

State of Washington Alternative Mitigation Policy Guidance For Aquatic Permitting Requirements from the Departments of Ecology and Fish and Wildlife

INTRODUCTION

The following is adopted as the State of Washington's Interagency Policy Guidance for evaluating aquatic mitigation alternatives. The intent of this guidance is to represent consensus on mitigation policy among the disciplines and the agencies responsible for evaluating, approving, implementing and enforcing aquatic resource mitigation.

Because stocks of salmon are genetically different, and because these stocks have associations with particular stream reaches, there will be limitations on uses of alternative mitigation in such cases. Nothing in the guidance should be assumed to direct the use of alternative mitigation when it would result in loss of at-risk fish stocks, prevent salmon recovery, or create policy of the state that would be in conflict with the Federal Endangered Species Act, Federal Clean Water Act, Native American Treaty Rights to fish habitat protection, or Department of Fish and Wildlife – Treaty Tribes Wild Salmonid policy. Alternative mitigation tools will be used only where they are the best choices for mitigating unavoidable impacts and are agreed to by the participating parties. However, where federal or local policies are more stringent than those identified in the state interagency policy guidance, the more stringent policies will have precedence for state-issued permits.

This policy guidance will assist the Departments of Ecology or Fish and Wildlife in issuing permits or reviewing actions under section 401 of the Clean Water Act, the Shoreline Management Act or Title 75 of the Hydraulics Code. The policy guidance was developed to be consistent with WDFW's mitigation policy (M5002 – *Requiring or Recommending Mitigation*). While this guidance represents consensus between agencies for a general approach to mitigation, it is not intended to supersede any existing authority or responsibility for regulatory and resource decisions of permitting agencies as they relate to site-specific conditions. Because this policy guidance is intended to address many media, the authors seek to use a standardized language, which departs from traditional syntax adopted within these disciplines. For example, water quality managers use the term "beneficial uses" where wetlands or fish and wildlife managers use "functions and values". To avoid confusion, neutral terms such as "functions" will be substituted.

Background - Increasingly, governmental programs designed to protect, enhance, and restore natural resources are expected to coordinate policy and implementation. Watersheds function as ecological units. Actions in one part of a watershed influence the remaining parts, potentially affecting its ability to function as a self-sustaining ecosystem. Regulators and applicants need to look at the watershed ecosystem as a whole when considering impacts and the use of preservation, mitigation banking, and off-site or out-of-kind mitigation as tools for salmon and

The 1998 Washington State Legislature passed legislation creating Chapter 90.84 RCW, Wetland Mitigation Banking, as one element of compensatory mitigation. It directed consistency with Federal Guidance on Mitigation Banking. The statute used the definition for mitigation listed in federal guidance (sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts).

Agency and Tribal Authority - The Washington Departments of Fish and Wildlife (WDFW) and Ecology (WDOE) have the regulatory authority to require or recommend mitigation of impacts to aquatic resources for the State of Washington. Authority for state agencies to recommend or require mitigation is granted by the following:

Federal Coastal Zone Management Act
Federal Clean Water Act
Federal Endangered Species Act
Federal Fish and Wildlife Coordination Act
National Environmental Policy Act
State Water Pollution Control Act (RCW 90.48)
Shoreline Management Act (RCW 90.58)
Hydraulic Code (RCW 75.20)
Aquatic Resources Mitigation Act (RCW 90.74)
Wetlands Mitigation Banking Law (RCW 90.84)
State Environmental Policy Act (RCW 43.21C)
Growth Management Act [RCW 36.70(A)]
International Treaties on Migratory Birds

Note: Not all of these authorities rest with each agency.

Federally recognized Indian Tribes of the State of Washington possess treaty rights intended to ensure that rights retained under treaty agreements include provisions to hunt, fish, and gather within their usual and accustomed grounds. In addition, the Orrick Decision in Federal Court determined that the Tribes are guaranteed the right to fish habitat protection. When applying this guidance for mitigation site selection, any affected tribe must be consulted to ensure that no net loss of the tribal Usual and Accustomed Area will occur. Agencies and applicants need to be in contact with tribes, be cognizant of which tribes co-manage what areas, and work with the tribes on any mitigation decisions that affect the tribe. Each respective tribe adversely affected by a prospective permit or mitigation decision should be contacted directly and involved from the start. It is important to note that the Northwest Indian Fisheries Commission (NWIFC) does not act in place of individual tribes when treaty rights are concerned, and notice to the NWIFC does not constitute notice to the separate tribes.

