

---

**SUBSTITUTE HOUSE BILL 2238**

---

**State of Washington**

**62nd Legislature**

**2012 Regular Session**

**By** House Agriculture & Natural Resources (originally sponsored by Representatives Wilcox, Clibborn, Armstrong, Billig, Takko, Rivers, Angel, Hinkle, Schmick, Orcutt, Johnson, Warnick, Dahlquist, Blake, and Chandler)

READ FIRST TIME 01/26/12.

1       AN ACT Relating to pairing required investments in compensatory  
2 environmental mitigation, including the mitigation of transportation  
3 projects, with existing programs currently referenced in Title 76 RCW  
4 that enhance natural environmental functions; amending RCW 47.01.300,  
5 90.74.005, 90.74.010, 90.74.020, and 90.74.030; adding a new section to  
6 chapter 90.74 RCW; and adding a new section to chapter 76.09 RCW.

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

8       **Sec. 1.** RCW 47.01.300 and 1994 c 258 s 4 are each amended to read  
9 as follows:

10       The department shall, in cooperation with environmental regulatory  
11 authorities:

12       (1) Identify and document environmental resources in the  
13 development of the statewide multimodal plan under RCW 47.06.040;

14       (2) Allow for public comment regarding changes to the criteria used  
15 for prioritizing projects under chapter 47.05 RCW before final adoption  
16 of the changes by the commission;

17       (3) Use an environmental review as part of the project prospectus  
18 identifying potential environmental impacts, mitigation, the  
19 utilization of the mitigation option provided in section 5 of this act,

1 and costs during the early project identification and selection phase,  
2 submit the prospectus to the relevant environmental regulatory  
3 authorities, and maintain a record of comments and proposed revisions  
4 received from the authorities;

5 (4) Actively work with the relevant environmental regulatory  
6 authorities during the design alternative analysis process and seek  
7 written concurrence from the authorities that they agree with the  
8 preferred design alternative selected;

9 (5) Develop a uniform methodology, in consultation with relevant  
10 environmental regulatory authorities, for submitting plans and  
11 specifications detailing project elements that impact environmental  
12 resources, and proposed mitigation measures including the mitigation  
13 option provided in section 5 of this act, to the relevant environmental  
14 regulatory authorities during the preliminary specifications and  
15 engineering phase of project development;

16 (6) Screen construction projects to determine which projects will  
17 require complex or multiple permits. The permitting authorities shall  
18 develop methods for initiating review of the permit applications for  
19 the projects before the final design of the projects;

20 (7) Conduct special prebid meetings for those projects that are  
21 environmentally complex; and

22 (8) Review environmental considerations related to particular  
23 projects during the preconstruction meeting held with the contractor  
24 who is awarded the bid.

25 **Sec. 2.** RCW 90.74.005 and 1997 c 424 s 1 are each amended to read  
26 as follows:

27 (1) The legislature finds that:

28 (a) The state lacks a clear policy relating to the mitigation of  
29 wetlands and aquatic habitat for infrastructure development;

30 (b) Regulatory agencies have generally required project proponents  
31 to use compensatory mitigation only at the site of the project's  
32 impacts and to mitigate narrowly for the habitat or biological  
33 functions impacted by a project;

34 (c) This practice of considering traditional on-site, in-kind  
35 mitigation may provide fewer environmental benefits when compared to  
36 innovative mitigation proposals that provide benefits in advance of a

1 project's planned impacts and that restore functions or habitat other  
2 than those impacted at a project site; ((and))

3 (d) Regulatory decisions on development proposals that attempt to  
4 incorporate innovative mitigation measures take an unreasonably long  
5 period of time and are subject to a great deal of uncertainty and  
6 additional expenses; and

7 (e) Greater environmental benefits are achievable through  
8 compensatory wetland mitigation when the collective mitigation  
9 investments of project proponents is paired with the structure of  
10 existing, successful state programs that are designed to enhance and  
11 preserve aquatic and riparian functions but are not achieving their  
12 maximum, collective benefit due to a lack of funding support. Programs  
13 such as the family forest fish passage program have a logical and  
14 physical nexus with many underlying projects, especially road projects,  
15 and are proven to create a sustained benefit in the aquatic environment  
16 at a per-dollar-invested level greater than other mitigation options  
17 currently available.

