

# HOUSE BILL REPORT

## E2SHB 2238

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**As Passed House:**  
February 13, 2012

**Title:** An act relating to pairing required investments in compensatory environmental mitigation, including the mitigation of transportation projects, with existing programs currently referenced in Title 76 RCW that enhance natural environmental functions.

**Brief Description:** Regarding wetlands mitigation.

**Sponsors:** House Committee on General Government Appropriations & Oversight (originally sponsored by Representatives Wilcox, Clibborn, Armstrong, Billig, Takko, Rivers, Angel, Hinkle, Schmick, Orcutt, Johnson, Warnick, Dahlquist, Blake and Chandler).

**Brief History:**

**Committee Activity:**

Agriculture & Natural Resources: 1/17/12, 1/24/12 [DPS];  
General Government Appropriations & Oversight: 2/2/12, 2/3/12 [DP2S(w/o sub AGNR)].

**Floor Activity:**

Passed House: 2/13/12, 88-9.

**Brief Summary of Engrossed Second Substitute Bill**

- Creates an environmental mitigation option that may not be additive to existing regulations and that pairs mitigation investments available to specific forestry programs with various environmental mitigation mandates.
- Requires the Department of Ecology and the Department of Fish and Wildlife to report to the Legislature the successes and constraints of the identified programs and the appropriateness of extending the option to other additional programs.
- Requires the Department of Natural Resources and, when appropriate, the Small Forest Landowner Office to assist in identifying potential projects.

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**HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES**

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Blake, Chair; Chandler, Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Finn, Hinkle, Kretz, Orcutt, Pettigrew and Van De Wege.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Stanford, Vice Chair; Dunshee and Lytton.

**Staff:** Jason Callahan (786-7117).

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## **HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT**

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Agriculture & Natural Resources. Signed by 13 members: Representatives Hudgins, Chair; Miloscia, Vice Chair; Moscoso, Vice Chair; McCune, Ranking Minority Member; Taylor, Assistant Ranking Minority Member; Ahern, Armstrong, Blake, Fitzgibbon, Ladenburg, Pedersen, Van De Wege and Wilcox.

**Staff:** Michael Bennion (786-7118).

### **Background:**

Both the state and federal governments require a proponent of a project that will diminish the function of an existing wetland to mitigate that loss of function. This duty is called compensatory wetland mitigation. The project proponent has a number of options available to him or her for mitigating wetland loss; however, any mitigation plan must be approved by the state (primarily through the Department of Ecology) and the United States Army Corps of Engineers.

Projects that disturb wetlands are expected to undergo a sequencing review. Actual compensation for wetland loss does not occur unless the loss cannot be avoided or minimized through project planning. Once mitigation requirements are triggered, a project proponent must develop a mitigation plan that either restores the damaged wetland, creates new wetland functions at a new site, enhances an existing wetland, or preserves an at-risk wetland.

### **Summary of Engrossed Second Substitute Bill:**

A new wetland mitigation option is created for the proponents of projects that reduce existing wetland function. This option is the agreement to provide a monetary payment to a specific state program that enhances or preserves riparian and aquatic resources. The programs that are eligible to receive monetary payments in exchange for wetland mitigation credits are the Forestry Riparian Easement Program, cost assistance for small forest landowners to repair forest roads, riparian and open space conservation easements, and incentives to promote landowner conservation measures.

The exercise of this option, like all mitigation plans, must be agreed to and approved by the Department of Ecology or other appropriate agency responsible for environmental management. The agreement and approval process must include commitments as to which program will be funded, the appropriate funding level commitment, and how the funds will be ultimately used by the selected program. This negotiation process must occur between the project proponent and the approving agency; however, the Forest Practices Board and any other relevant state or federal agency must be consulted in an attempt to match the funding with an appropriate project within the selected state program.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony (Agriculture & Natural Resources):**

(In support) Current mitigation requirements can be used to increase environmental benefits by using existing dollars with increased efficiencies. Mitigation investments would be paired with effective and important proven state programs that are currently not being maximized due to underfunding. Promises were made to fund certain forestry related programs and this bill offers a way to fulfill that promise with no new state expenditures.

The programs being paired with mitigation investments were in part created to fulfill the state's commitment to resolve the disproportionate impact the Forest and Fish Law had on small forest landowners. These programs may not always link functional improvements to wetlands with the exact functions lost, but the overall environmental benefits are increased.

There is some work to do with the bill and coordination with the federal government but success would benefit the landscape and those who are required to mitigate.