The Washington State Department of Transportation (WSDOT) is responsible for building, operating, and maintaining the state's transportation system in an environmentally responsible manner. As such, WSDOT has a vested interest in policies affecting the management of the state's natural resources both as a permit applicant and as an agency of government. WSDOT is

SPECIAL NOTE ON PRESERVATION

It has been decided by the permitting agencies that, in some cases, protecting high-functioning, irreplaceable areas at substantially higher ratios may be the best ecological choice and acceptable for compensatory mitigation, as long as there is no overall loss of habitat functions. There is value gained in protecting sites that are already providing high quality functions necessary for watershed health and salmon recovery efforts. For example, protecting aquatic habitat high in the watershed serves to protect downstream resources from erosion and degradation.

Preservation may be beneficial in some circumstances because; a) larger mitigation areas can be set aside due to the higher preservation mitigation ratios; b) can ensure protection for high quality, highly functioning aquatic systems that are critical for the health of the watershed and aquatic resources that may otherwise be adversely affected; and c) preservation of an existing system removes the uncertainty of success inherent in a creation or restoration project.

Additional information on preservation can be found in the Interagency Report , *"Mitigation Tools for Special Circumstances: Preservation of High Quality Wetlands"* prepared by WSDOT and an interagency workgroup. Contact WSDOT Environmental Affairs office at (360) 705-7494 for a copy of the report.

the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act, Section 404(b)(1) Guidelines” will apply. It states, “the determination of avoidance requirements will not be based on characteristics of the proposed projects such as need, societal value, or the nature or investment objectives of the project’s sponsor”. It is also important to note that per the Federal Clean Water Act and MOA requirements, avoidance measures are required so that only the “least environmentally damaging and practicable alternative (as determined by the Corps and EPA) may be permitted”. Avoidance requires relocation of the proposed project if 1) alternatives are available for non-water dependent activities that do not involve special aquatic sites, or 2) alternatives are available that have less adverse impacts on the aquatic environment than the proposed impact site.

STATE -- When applying this state policy guidance, a potential site for development or alteration should have all aquatic resources delineated and project proponents should examine avoidance alternatives. The agencies will strive to avoid adverse impacts to existing aquatic systems through implementation of the Clean Water Act and State Aquatic protection laws. Decisions on avoidance may take into consideration the quality and size of the resource impacts.

Compensatory mitigation may not be used as a method to reduce environmental impacts in the decision of avoidance or when defining alternatives (e.g. in SEPA, NEPA or project permitting). Unacceptable activities may include, but are not limited to the following:

- When the activity will cause violations of state water quality numerical or anti-degradation standards
- When the activity will cause violations of toxic-effluent standards
- When the activity impacts threatened or endangered species or their habitats
- When activity will cause or contribute to permanent loss of aquatic resource functions
- When non-affecting or less affecting alternatives are available
- When the activity is determined non-water dependent per the Clean Water Act, State Shoreline Management Act, or Local Shoreline Management Plans and Programs

0 III. MINIMIZATION

Minimization refers to actions taken on a site to reduce impacts that will occur to aquatic resources. An applicant must first demonstrate to the satisfaction of the permitting agencies that avoidance of those impacts is not practicable or possible. Methods of minimization include, but are not limited to:

- Choosing the location of an impact so as to minimize the adverse effect to aquatic resource functions
- Ensuring that indirect impacts do not occur as a result of choosing an impact location or method of site alteration and development
- Avoiding creating changes in water current and circulation patterns that would interfere with the movement of sediment transport, plants, fish and wildlife
- Avoiding changes in water inundation regimes that would interfere with the distribution of native plants

4. Off-site, out-of-kind

Note –WDFW’s preference for sequencing alternatives does not prohibit project proponents from considering off-site and/or out-of-kind actions if on-site, in-kind conditions are first considered, any ESA or state aquatic resource recovery considerations are satisfied, and the compensatory mitigation requirements outlined in Section IV Part D of this policy guidance are met. Section IV Part D is intended to help project proponents and regulatory agency staff determine the most appropriate action within the above sequence of alternatives. Other permitting agencies do not require formal sequencing of alternatives before considering the Section IV Part D requirements for compensatory mitigation. Combinations of the four types of mitigation may be acceptable to all state agencies.

