
HOUSE BILL 2238

State of Washington

62nd Legislature

2012 Regular Session

By Representatives Wilcox, Clibborn, Armstrong, Billig, Takko, Rivers, Angel, Hinkle, Schmick, Orcutt, Johnson, Warnick, Dahlquist, Blake, and Chandler

Prefiled 01/06/12. Read first time 01/09/12. Referred to Committee on Environment.

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 new sections 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 forest practices habitat conservation plan, the
2 forestry riparian easement program, 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 the riparian and aquatic resources enhancement
28 account created in section 6 of this act.

29 (2) The amount of the required payments to the riparian and aquatic
30 resources enhancement account must be determined by the joint
31 discussions among the project proponent and the environmental
32 regulatory agencies consistent with the guidance of RCW 90.74.020. The
33 project proponent and the environmental regulatory agencies may decide
34 if required payments to the riparian and aquatic resources enhancement
35 account are to be made as one lump sum or as a commitment for a series
36 of payments over time.

1 (3) Payments to the riparian and aquatic resources enhancement
2 account may only be used to offset other compensatory mitigation
3 requirements of the infrastructure development or minor project.
4 Payments may not be required that are additive to other compensatory
5 mitigation requirements.

6 NEW SECTION. **Sec. 6.** A new section is added to chapter 90.74 RCW
7 to read as follows:

8 (1) The riparian and aquatic resources enhancement account is
9 created in the custody of the state treasurer. All receipts from
10 payments made by project proponents pursuant to a mitigation plan
11 entered into under this chapter must be deposited into the account.
12 The account may also receive direct legislative appropriations and
13 accept nonstate grant payments and private donations. Only the forest
14 practices board may authorize expenditures from the account in a manner
15 consistent with section 8 of this act. The account is subject to
16 allotment procedures under chapter 43.88 RCW, but an appropriation is
17 not required for expenditures.

18 (2)(a) Expenditures from the account may be used only as
19 contributing or additive funds for state programs that contribute to
20 ecosystem services, as that term is defined in RCW 76.09.020, by
21 forwarding the enhancement or preservation of riparian and aquatic
22 resources and are not to be considered substitute or replacement funds
23 for other funding directed or committed to a program. These state
24 programs include, but are not limited to:

25 (i) Incentives to landowners to provide additional conservation
26 measures recommended through the adaptive management program outlined
27 in the forest practices rules, as that term is defined in RCW
28 76.09.020;

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

31 (iii) The program required to be established by the forest
32 practices board under RCW 76.09.040 that acquires conservation
33 easements for land that is riparian open space or critical habitat for
34 threatened or endangered species; and

35 (iv) Programs to provide public cost assistance to small forest
36 landowners associated with the road maintenance and abandonment
37 processes referenced in RCW 76.09.410(2).

1 (b) The decision as to which qualifying programs receive
2 contributing funding from the riparian and aquatic resources
3 enhancement account must be made by the forest practices board.
4 However, the forest practices board must seek input from the department
5 of ecology, the department of fish and wildlife, or other state or
6 federal environmental regulatory agencies in an attempt to match
7 funding with projects that satisfy the guidance for compensatory
8 mitigation projects under RCW 90.74.020.

9 (3) To the degree practicable, the forest practices board must
10 direct expenditures from the riparian and aquatic resources enhancement
11 account to riparian and aquatic resources projects and programs located
12 in specific watersheds based on the proportion of mitigation plans
13 located in each specific watershed that contain requirements under
14 section 5 of this act for payments by project proponents to the
15 riparian and aquatic resources enhancement account.

16 (4) The forest practices board may retain up to five percent of the
17 funds in the riparian and aquatic resources enhancement account for the
18 department of natural resources to use as reimbursement for
19 administrative costs of the riparian and aquatic resources enhancement
20 account.

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

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

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

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

33 (1) As part of the responsibilities of the board set forth in this
34 chapter, it must serve as the entity responsible for authorizing
35 expenditures from the riparian and aquatic resources enhancement
36 account created in section 6 of this act. However, the board's

1 authority over the riparian and aquatic resources enhancement account
2 is limited to identifying and directing expenditures. This section
3 does not give the board the authority to change or dictate how programs
4 funded by the riparian and aquatic resources enhancement account are
5 administered.

6 (2) The board may adopt rules, if deemed necessary, outlining its
7 administration of the riparian and aquatic resources enhancement
8 account.

--- END ---