(In support with concerns) If mitigation investments are to be paired with existing programs, it must be clear how the mitigation is replacing lost wetland functions with adequate new functions. It is not clear that the existing state forestry programs can deliver this outcome. It is also not clear that the existing forestry programs all offer benefits to the environment that go on into perpetuity and can match in-kind wetland losses with like benefits.

(With concerns) Novel and potentially exciting ideas are contained in this bill, but a pilot approach would allow the state and project proponents to test the application of the concept and identify limitations. One limitation may be how the funding will be used to match restoration directly to unavoidable wetland losses. There could be limited opportunities to correct direct wetland impacts with overall improvements to fish habitat in a watershed. This is a tremendous opportunity to improve the mitigation process by placing forestry and ecosystem services into the mitigation sequence, but before the state embarks on this course, it should be sure that the approach will work.

Any new mitigation options must be approved by both the Department of Ecology and the federal government through the Army Corps of Engineers. This is a complicated process. A mitigation option will not be attractive to project proponents if the approach cannot be accepted for mitigation credit from local, state, and federal regulators. Programs that could be funded from the new account likely need to offer perpetual protections and not just 50-year leases.

Hydraulic project approvals issued by the Department of Fish and Wildlife occasionally have mitigation requirements. To be effective, those projects must be appropriately placed on the landscape. A linkage between the wetland loss and the mitigation should be clear and all cost-benefit analyses must be in place.

(Opposed) The Forest Practices Board should not be in complete control of how the mitigation money is spent. The permitting agencies signing off on the underlying mitigation will want some say in how the money is spent.

**Staff Summary of Public Testimony (General Government Appropriations & Oversight):**

(In support) The bill utilizes environmental mitigation dollars already slated to be spent and uses the money to fund one of three programs, which primarily benefit small forest landowners, if it makes sense to the regulatory agencies and the project proponent. The goal is to provide additional funding sources to the program which has been depleted in the capital budget. Landowners who support this bill are not tree farmers with their hands out, but proud land-owning taxpayers who provide jobs. Since 1999, when Forest and Fish was created, it has resulted in a disproportionate impact on operations and businesses have been struggling to offset that ever since. There are over 90,000 small forest landowners with 20 acres or more of land, so there is a substantial amount of land, creating a growing crisis. The crisis was caused by the failure of the 1994 Forest and Fish Rules to honor the commitment to pay for half of the timber in our riparian zones. Landowners have been trying to get Forest Riparian Easement Program funding, but it has been difficult and there is now a \$9 million backlog. The bill addresses the need that small forest landowners have to meet the requirements of the Forest and Fish agreement and encourage support of the bill. The Department of Ecology supports finding innovative ways to mitigate unavoidable impacts to development and to ensure that the mitigation provided has an adequate nexus to the impacts taking place. Testing out the program on forestry programs has merit and may present opportunities for where landowners can use this program.

(With concerns) The Department of Transportation (DOT) is interested in having more options for mitigation and to get the most value out of the environmental investments that the DOT makes. To make sure the DOT is directed to consider options that are likely to gain regulatory approval, the DOT suggests clarification that alternative mitigation programs can be used when compatible with regulatory requirements and that the use of the program does not add to existing requirements but instead replaces.

(Opposed) A section of the bill has the departments doing outreach with stakeholders, and tribes are considered a stakeholder. Tribes should be at the table. The Yakama Nation also thinks that mitigation projects are more site specific and want to make sure that projects are done with a broader consideration of where they are appropriate.

**Persons Testifying** (Agriculture & Natural Resources): (In support) Representative Wilcox, prime sponsor; Rick Dunning, Washington Farm Forestry Association; and Debora Munguia, Washington Forest Protection Association.

(In support with concerns) Lauren Driscoll, Department of Ecology; Bill Robinson, Nature Conservancy; Bridget Moran, Department of Natural Resources; and David Whipple, Washington Department of Fish and Wildlife.

(With concerns) Megan White, Department of Transportation.

(Opposed) Miguel Perez-Gibson, Washington Environmental Council; and Bruce Wishart, People for Puget Sound.

**Persons Testifying** (General Government Appropriations & Oversight): (In support) Bridget Moran, Department of Natural Resources; Rick Dunning, Washington Farm Forestry Association; Debora Munguia, Washington Forest Protection Association; Bill Robinson, The Nature Conservancy; Dave Mastin, Muckleshoot Tribe; and Lauren Driscoll, Department of Ecology.

(With concerns) Megan White, Department of Transportation.

(Opposed) Dawn Vyvyan, Yakama Nation.

**Persons Signed In To Testify But Not Testifying** (Agriculture & Natural Resources): None.

**Persons Signed In To Testify But Not Testifying** (General Government Appropriations & Oversight): None.