C. Definitions: To further understand how resource agencies will determine the appropriate mitigation for the impact site’s functions, the following definitions will be used in making decisions:

- “On site” means on or adjacent to the impact site or in the same stream reach, based on resource needs. It is not to be limited to property ownership or city/county boundaries that do not restrict the needs and uses of the resources.
- “In-kind” mitigation means replacing the same species, habitat type, and function as those affected. However, disturbed habitat shall not be replaced with additional disturbed habitat. In these cases the applicant must restore the site to its natural condition based on adjacent undisturbed sites, as approved by the permitting agencies.
- “Off site” means outside of the area from where the impact has occurred. Acceptable off-site mitigation must occur in the same Water Resource Inventory Area (WRIA), basin or sub-basin as the impacts, depending on affected functions, but not necessarily directly adjacent to the impacts. However, permitting agencies may approve compensatory mitigation sites outside a WRIA for projects with impacts in more than one WRIA, or when it is determined that moving to a different WRIA makes the most sense for the resource needs. For federal threatened or endangered species, mitigation must occur within the habitat supporting the same Evolutionary Significant Unit (ESU). For off-site mitigation to be acceptable, it must be demonstrated that greater functions can be achieved off site than is possible on site.
- “Out of kind” means species, habitat types and/or functions that are different than those at the impact site. For out-of-kind mitigation to be acceptable, applicants must demonstrate that the mitigation will provide an overall net gain for the resources of the watershed.
- “Special Species” means plants or animals listed by the state or federal government as threatened or endangered, and those that are candidates for listing. It also includes the priority habitats and species designated by WDFW, and those species designated as species of local concern under the Growth Management Act.

4. **Out of kind** may be acceptable in the following circumstances:

- a) When the resources adversely affected provide minimal desirable function and are not considered limiting for a Special Species, or determined limiting within the watershed; or
- b) When out-of-kind functions proposed are demonstrated by the proponent and agreed to by the permitting agencies, to be critical or limiting within the watershed and provide a net gain for the resources of the watershed.

5. **Preservation**

Preservation is an acceptable form of compensatory mitigation when used in combination with other forms of compensation such as creation, restoration or enhancement at the preservation site, or at a separate location. Preservation may also be used by itself, but more restrictions as outlined below will apply.

a) **Preservation in combination with other forms of compensation:**

Preservation as compensatory mitigation has been determined to be acceptable by the agencies when done in combination with creation, enhancement or restoration, providing that the criteria below are met. The criteria are designed to limit inappropriate uses, and ensure protection of high-quality sites under imminent threat of destruction or impairment of ecological functions, wildlife, or fish and aquatic resources.

i. **Preservation is most desirable when:**

- The impact area is small and impacts are occurring to a low functioning system; and
- Preservation of a high quality system occurs in the same WRIA or watershed where a resource loss has occurred; and
- When the functions lost occur within the preservation site, or can be exchanged for higher quality functions determined to be limiting by local or regional resource needs; and
- Preservation sites should include buffer areas adequate to protect the habitat and it's functions from encroachment and degradation. When the site contains large, diverse buffers that provide exceptional wildlife habitat, the buffer may be accepted as part of the ratio if agreed to by the permitting agencies.

ii. **Preservation is undesirable when:**

- Preservation sites are smaller than 3 acres, including the buffer; or
- Proposed sites are highly fragmented; or
- Proposed sites are dominated by non-native plants or animals (or non-natives are expected to spread and threaten the sites natural diversity).

iii. **Acceptable Use of Preservation** -- Preservation of at-risk, high-quality habitat may be considered as part of an acceptable mitigation plan when **all** of the following criteria are met:

- 1) Preservation is used as a form of compensation only after the standard sequencing of mitigation (avoid, minimize, and then compensate); and

banking proposals may be considered by project applicants and permitting agencies, no federal or state guidance defining the management, limitations or use of credits for resource banking has been undertaken, with the exception of wetlands. Developing such guidance for all types of banking proposals is beyond the scope of this document. However, mitigation criteria contained throughout this document may be helpful for determining the appropriateness of the use of banks for off-site mitigation. Available specific guidance for wetland banking is provided as follows:

Wetland Mitigation Banking – As defined in RCW 90.84.010, a Wetland Mitigation Bank is a site where wetlands are restored, created, or enhanced or, in exceptional circumstances preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.

- a) Credits from a mitigation bank are used as a form of compensation only for unavoidable impacts.
- b) Credits and debits shall be based on acreage or other scientifically valid measure of aquatic-resource functions acceptable to the appropriate agencies.

As of February, 2000, Ecology is continuing to work with an advisory team to develop an Administrative Rule for a wetland bank certification program. Specific criteria for wetland banking and limitations on the use of banking credits will be listed in the Certification Rule (WAC 173-700) now under development. Adoption of WAC 173-700 is expected in the winter of 2001. Additional site specific restrictions on the use of bank credits will be listed in banking instruments for specific banks. It is the intent that this alternative mitigation policy guidance be consistent with any requirements developed within the banking rulemaking process. The alternative mitigation policy guidance may be used to assist project proponents and permitting agencies with decision making for the use of a wetland bank as an acceptable option for compensatory mitigation. However, decisions regarding the bank restrictions and credit acceptance should be based on any local banking agreements in place, and ultimately with the Administrative Rule, when complete.

