

**E2SHB 2238** - S COMM AMD

By Committee on Transportation

NOT ADOPTED 03/01/2012

1 Strike everything after the enacting clause and insert the  
2 following:

3 "Sec. 1. RCW 47.01.300 and 1994 c 258 s 4 are each amended to read  
4 as follows:

5 The department shall, in cooperation with environmental regulatory  
6 authorities:

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

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

12 (3) Use an environmental review as part of the project prospectus  
13 identifying potential environmental impacts, mitigation, the  
14 utilization of the mitigation option available in section 5 of this  
15 act, and costs during the early project identification and selection  
16 phase, submit the prospectus to the relevant environmental regulatory  
17 authorities, and maintain a record of comments and proposed revisions  
18 received from the authorities;

19 (4) Actively work with the relevant environmental regulatory  
20 authorities during the design alternative analysis process and seek  
21 written concurrence from the authorities that they agree with the  
22 preferred design alternative selected;

23 (5) Develop a uniform methodology, in consultation with relevant  
24 environmental regulatory authorities, for submitting plans and  
25 specifications detailing project elements that impact environmental  
26 resources, and proposed mitigation measures including the mitigation  
27 option available in section 5 of this act, to the relevant  
28 environmental regulatory authorities during the preliminary  
29 specifications and engineering phase of project development;

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

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

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

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

12 (1) The legislature finds that:

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

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

19 (c) This practice of considering traditional on-site, in-kind  
20 mitigation may provide fewer environmental benefits when compared to  
21 innovative mitigation proposals that provide benefits in advance of a  
22 project's planned impacts and that restore functions or habitat other  
23 than those impacted at a project site; (~~and~~)

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

28 (e) Greater environmental benefits may be achievable through  
29 compensatory environmental mitigation when the collective mitigation  
30 investments of project proponents is paired with the structure of  
31 successful state programs that are referenced in statute and are  
32 designed to enhance and preserve aquatic and riparian functions when  
33 there is a clear linkage between the environmental impacts and the  
34 goals of the state program. Programs such as the forestry riparian  
35 easement program, the family forest fish passage program, and the  
36 riparian open space program created pursuant to RCW 76.09.040 may have

1 a logical and physical nexus with many underlying projects, especially  
2 road projects, and are proven to create a sustained benefit in the  
3 aquatic environment.

4 (2) The legislature therefore declares that it is the policy of the  
5 state to authorize innovative mitigation measures by requiring state  
6 regulatory agencies to consider mitigation proposals for  
7 ((infrastructure)) projects that are timed, designed, and located in a  
8 manner to provide equal or better biological functions and values  
9 compared to traditional on-site, in-kind mitigation proposals.

10 (3) It is the intent of the legislature to authorize local  
11 governments to accommodate the goals of this chapter. It is not the  
12 intent of the legislature to: (a) Restrict the ability of a project  
13 proponent to pursue project specific mitigation; or (b) create any new  
14 authority for regulating wetlands or aquatic habitat beyond what is  
15 specifically provided for in this chapter.

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

18 The definitions in this section apply throughout this chapter  
19 unless the context clearly requires otherwise.

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

22 (2) "Compensatory mitigation" means the restoration, creation,  
23 enhancement, or preservation of uplands, wetlands, or other aquatic  
24 resources for the purposes of compensating for unavoidable adverse  
25 impacts that remain after all appropriate and practicable avoidance and  
26 minimization has been achieved. "Compensatory mitigation" includes  
27 mitigation that:

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

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

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

34 (3) "Infrastructure development" means an action that is critical  
35 for the maintenance or expansion of an existing infrastructure feature  
36 such as a highway, rail line, airport, marine terminal, utility  
37 corridor, harbor area, or hydroelectric facility and is consistent with

1 an approved land use planning process. This planning process may  
2 include the growth management act, chapter 36.70A RCW, or the shoreline  
3 management act, chapter 90.58 RCW, in areas covered by those chapters.

