

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 5273

Chapter 424, Laws of 1997

55th Legislature
1997 Regular Session

COMPENSATORY MITIGATION FOR AQUATIC RESOURCES

EFFECTIVE DATE: 7/27/97

Passed by the Senate April 21, 1997
YEAS 37 NAYS 7

BRAD OWEN

President of the Senate

Passed by the House April 8, 1997
YEAS 94 NAYS 3

CLYDE BALLARD

**Speaker of the
House of Representatives**

Approved May 19, 1997

GARY LOCKE

Governor of the State of Washington

CERTIFICATE

I, Mike O Connell, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5273** as passed by the Senate and the House of Representatives on the dates hereon set forth.

MIKE O'CONNELL

Secretary

FILED

May 19, 1997 - 7:33 p.m.

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5273

Passed Legislature - 1997 Regular Session

AS AMENDED BY THE HOUSE

State of Washington 55th Legislature 1997 Regular Session

By Senate Committee on Agriculture & Environment (originally sponsored by Senators Morton, Fraser, Swecker, Prentice, Strannigan and Haugen)

Read first time 02/14/97.

1 AN ACT Relating to compensatory mitigation; adding new sections to
2 chapter 75.20 RCW; adding a new section to chapter 90.48 RCW; and
3 adding a new chapter to Title 90 RCW.

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

5 NEW SECTION. **Sec. 1.** (1) The legislature finds that:

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

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

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

17 (d) Regulatory decisions on development proposals that attempt to
18 incorporate innovative mitigation measures take an unreasonably long

1 period of time and are subject to a great deal of uncertainty and
2 additional expenses.

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

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

15 NEW SECTION. **Sec. 2.** The definitions in this section apply
16 throughout this chapter unless the context clearly requires otherwise.

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

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

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

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

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

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

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

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

8 (6) "Watershed" means an area identified as a state of Washington
9 water resource inventory area under WAC 173-500-040 as it exists on the
10 effective date of this section.

11 NEW SECTION. **Sec. 3.** (1) Project proponents may use a mitigation
12 plan to propose compensatory mitigation within a watershed. A
13 mitigation plan shall:

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

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

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

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

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

35 (3) When making a permit or other regulatory decision under the
36 guidance of this chapter, the departments of ecology and fish and
37 wildlife shall consider whether the mitigation plan provides equal or
38 better biological functions and values, compared to the existing

1 conditions, for the target resources or species identified in the
2 mitigation plan. This consideration shall be based upon the following
3 factors:

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

7 (b) The compatibility of the proposal with the intent of broader
8 resource management and habitat management objectives and plans, such
9 as existing resource management plans, watershed plans, critical areas
10 ordinances, and shoreline master programs;

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

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

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

19 (f) The significance of any negative impacts to nontarget species
20 or resources.

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

24 NEW SECTION. **Sec. 4.** (1) In making regulatory decisions relating
25 to wetland or aquatic resource mitigation, the departments of ecology
26 and fish and wildlife shall, at the request of the project proponent,
27 follow the guidance of sections 1 through 3 of this act.

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

32 NEW SECTION. **Sec. 5.** A new section is added to chapter 75.20 RCW
33 to read as follows:

34 The department shall not require mitigation for sediment dredging
35 or capping actions that result in a cleaner aquatic environment and
36 equal or better habitat functions and values, if the actions are taken
37 under a state or federal cleanup action.

1 This chapter shall not be construed to require habitat mitigation
2 for navigation and maintenance dredging of existing channels and
3 berthing areas.

4 NEW SECTION. **Sec. 6.** A new section is added to chapter 75.20 RCW
5 to read as follows:

6 When reviewing a mitigation plan under RCW 75.20.100 or RCW
7 75.20.103, the department shall, at the request of the project
8 proponent, follow the guidance contained in sections 1 through 4 of
9 this act.

10 NEW SECTION. **Sec. 7.** A new section is added to chapter 90.48 RCW
11 to read as follows:

12 When exercising its powers under RCW 90.48.260, the department
13 shall, at the request of the project proponent, follow the guidance
14 contained in sections 1 through 4 of this act.

15 NEW SECTION. **Sec. 8.** Sections 1 through 4 of this act constitute
16 a new chapter in Title 90 RCW.

Passed the Senate April 21, 1997.

Passed the House April 8, 1997.

Approved by the Governor May 19, 1997.

Filed in Office of Secretary of State May 19, 1997.