18 (2) The legislature therefore declares that it is the policy of the  
19 state to authorize innovative mitigation measures by requiring state  
20 regulatory agencies to consider mitigation proposals for  
21 ((infrastructure)) projects that:

22 (a) Are timed, designed, and located in a manner to provide equal  
23 or better biological functions and values compared to traditional on-  
24 site, in-kind mitigation proposals; or

25 (b) Are designed to pair collective mitigation investments with  
26 successful state programs that are designed to enhance and preserve  
27 aquatic and riparian functions.

28 (3) It is the intent of the legislature to authorize local  
29 governments to accommodate the goals of this chapter. It is not the  
30 intent of the legislature to: (a) Restrict the ability of a project  
31 proponent to pursue project specific mitigation; or (b) create any new  
32 authority for regulating wetlands or aquatic habitat beyond what is  
33 specifically provided for in this chapter.

34 **Sec. 3.** RCW 90.74.010 and 1997 c 424 s 2 are each amended to read  
35 as follows:

36 The definitions in this section apply throughout this chapter  
37 unless the context clearly requires otherwise.

1 (1) "Mitigation" means sequentially avoiding impacts, minimizing  
2 impacts, or compensating for remaining unavoidable impacts.

3 (2) "Compensatory mitigation" means the restoration, creation,  
4 enhancement, or preservation of uplands, wetlands, or other aquatic  
5 resources for the purposes of compensating for unavoidable adverse  
6 impacts that remain after all appropriate and practicable avoidance and  
7 minimization has been achieved. "Compensatory mitigation" includes  
8 mitigation that:

9 (a) Occurs at the same time as, or in advance of, a project's  
10 planned environmental impacts;

11 (b) Is located in a site either on, near, or distant from the  
12 project's impacts; and

13 (c) Provides either the same or different biological functions and  
14 values as the functions and values impacted by the project.

15 (3) "Infrastructure development" means an action that is critical  
16 for the maintenance or expansion of an existing infrastructure feature  
17 such as a highway, rail line, airport, marine terminal, utility  
18 corridor, harbor area, or hydroelectric facility and is consistent with  
19 an approved land use planning process. This planning process may  
20 include the growth management act, chapter 36.70A RCW, or the shoreline  
21 management act, chapter 90.58 RCW, in areas covered by those chapters.

22 (4) "Mitigation plan" means a document or set of documents  
23 developed through joint discussions between a project proponent and  
24 environmental regulatory agencies that describe the unavoidable wetland  
25 or aquatic resource impacts of ~~((the))~~ a proposed infrastructure  
26 development or minor project and the proposed compensatory mitigation  
27 for those impacts.

28 (5) "Project proponent" means a public or private entity  
29 responsible for preparing a mitigation plan.

30 (6) "Watershed" means an area identified as a state of Washington  
31 water resource inventory area under WAC 173-500-040 as it exists on  
32 ~~((July 27, 1997))~~ the effective date of this section.

33 (7) "Minor project" means a development project that requires the  
34 completion of compensatory mitigation that does not meet the definition  
35 of "infrastructure development."

36 **Sec. 4.** RCW 90.74.020 and 1997 c 424 s 3 are each amended to read  
37 as follows:

1 (1) Project proponents may use a mitigation plan to propose  
2 compensatory mitigation within a watershed. A mitigation plan shall:

3 (a) Contain provisions that guarantee the long-term viability of  
4 the created, restored, enhanced, or preserved habitat, including  
5 assurances for protecting any essential biological functions and values  
6 defined in the mitigation plan;

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

9 (c) Be consistent with the local comprehensive land use plan and  
10 any other applicable planning process in effect for the development  
11 area, such as an adopted subbasin or watershed plan.

12 (2)(a) The departments of ecology and fish and wildlife may not  
13 limit the scope of options in a mitigation plan to areas on or near the  
14 project site, or to habitat types of the same type as contained on the  
15 project site. The departments of ecology and fish and wildlife shall  
16 fully review and give due consideration to compensatory mitigation  
17 proposals that improve the overall biological functions and values of  
18 the watershed or bay and accommodate the mitigation needs of the  
19 infrastructure development or minor project, including proposals or  
20 portions of proposals that incorporate the mitigation option set forth  
21 in section 5 of this act.

22 (b) The departments of ecology and fish and wildlife are not  
23 required to grant approval to a mitigation plan that the departments  
24 find does not provide equal or better biological functions and values  
25 within the watershed or bay.