4 (4) "Mitigation plan" means a document or set of documents  
5 developed through joint discussions between a project proponent and  
6 environmental regulatory agencies that describe the unavoidable wetland  
7 or aquatic resource impacts of ~~((the))~~ a proposed infrastructure  
8 development or noninfrastructure development and the proposed  
9 compensatory mitigation for those impacts.

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

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

15 (7) "Family forest fish passage program" means the program  
16 administered by the recreation and conservation office created pursuant  
17 to RCW 76.09.410 that provides public cost assistance to small forest  
18 landowners associated with the road maintenance and abandonment  
19 processes.

20 (8) "Forestry riparian easement program" means the program  
21 established in RCW 76.13.120.

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

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

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

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

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

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

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

6 (2)(a) The departments of ecology and fish and wildlife may not  
7 limit the scope of options in a mitigation plan to areas on or near the  
8 project site, or to habitat types of the same type as contained on the  
9 project site. The departments of ecology and fish and wildlife shall  
10 fully review and give due consideration to compensatory mitigation  
11 proposals that improve the overall biological functions and values of  
12 the watershed or bay and accommodate the mitigation needs of the  
13 infrastructure development or noninfrastructure development, including  
14 proposals or portions of proposals that are explored or developed in  
15 section 5 of this act.

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

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

27 (a) The relative value of the mitigation for the target resources,  
28 in terms of the quality and quantity of biological functions and values  
29 provided;

30 (b) The compatibility of the proposal with the intent of broader  
31 resource management and habitat management objectives and plans, such  
32 as existing resource management plans, watershed plans, critical areas  
33 ordinances, the forestry riparian easement program, the riparian open  
34 space program, the family forest fish passage program, and shoreline  
35 master programs;

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

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

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

7 (f) The significance of any negative impacts to nontarget species  
8 or resources.

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

12 NEW SECTION. **Sec. 5.** A new section is added to chapter 90.74 RCW  
13 to read as follows:

14 (1)(a) To the degree that resources are deemed available by the  
15 affected departments, the department of ecology and the department of  
16 fish and wildlife shall allow, when appropriate, programs that are  
17 related to environmental mitigation, or explore the potential of  
18 developing new programs, to utilize the forestry riparian easement  
19 program, the riparian open space program, or the family forest fish  
20 passage program to mitigate for environmental impacts from projects  
21 conducted in the state where compatible with existing regulations. The  
22 use of these programs may not be additive to existing compensatory  
23 mitigation requirements.

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

28 (2) The department of ecology and the department of fish and  
29 wildlife are authorized to seek federal or private funds and in-kind  
30 contributions to implement this section. The scope of effort in  
31 implementing this section may be defined by the success of the  
32 department of ecology and the department of fish and wildlife in  
33 securing specific funding.

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

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

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

6 (2) The department of ecology and the department of fish and  
7 wildlife must provide a report to the legislature, consistent with RCW  
8 43.01.036, by December 31, 2013, on:

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

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

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

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

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

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

19 (3) The report required in subsection (2) of this section should,  
20 if deemed appropriate and funding allows, be developed in consultation  
21 with the department of commerce, the department of transportation, the  
22 department of natural resources, and other stakeholders such as  
23 counties, cities, affected tribes, forest landowners, environmental  
24 interests, and the development community.

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

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

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

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

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

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

7 The department and, when appropriate, the small forest landowner  
8 office established in RCW 76.13.110 must assist in identifying  
9 potential projects that can be used for the mitigation of  
10 infrastructure and noninfrastructure development, as those terms are  
11 defined in RCW 90.74.010, as provided in section 5 of this act."

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12 On page 1, line 4 of the title, after "functions;" strike the  
13 remainder of the title and insert "amending RCW 47.01.300, 90.74.005,  
14 90.74.010, 90.74.020, and 90.74.030; adding a new section to chapter  
15 90.74 RCW; adding a new section to chapter 76.09 RCW; creating a new  
16 section; and providing an expiration date."

EFFECT: Restates Substitute Senate Bill No. 6093 as passed by the  
senate transportation committee.

Restates and reorders the list of entities that the department of  
ecology may consult with in planning the long-term implementation of  
the policy contained in the bill.

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