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SECOND SUBSTITUTE HOUSE BILL 2238

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State of Washington

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2012 Regular Session

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

READ FIRST TIME 02/06/12.

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; adding a new section to chapter 76.09 RCW; creating  
7 a new section; and providing an expiration date.

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

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

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

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

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

18       (3) Use an environmental review as part of the project prospectus  
19 identifying potential environmental impacts, mitigation, the

1 utilization of the mitigation option available in section 5 of this  
2 act, and costs during the early project identification and selection  
3 phase, submit the prospectus to the relevant environmental regulatory  
4 authorities, and maintain a record of comments and proposed revisions  
5 received from the authorities;

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

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

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

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

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

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

28 (1) The legislature finds that:

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

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

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

1 innovative mitigation proposals that provide benefits in advance of a  
2 project's planned impacts and that restore functions or habitat other  
3 than those impacted at a project site; (~~and~~)

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

8 (e) Greater environmental benefits may be achievable through  
9 compensatory environmental mitigation when the collective mitigation  
10 investments of project proponents is paired with the structure of  
11 successful state programs that are referenced in statute and are  
12 designed to enhance and preserve aquatic and riparian functions when  
13 there is a clear linkage between the environmental impacts and the  
14 goals of the state program. Programs such as the forestry riparian  
15 easement program, the family forest fish passage program, and the  
16 riparian open space program created pursuant to RCW 76.09.040 may have  
17 a logical and physical nexus with many underlying projects, especially  
18 road projects, and are proven to create a sustained benefit in the  
19 aquatic environment.

20 (2) The legislature therefore declares that it is the policy of the  
21 state to authorize innovative mitigation measures by requiring state  
22 regulatory agencies to consider mitigation proposals for  
23 (~~infrastructure~~) projects that are timed, designed, and located in a  
24 manner to provide equal or better biological functions and values  
25 compared to traditional on-site, in-kind mitigation proposals.

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

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

34 The definitions in this section apply throughout this chapter  
35 unless the context clearly requires otherwise.

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

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

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

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

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

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

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

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

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

31 (7) "Family forest fish passage program" means the program  
32 administered by the recreation and conservation office created pursuant  
33 to RCW 76.09.410 that provides public cost assistance to small forest  
34 landowners associated with the road maintenance and abandonment  
35 processes.

36 (8) "Forestry riparian easement program" means the program  
37 established in RCW 76.13.120.

1       (9) "Noninfrastructure development" means a development project  
2 that requires the completion of compensatory mitigation that does not  
3 meet the definition of "infrastructure development" and is consistent  
4 with an approved land use planning process. This planning process may  
5 include the growth management act, chapter 36.70A RCW, or the shoreline  
6 management act, chapter 90.58 RCW, in areas covered by those chapters.

7       (10) "Riparian open space program" means the program created  
8 pursuant to RCW 76.09.040.

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

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

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

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

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

22       (2)(a) The departments of ecology and fish and wildlife may not  
23 limit the scope of options in a mitigation plan to areas on or near the  
24 project site, or to habitat types of the same type as contained on the  
25 project site. The departments of ecology and fish and wildlife shall  
26 fully review and give due consideration to compensatory mitigation  
27 proposals that improve the overall biological functions and values of  
28 the watershed or bay and accommodate the mitigation needs of the  
29 infrastructure development or noninfrastructure development, including  
30 proposals or portions of proposals that are explored or developed in  
31 section 5 of this act.

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

36       (3) When making a permit or other regulatory decision under the  
37 guidance of this chapter, the departments of ecology and fish and

1 wildlife shall consider whether the mitigation plan provides equal or  
2 better biological functions and values, compared to the existing  
3 conditions, for the target resources or species identified in the  
4 mitigation plan. This consideration shall be based upon the following  
5 factors:

6 (a) The relative value of the mitigation for the target resources,  
7 in terms of the quality and quantity of biological functions and values  
8 provided;

9 (b) The compatibility of the proposal with the intent of broader  
10 resource management and habitat management objectives and plans, such  
11 as existing resource management plans, watershed plans, critical areas  
12 ordinances, the forestry riparian easement program, the riparian open  
13 space program, the family forest fish passage program, and shoreline  
14 master programs;

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

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

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

23 (f) The significance of any negative impacts to nontarget species  
24 or resources.

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

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

30 (1)(a) To the degree that resources are deemed available by the  
31 affected departments, the department of ecology and the department of  
32 fish and wildlife shall allow, when appropriate, programs that are  
33 related to environmental mitigation, or explore the potential of  
34 developing new programs, to utilize the forestry riparian easement  
35 program, the riparian open space program, or the family forest fish  
36 passage program to mitigate for environmental impacts from projects

1 conducted in the state where compatible with existing regulations. The  
2 use of these programs may not be additive to existing compensatory  
3 mitigation requirements.

4 (b) In implementing this subsection, the department of natural  
5 resources may be used as a resource, consistent with section 8 of this  
6 act, to assist in identifying potential projects that can be used for  
7 the mitigation of infrastructure and noninfrastructure development.

8 (2) The department of ecology and the department of fish and  
9 wildlife are authorized to seek federal or private funds and in-kind  
10 contributions to implement this section. The scope of effort in  
11 implementing this section may be defined by the success of the  
12 department of ecology and the department of fish and wildlife in  
13 securing specific funding.

14 NEW SECTION. **Sec. 6.** (1) The department of ecology and the  
15 department of fish and wildlife must provide a report to the  
16 legislature, consistent with RCW 43.01.036, by December 31, 2012, on:

17 (a) Any successes in using existing programs to mitigate impacts  
18 for infrastructure and noninfrastructure development, as those terms  
19 are defined in RCW 90.74.010, as provided in section 5 of this act; and

20 (b) Any constraints discovered that limits the applicability of  
21 section 5 of this act.

22 (2) The department of ecology and the department of fish and  
23 wildlife must provide a report to the legislature, consistent with RCW  
24 43.01.036, by December 31, 2013, on:

25 (a) The identification of any additional programs that may be  
26 appropriate for inclusion in an environmental mitigation plan;

27 (b) The feasibility of developing new programs that may be  
28 appropriate for inclusion in an environmental mitigation plan,  
29 including the identification of:

30 (i) How often a program would be suitable for inclusion;

31 (ii) When and where a new program would be suitable for inclusion;

32 (iii) Constraints on the suitability of any new program; and

33 (iv) Timelines, implementation costs, agency resource needs, and  
34 requests for new legal authority.

35 (3) The report required in subsection (2) of this section should,  
36 if deemed appropriate and funding allows, be developed in consultation  
37 with the department of commerce, the department of transportation, the

1 department of natural resources, and other stakeholders such as  
2 counties, cities, affected tribes, forest landowners, environmental  
3 interests, and the development community.

4 (4) The authority provided in section 5(2) of this act relating to  
5 the acceptance of nonstate money may be utilized to fund the  
6 implementation of this section. The scope of effort in implementing  
7 this section may be defined by the success of the department of ecology  
8 and the department of fish and wildlife in securing specific funding.

9 (5) This section expires July 30, 2014.

10 **Sec. 7.** RCW 90.74.030 and 1997 c 424 s 4 are each amended to read  
11 as follows:

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

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

20 NEW SECTION. **Sec. 8.** A new section is added to chapter 76.09 RCW  
21 to read as follows:

22 The department and, when appropriate, the small forest landowner  
23 office established in RCW 76.13.110 must assist in identifying  
24 potential projects that can be used for the mitigation of  
25 infrastructure and noninfrastructure development, as those terms are  
26 defined in RCW 90.74.010, as provided in section 5 of this act.

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