received under this section for:

- 8 (i) The long-term management of compensatory mitigation sites;
- 9 (ii) The long-term management of mitigation bank sites; and
- 10 (iii) The design, implementation, and management of in-lieu fee  
11 compensatory mitigation projects.

12 (b) The department shall ensure, through its accounting records,  
13 that the funds for each site are fully secured and expended as approved  
14 through state or federal regulatory mitigation processes.

15 (6) Consistent with state and federal regulatory mitigation  
16 policies, state-owned aquatic lands utilized as compensatory mitigation  
17 sites to offset long-term unavoidable project impacts and mitigation  
18 banks shall not be available for other uses that will compromise the  
19 ecological functions of the sites.

20 NEW SECTION. **Sec. 4.** The department is authorized to enter into  
21 mitigation banking agreements with public or private entities to  
22 develop, implement, and manage mitigation banks that are located on  
23 state-owned aquatic lands and are approved through state or federal  
24 regulatory mitigation processes.

25 NEW SECTION. **Sec. 5.** (1) The department is authorized to:

26 (a) Sell mitigation bank credits from a department mitigation bank  
27 that is located on state-owned aquatic lands and approved through state  
28 or federal regulatory mitigation processes; and

29 (b) Receive revenues from the sale of mitigation bank credits sold  
30 by public or private entities with which the department has entered  
31 into mitigation banking agreements.

32 (2)(a) State or federal regulatory agencies must determine the  
33 ecological value of the mitigation bank credits through mitigation bank  
34 certification processes developed by those agencies. The ecological  
35 value may not be determined by the department.

1 (b) The department and its mitigation partners must determine the  
2 economic value of the credits. The department and its mitigation  
3 partners shall sell the credits for no less than market value, as  
4 determined using appropriate mitigation credit market appraisal  
5 techniques. The economic value of the mitigation bank credits may  
6 include the value associated with the use of state-owned aquatic lands  
7 for the mitigation bank.

8 (3) Revenue from the sale of mitigation bank credits generated by  
9 a department mitigation bank on state-owned aquatic lands must be  
10 deposited into the aquatic lands compensatory mitigation endowment  
11 account established in section 6 of this act. All moneys received by  
12 the department from the sale of mitigation bank credits from a specific  
13 mitigation bank on state-owned aquatic lands, in excess of the revenues  
14 to mitigation partners and in excess of the long-term management  
15 endowment for that particular site, must be deposited according to RCW  
16 79.90.245 and 79.64.040, and paid to towns according to RCW 79.92.110.

17 (4) The department shall keep separate accounting records of all  
18 moneys received from the sale of mitigation bank credits from  
19 department mitigation banks to ensure that funding for the long-term  
20 management of particular mitigation bank sites are fully secured and  
21 expended as approved through state or federal regulatory mitigation  
22 processes.

23 (5) Consistent with state and federal regulatory mitigation  
24 processes, state-owned aquatic lands utilized as department mitigation  
25 banks are not available for other uses that will compromise the  
26 ecological functions of the mitigation banks.

27 NEW SECTION. **Sec. 6.** (1) The aquatic lands compensatory  
28 mitigation endowment account is created in the custody of the state  
29 treasurer. All receipts from moneys received by the department for the  
30 sole purpose of creating long-term management endowments under sections  
31 3 and 5 of this act must be deposited into the account.

32 (2) The moneys in the account must be pooled and invested for the  
33 benefit of all compensatory mitigation sites and mitigation bank sites  
34 that the department has agreed to manage under this chapter.

35 (3) The account must be administered by the state investment board.  
36 The principal of the account is irreducible. Disbursements of the  
37 interest and investment earnings from the account, less the allocations

1 to the state investment board expense account under RCW 43.33A.160,  
2 must be made to the aquatic lands compensatory mitigation management  
3 account, created in section 7 of this act, upon authorization of the  
4 commissioner of public lands, and the director of the state investment  
5 board. The account is subject to allotment procedures under chapter  
6 43.88 RCW, but an appropriation is not required for expenditures.

7 NEW SECTION. **Sec. 7.** (1) The aquatic lands compensatory  
8 mitigation management account is created in the custody of the state  
9 treasurer. All receipts from interest and investment earnings from the  
10 aquatic lands compensatory mitigation endowment account created in  
11 section 6 of this act and in-lieu compensation payments for completing  
12 compensatory mitigation projects on state-owned aquatic lands received  
13 under section 3 of this act must be deposited into the account.

14 (2) Expenditures from the account may be used solely by the  
15 department for the purpose of designing, implementing, and managing  
16 in-lieu compensatory mitigation projects and performing long-term  
17 monitoring, maintenance, and management of compensatory mitigation  
18 sites and mitigation bank sites that are located on state-owned aquatic  
19 lands.