26 (3) When making a permit or other regulatory decision under the  
27 guidance of this chapter, the departments of ecology and fish and  
28 wildlife shall consider whether the mitigation plan provides equal or  
29 better biological functions and values, compared to the existing  
30 conditions, for the target resources or species identified in the  
31 mitigation plan. This consideration shall be based upon the following  
32 factors:

33 (a) The relative value of the mitigation for the target resources,  
34 in terms of the quality and quantity of biological functions and values  
35 provided;

36 (b) The compatibility of the proposal with the intent of broader  
37 resource management and habitat management objectives and plans, such  
38 as existing resource management plans, watershed plans, critical areas

1 ordinances, the forestry riparian easement program, the forest  
2 practices habitat conservation plan, the forest practices board's  
3 acquisition program for riparian open space and critical habitat,  
4 programs to provide public cost assistance to small forest landowners  
5 associated with the road maintenance and abandonment processes, and  
6 shoreline master programs;

7 (c) The ability of the mitigation to address scarce functions or  
8 values within a watershed;

9 (d) The benefits of the proposal to broader watershed landscape,  
10 including the benefits of connecting various habitat units or providing  
11 population-limiting habitats or functions for target species;

12 (e) The benefits of early implementation of habitat mitigation for  
13 projects that provide compensatory mitigation in advance of the  
14 project's planned impacts; and

15 (f) The significance of any negative impacts to nontarget species  
16 or resources.

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

20 NEW SECTION. Sec. 5. A new section is added to chapter 90.74 RCW  
21 to read as follows:

22 (1) A project proponent may opt to satisfy, with the approval of  
23 the department of ecology or the department of fish and wildlife, all  
24 or a portion of the compensatory mitigation requirements for an  
25 infrastructure development or a minor project through the inclusion in  
26 the development or project's corresponding mitigation plan a required  
27 monetary payment to one of the following state programs that enhances  
28 or preserves riparian and aquatic resources:

29 (a) The forestry riparian easement program established in RCW  
30 76.13.120;

31 (b) Incentives to landowners to provide additional conservation  
32 measures recommended through the adaptive management program outlined  
33 in the forest practices rules, as the term "forest practices rules" is  
34 defined in RCW 76.09.020;

35 (c) The program required to be established by the forest practices  
36 board under RCW 76.09.040 that acquires conservation easements for land

1 that is riparian open space or critical habitat for threatened or  
2 endangered species; and

3 (d) Programs to provide public cost assistance to small forest  
4 landowners associated with the road maintenance and abandonment  
5 processes referenced in RCW 76.09.410(2).

6 (2)(a) The amount of the required payments, which program the  
7 payment funds, and how those funds are ultimately used must be  
8 determined by the joint discussions among the project proponent and the  
9 environmental regulatory agencies consistent with the guidance of RCW  
10 90.74.020. The project proponent and the environmental regulatory  
11 agencies may decide if payments are to be made as one lump sum or as a  
12 commitment for a series of payments over time.

13 (b) Although the decision as to which qualifying programs receive  
14 contributing funding under this section must ultimately be approved by  
15 the environmental regulatory agency charged with approving the  
16 mitigation plan, that agency must seek input from the forest practices  
17 board or other relevant state or federal environmental regulatory  
18 agency in an attempt to match funding with projects that satisfy the  
19 guidance for compensatory mitigation projects under RCW 90.74.020.

20 (3) Payments under this section may only be used to offset other  
21 compensatory mitigation requirements of the infrastructure development  
22 or minor project. Payments may not be required that are additive to  
23 other compensatory mitigation requirements.

24 **Sec. 6.** RCW 90.74.030 and 1997 c 424 s 4 are each amended to read  
25 as follows:

26 (1) In making regulatory decisions relating to wetland or aquatic  
27 resource mitigation, the departments of ecology and fish and wildlife  
28 shall, at the request of the project proponent, follow the guidance of  
29 (~~RCW 90.74.005 through 90.74.020~~) this chapter.

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

34 NEW SECTION. **Sec. 7.** A new section is added to chapter 76.09 RCW  
35 to read as follows:

36 As part of the responsibilities of the board set forth in this

1 chapter, it must serve as an advisory body to environmental regulatory  
2 agencies charged with approving wetland mitigation plans that contain  
3 direct payments to riparian and aquatic enhancement and conservation  
4 programs as provided in section 5 of this act. However, the board's  
5 role under section 5 of this act is limited to assisting with the  
6 identifying and directing of payments. Neither this section nor  
7 section 5 of this act gives the board the authority to change or  
8 dictate how programs funded by section 5 of this act are administered.

--- END ---