

# HOUSE BILL REPORT

## HB 2550

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**As Reported by House Committee On:**  
Environment & Energy

**Title:** An act relating to establishing net ecological gain as a policy for application across identified land use, development, and environmental laws.

**Brief Description:** Establishing net ecological gain as a policy for application across identified land use, development, and environmental laws.

**Sponsors:** Representatives Lekanoff, Fitzgibbon, Doglio, Peterson, Pollet and Macri.

**Brief History:**

**Committee Activity:**

Environment & Energy: 1/28/20, 2/4/20 [DPS].

**Brief Summary of Substitute Bill**

- Directs the Office of Financial Management to submit a report to the Legislature by December 1, 2020, that assesses how to incorporate a standard of net ecological gain into the Growth Management Act, Shoreline Management Act, Construction Projects in State Waters/Hydraulic Projects Approvals, and Model Toxics Control Act, or other laws and rules where the existing standard is less protective of ecological integrity than the standard of net ecological gain.

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### HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Fitzgibbon, Chair; Lekanoff, Vice Chair; Doglio, Fey, Mead, Robinson and Shewmake.

**Minority Report:** Do not pass. Signed by 4 members: Representatives DeBolt, Ranking Minority Member; Dye, Assistant Ranking Minority Member; Boehnke and Goehner.

**Staff:** Jacob Lipson (786-7196).

**Background:**

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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.*

### Growth Management Act.

The Growth Management Act (GMA) is the comprehensive land-use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, the GMA establishes land-use designation and environmental protection requirements for all Washington counties and cities. The GMA also establishes a significantly wider array of planning duties for 29 counties, and the cities within those counties, that are obligated to satisfy all planning requirements of the GMA. Major components of the GMA include:

- the requirement that cities and counties designate natural resource lands and critical areas;
- the requirement that certain cities and counties adopt comprehensive plans and development regulations to implement those plans;
- the statutory establishment of goals to guide the adoption of comprehensive plans;
- the designation of urban growth areas;
- the adoption of countywide planning policies; and
- the voluntary stewardship program, which provides an alternative for counties to protect areas used for agricultural activities through voluntary actions rather than development regulations.

### The Shoreline Management Act.

The Shoreline Management Act of 1971 (SMA) requires that most developments near state shorelines be consistent with shoreline master programs, which are plans developed by local governments and approved or adopted by the Department of Ecology (Ecology) for the uses of local governments' shoreline areas. Certain projects require a substantial development permit that is reviewed by the local government and filed with Ecology; projects that require a substantial development permit include developments exceeding a cost of \$7,047 (as adjusted for inflation by the Office of Financial Management in September 2017), or any development that materially interferes with the normal public use of the water or shorelines of the state. In certain property-specific circumstances, variance permits or conditional use permits may be issued by a local government that allow for development that is not consistent with the local shoreline master program. Certain other types of development, such as single-family residences and bulkheads to protect single-family residences, are exempt from permit requirements under the SMA.

### The Model Toxics Control Act.

The Model Toxics Control Act (MTCA), which is administered and enforced by Ecology, requires liable parties to clean up sites contaminated with hazardous substances and authorizes Ecology to conduct certain pollution prevention activities. Potentially liable parties may include current or past facility owners and operators and parties that transported or arranged for the disposal or treatment of hazardous substances at a site. Where there is more than one potentially liable party, each party is jointly and severally liable for cleanup. Ecology uses several methods to assist potentially liable persons to clean up hazardous waste sites, including a voluntary clean-up program, entering into settlement agreements or consent decrees, and agreed orders. The chronology of the site clean-up process usually involves an initial investigation, an assessment of the site's hazardousness and a ranking relative to the hazardousness of other contaminated sites, an investigation of the extent and magnitude of site contamination and potential human health and environmental impacts, the selection of a cleanup action, and, ultimately, the performance of the selected cleanup activity.

### Hydraulic Project Approvals.

The Hydraulic Project Approval (HPA) program is a permitting process managed by the Washington Department of Fish and Wildlife (WDFW). Any activity that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state must first obtain an HPA from the WDFW. Through the HPA process, the WDFW specifically analyzes and conditions projects based on the anticipated effect on fish life. The protection of fish life is the only ground upon which an HPA may be denied or conditioned. If the WDFW denies approval of a permit, it must provide the applicant with a statement of the reasons why and how the proposed project would adversely affect fish life.

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### **Summary of Substitute Bill:**

The concept of net ecological gain is defined as a standard for a development project, policy, plan, development regulation, or activity in which the environmental impacts caused by the development are outweighed by measures to mitigate the impacts. Under net ecological gain, proponents must first avoid and minimize impacts before moving to additional steps in mitigation sequencing.