7. **Stormwater**: Ecology has approved an off-site mitigation strategy implemented by establishing Supplemental Treatment as an appropriate best management practice (BMP) per WAC 173-201(A) for discharges permitted under Section 401 of the CWA. Supplemental Treatment may be applied to stormwater projects to result in improvements to water-quality and quantity needs in watersheds. Please note the use of Supplemental Treatment to meet stormwater discharge requirements is only to be used after Ecology has ensured that all necessary avoidance and minimization measures have been incorporated into the design, construction, or operation of the proposed project. Additionally, in order to ensure compliance with the water quality standards, applicants must provide for agency approval, a justification of how any supplemental treatment approach will improve the water quality of the water body segment receiving the new discharge. The justification may include, but is not limited to: numeric modeling techniques, ambient monitoring, biological indices, and indirect indicators such as total impervious area for treatment. For more detailed information please refer to the Ecology Policy #1-22, and Procedure #1-23 "*Adopting and Use of Supplemental Treatment as a BMP*".

W. OTHER REQUIREMENTS OF AQUATIC-RESOURCE FUNCTIONS MITIGATION

- 1.—When determined necessary by the permitting agencies, project impacts and mitigation success should be measured with the Habitat Evaluation Procedure (HEP), the Washington State Wetlands Functional Assessment Method (WSWFAM), photographic documentation or other methods acceptable to the permitting agencies.
2. Compensation techniques should be based on best available science. Best Available Science may:
 - a) Include experimental techniques that will require higher replacement ratios until the method is tested and determined a successful form of mitigation;
 - b) Advise mitigation to be performed as part of a mitigation bank, or
 - c) Require implementation of a fully functional system prior to project impacts.
3. Cumulative impacts of mitigation strategies used within the watershed should be taken into consideration, and appropriate measures utilized to avoid or minimize further degradation of the resources. Permitting decisions for unavoidable project impacts may take into consideration the benefits or adverse impacts of other compensatory mitigation, watershed restoration or recovery projects, or impact sites within the watershed, WRIA or basin.
4. Mitigation measures are an integral part of a construction project and shall be completed before or during project construction.
5. Compensatory mitigation that must be implemented after project construction, or requires a long time to reach replacement functions, shall include additional acreage or water-quality measures to mitigate for those losses at the impact site over time.
6. The permitting agencies shall make the determination of the project impacts, the significance of impacts, the type and amount of compensation required after implementing the mitigation sequence, and the level of replacement functions achieved. The permitting agencies shall base their determinations on the best available information, including the applicant's plans and specifications. For large projects with potentially significant impacts, determinations may be based on review of studies required and approved by the permitting agencies.
7. In order to save time and resources of both the applicant and the state, conceptual mitigation plans should be discussed with the lead permitting agency prior to preparing a detailed mitigation plan.
8. Mitigation plans shall be required for projects with significant impacts and shall include, at a minimum, the following:
 - Baseline impact site conditions
 - Quantitative and spatial estimate of impacts

method to WDFW, the Department of Natural Resources (DNR), a private land trust, non-profit organization, or local government with restrictive easement. This may include land transfer fees, operations and maintenance costs.

14. Compliance monitoring may be performed by the agencies through routine site inspections, review of monitoring reports, and response to reports of non-compliance. Access agreements must be made part of the permit requirements.
15. A commitment by applicants to complete mitigation requirements shall be documented in one or more of the following ways:
 - Mitigation plan approved by the regulatory agencies.
 - Federal Energy Regulatory Commission (FERC) Order.
 - Conditions on an environmental permit.
 - Conservation easement.
 - Energy Facility Site Evaluation Council (EFSEC) site certification.
 - Agency Mitigation Contract

To ensure that the required mitigation was satisfactorily completed, such mitigation should be confirmed by the permitting agency.

16. Project proponent pays mitigation costs. Mitigation costs may include but are not limited to:
 - Studies to determine impacts and mitigation needs.
 - Alteration of project design in response to sequencing requirements
 - Planning, design, and construction of mitigation features.
 - Operation and maintenance of mitigation measures for duration of project (including personnel).
 - Monitoring success of mitigation measures performance standards.
 - Contingency costs associated with non-compliance with permit conditions or non-attainment of performance standards.