20 (3) The moneys in the account shall be pooled and expended solely  
21 for the benefit of compensatory mitigation sites, under sections 3 and  
22 5 of this act, that the department has agreed to manage under this  
23 chapter. Only the commissioner of public lands or the commissioner's  
24 designee may authorize expenditures from the account. The account is  
25 subject to allotment procedures under chapter 43.88 RCW, but an  
26 appropriation is not required for expenditures.

27 NEW SECTION. **Sec. 8.** The authority granted in this chapter for  
28 the use of state-owned aquatic lands for compensatory mitigation or  
29 mitigation bank sites is intended to be voluntarily agreed to by the  
30 department and a public or private third-party entity. The department  
31 is prohibited from conditioning a third party's use of state-owned  
32 aquatic lands with the provisions of this chapter unless the conditions  
33 are agreed to by both the department and the third party.

34 NEW SECTION. **Sec. 9.** Nothing in this chapter affects the

1 authority of the department to exchange state-owned tidelands and  
2 shorelands under RCW 79.90.457.

3 **Sec. 10.** RCW 43.79A.040 and 2003 c 403 s 9, 2003 c 313 s 10, 2003  
4 c 191 s 7, 2003 c 148 s 15, 2003 c 92 s 8, and 2003 c 19 s 12 are each  
5 reenacted and amended to read as follows:

6 (1) Money in the treasurer's trust fund may be deposited, invested,  
7 and reinvested by the state treasurer in accordance with RCW 43.84.080  
8 in the same manner and to the same extent as if the money were in the  
9 state treasury.

10 (2) All income received from investment of the treasurer's trust  
11 fund shall be set aside in an account in the treasury trust fund to be  
12 known as the investment income account.

13 (3) The investment income account may be utilized for the payment  
14 of purchased banking services on behalf of treasurer's trust funds  
15 including, but not limited to, depository, safekeeping, and  
16 disbursement functions for the state treasurer or affected state  
17 agencies. The investment income account is subject in all respects to  
18 chapter 43.88 RCW, but no appropriation is required for payments to  
19 financial institutions. Payments shall occur prior to distribution of  
20 earnings set forth in subsection (4) of this section.

21 (4)(a) Monthly, the state treasurer shall distribute the earnings  
22 credited to the investment income account to the state general fund  
23 except under (b) and (c) of this subsection.

24 (b) The following accounts and funds shall receive their  
25 proportionate share of earnings based upon each account's or fund's  
26 average daily balance for the period: The Washington promise  
27 scholarship account, the college savings program account, the  
28 Washington advanced college tuition payment program account, the  
29 agricultural local fund, the American Indian scholarship endowment  
30 fund, the students with dependents grant account, the basic health plan  
31 self-insurance reserve account, the contract harvesting revolving  
32 account, the Washington state combined fund drive account, the  
33 Washington international exchange scholarship endowment fund, the  
34 developmental disabilities endowment trust fund, the energy account,  
35 the fair fund, the fruit and vegetable inspection account, the game  
36 farm alternative account, the grain inspection revolving fund, the  
37 juvenile accountability incentive account, the law enforcement

1 officers' and fire fighters' plan 2 expense fund, the local tourism  
2 promotion account, the produce railcar pool account, the rural  
3 rehabilitation account, the stadium and exhibition center account, the  
4 youth athletic facility account, the self-insurance revolving fund, the  
5 sulfur dioxide abatement account, the children's trust fund, ((and))  
6 the ((~~investing in innovation~~)) aquatic lands compensatory mitigation  
7 endowment account, and the aquatic lands compensatory mitigation  
8 management account. However, the earnings to be distributed shall  
9 first be reduced by the allocation to the state treasurer's service  
10 fund pursuant to RCW 43.08.190.

11 (c) The following accounts and funds shall receive eighty percent  
12 of their proportionate share of earnings based upon each account's or  
13 fund's average daily balance for the period: The advanced right of way  
14 revolving fund, the advanced environmental mitigation revolving  
15 account, the city and county advance right-of-way revolving fund, the  
16 federal narcotics asset forfeitures account, the high occupancy vehicle  
17 account, the local rail service assistance account, and the  
18 miscellaneous transportation programs account.

19 (5) In conformance with Article II, section 37 of the state  
20 Constitution, no trust accounts or funds shall be allocated earnings  
21 without the specific affirmative directive of this section.

22 NEW SECTION. Sec. 11. Sections 1 through 9 of this act constitute  
23 a new chapter in Title 79 RCW.

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