By December 1, 2020, the Office of Financial Management (OFM) must submit a report to the Legislature that assesses how to incorporate net ecological gain into state land-use, environmental, and development laws. The report must address each land-use, environmental, or development law or rule where the existing standard is less protective than net ecological gain, including the MTCA, the SMA, the GMA, and the HPA. The OFM must consult with state agencies, local governments, federally recognized Indian tribes, and stakeholders with subject matter expertise in each of the assessed laws. The OFM's report to the Legislature must include:

- an assessment of opportunities and challenges for local government achievement of net ecological gain through both implementation of a net ecological gain standard and enhanced implementation of a no net loss standard;
- recommendations for funding, incentives, technical assistance, and similar considerations relevant to the integration of net ecological gain into each law; and
- assessments of how the application of the net ecological gain standard is likely to achieve co-benefits.

### **Substitute Bill Compared to Original Bill:**

The substitute version of the bill makes the following changes to the original house bill:

- eliminates provisions that: (1) addressed aquatic resources compensatory mitigation under existing state law; (2) declared net ecological gain to be the policy of the state; and (3) required state agencies to adopt net ecological gain where state law provided discretion for them to do so;
- amends the requirements of the Office of Financial Management report due to the Legislature in December 2020, including by: (1) requiring consultation with federally recognized Indian tribes, local governments, and stakeholders with subject-matter expertise; and (2) adding an assessment of how overall state net ecological gain can be achieved through both the use of net ecological gain in specific environment, land-

- use, and development laws and through an enhanced approach using a "no net loss" standard; and
- amends the definition of net ecological gain and eliminates the defined mitigation hierarchy to be used in net ecological gain.
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**Appropriation:** None.

**Fiscal Note:** Preliminary fiscal note available.

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

**Staff Summary of Public Testimony:**

(In support) Environmental laws that rely on a standard of no net loss are not doing enough to protect the environment and prevent ecosystem loss. Restoring Puget Sound is an environmental challenge of a huge magnitude. Endangered whales and salmon, and the forage fish they rely upon, are gravely threatened by continued habitat loss. Net ecological gain is difficult to define and measure, but it is a worthwhile outcome for state law to work towards. Many environmental laws are premised on improvement of the environment. Under a net ecological gain standard, developers would have to ensure that they create more benefit than the harm caused by their projects. Net ecological gain could be a flexible and incentive-based approach. Lots of work still needs to be done around the sponsor's kitchen table to iron out the details of the concepts of net ecological gain and the mitigation hierarchy. More people are moving to Washington, and development pressures on the environment will continue to increase. Indian tribes should play a role in making decisions on aquatic resources, as a result of their co-manager role. The goal of the sections of the bill dealing with mitigation for infrastructure under existing law is to remove barriers to requiring in-kind mitigation.

(Opposed) No net loss is an environmental standard based in regulatory takings laws. This bill would be a radical departure from the current status of environmental and land-use laws. Requiring more than rough nexus and proportionality is a government taking that requires compensation. This bill cannot change constitutional property rights. Local governments would be required to carry out expensive work to implement this bill, and it would open them to legal liability. Greater code enforcement against unpermitted activities would be more helpful to environmental outcomes than changing the no net loss standard. The timeline for the Office of Financial Management study is too ambitious to lead to thoughtful work. Net ecological gain will expand government bureaucracy. This bill increases permitting costs and lengthens development timelines. This bill would place unreasonable mitigation burdens on developers. Without a clear definition and understanding of net ecological gain, it is imprudent to adopt a new standard.

(Other) Establishing new mitigation requirements would add regulatory uncertainty to utilities. The possible repercussions of this bill for business activity are very large. Forest practices should not be included as a type of infrastructure development. Existing

environmental tools have not been enough to protect salmon and shorelines from development and pollution.

**Persons Testifying:** (In support) Representative Lekanoff, prime sponsor; Jeff Dickison, Squaxin Island Tribe; Will Hall, City of Shoreline; Les Purse, Orca Task Force; Nora Nickum, Seattle Aquarium; Nick Norton, Washington Association of Land Trusts; Justin Allegro, The Nature Conservancy; Bruce Wishart, Sound Action; Mindy Roberts, Washington Environmental Council; Robb Krehbiel, Defenders of Wildlife; Jeff Davis, Department of Fish and Wildlife; and Phyllis Farrell, League of Women Voters.

(Opposed) Paul Jewell, Washington State Association of Counties; Doug Levy, Cities of Renton, Lake Stevens, and Fife; Ken Miller, Washington Farm Forestry Association; Steve Gano, Building Industry Association of Washington; and Gerry O'Keefe, Public Ports Association.

(Other) Nicolas Garcia, Washington Public Utility District Association; Denise Clifford, Department of Ecology; Stephen Bernath, Department of Natural Resources; and Jeff Parsons, Puget Sound Partnership.

**Persons Signed In To Testify But Not Testifying:** None.