

WAC 463-XX-XXX Fish and Wildlife. This rule applies to applications for the construction of combustion turbine projects and describes the applicable standards for fish, wildlife, and habitat protection.

- (1) Intent. The council's intent is to achieve no net loss of habitat functions and values by maintaining the functions and values of fish and wildlife habitat in the areas impacted by energy development. This includes the productive capacity and opportunities reasonably expected of a site in the future.
- (2) The council encourages applicants to select sites that avoid impacts to any species on federal or state lists of endangered or threatened species or to priority species and habitats.
- (3) Standards.
 - (a) Applications must demonstrate no net loss of fish and wildlife habitat function and value.
 - (b) Restoration and enhancement are preferred over creation of habitats due to the difficulty in successfully creating habitat.
 - (c) Mitigation credits and debits shall be based on a scientifically valid measure of habitat function, value, and area.
 - (d) The ratios of replacement habitat to impacted habitat shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and values.
 - (e) Wetlands shall be replaced at ratios following the wetland standard established by the council in WAC 463-XX-XXX.

(f) Fish and wildlife surveys shall be conducted during all seasons of the year to determine breeding, summer, winter, migratory usage, and habitat condition of the site.

(g) As required by Chapter 463-42 WAC, the application shall contain a full description of each measure to be taken by the applicant to protect all habitat types, vegetation, wetlands, wildlife, fish, and instream flows from the effects of project construction, operation, abandonment, termination, or cessation of operations.

(4) Definitions.

(a) Mitigation is defined as actions that will be required to avoid, minimize, or compensate for impacts to fish, wildlife, or habitat from the proposed project activity. Avoiding impacts is the highest mitigation priority. Mitigation shall continue for the duration of the project's impacts. Complete mitigation is achieved when the mitigation elements ensure no net loss of habitat functions or values, or fish and wildlife populations. Habitat loss and mitigation success shall be measured with the Habitat Evaluation Procedure (HEP) or other scientifically recognized method. The type(s) of mitigation required shall be considered and implemented, where feasible, in the following sequential order of preference:

(i) Avoiding the impact altogether by not taking a certain action or parts of an action.

(ii) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(iii) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

- (iv) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
 - (v) Compensating for the impact by replacing or providing substitute resources or environments.
 - (vi) Compliance and effectiveness monitoring, and taking appropriate corrective measures to achieve the identified goal, is a necessary component of all of the above.
- (b) Habitat function refers to one or more life requisites of a species that is met by the habitat. Function includes, but is not limited to, providing a species with food, cover, breeding area, water, migration route, escape cover, or winter cover.
- (c) Habitat value recognizes the relative importance the habitat provides to a species or recreational opportunity. Habitat value includes, but is not limited to, productivity, condition, availability, distribution, and importance to a species.
- (d) At risk means when a high quality priority habitat or habitats of priority species are subject to imminent development.
- (e) Best available science is defined as scientific information that is produced through a valid scientific process. A valid scientific process is one that produces reliable information useful in understanding consequences of development and mitigation techniques that are effective in protecting the function and values of habitat. A valid scientific process includes the following characteristics: peer review, methods, logical conclusions and reasonable inferences, quantitative analysis, context and references.
- (5) Priorities for Mitigation Location and Type. For federal endangered or threatened fish species, mitigation must occur with the habitat supporting the same Evolutionary

Significant Unit (ESU). Priorities for mitigation type and location are in the following sequential order:

(a) On-site, in-kind.

- (i) On-site means on or adjacent to the project impact site.
- (ii) In-kind means the same species or habitat that was impacted.

(b) Off-site, in-kind.

- (i) For off-site mitigation to be accepted, the project proponent must demonstrate that greater habitat function and value can be achieved off-site than on-site.
- (ii) In-kind means the same species or habitat that was impacted.

(c) On-site, out-of-kind.

- (i) On-site means on or adjacent to the project impact site.
- (ii) Out-of-kind mitigation is not acceptable for impacts to priority habitats and species, with one exception: priority habitats and species that are at greater risk can be substituted for impacted priority habitats and species. Priority habitats, and habitats of priority species may be replaced at a level greater than the impacts of the project on those habitats and species.

(d) Off-site, out-of-kind.

- (i) For off-site mitigation to be accepted, the project proponent must demonstrate that greater habitat function and value can be achieved off-site than on-site.
- (ii) Out-of-kind mitigation is not acceptable for impacts to priority habitats and species, with one exception: priority habitats and species that are at greater risk can be substituted for impacted priority habitats and species. Priority habitats, and habitats

of priority species may be replaced at a level greater than the impacts of the project on those habitats and species.

(6) Mitigation Plans. Mitigation plans shall be required for a combustion turbine project.

When high quality areas of priority habitats or habitats of priority species are at risk, preservation of those habitats may be accepted as part of a mitigation plan, as long as there is no net loss of habitat function. Mitigation plans shall include the elements specified in Chapter 463-42 WAC as well as a cost estimate to fulfill mitigation requirements including operation, maintenance, monitoring, and contingency plans for the duration of the project's impact.

(7) Habitat mitigation measures shall be based on best available science.

(8) Proven mitigation techniques shall be used. Experimental mitigation techniques are allowable only if advance mitigation is being performed and will be fully functional prior to the project impacts.

(9) Mitigation shall proceed along with project construction. Mitigation measures are an integral part of a construction project and shall be completed before or during project construction, except projects with impacts which have no proven mitigation techniques. Those projects require advance mitigation.

(10) Delayed mitigation shall include replacement that is greater than losses.

Mitigation that is implemented after project construction, or that requires a long time to reach replacement value, shall include additional habitat value (over and above replacement value) equal to the loss through time.

- (11) Cumulative impacts of projects shall be considered. Cumulative impacts of projects shall be identified, considered and appropriate measures taken to avoid or minimize those impacts.
- (12) The project proponent is responsible for all mitigation costs for the duration of impacts. Mitigation costs are the responsibility of the project owner, proponent, certificate holder, or successor in interest until the site is restored and fish and wildlife impacts cease. Mitigation costs may include but are not limited to:
- (a) Studies to determine impacts and mitigation needs.
 - (b) Alteration of project design.
 - (c) Planning, design, and construction of mitigation features.
 - (d) Operation and maintenance of mitigation measures for duration of project impact (including personnel).
 - (e) Compliance and effectiveness monitoring of mitigation measures.
 - (f) Contingency plans and adaptive management.
- (13) Performance bond or other monetary assurance shall be required. A performance bond, letter of credit, escrow account, or other written financial guarantee shall be required to ensure that the project proponent will fulfill mitigation requirements, operation and maintenance, monitoring, and contingency plans for the duration of the project's impacts. The amount of the bond shall cover the costs plus 10 percent.
- (14) Mitigation site shall be protected for the duration of the impacts. The mitigation site shall be protected for the duration of the impacts. This protection shall be through fee title, conservation easement, deed restriction, donation, or other legally binding method.

- (15) Compliance and effectiveness monitoring shall be performed and reported to the council. Compliance monitoring shall be performed to ensure that the required mitigation measures are developed in accordance with the site certification. Effectiveness monitoring of mitigation measures shall be performed to ensure that the mitigation measures achieve the desired results. The council shall analyze the monitoring reports and may require changes in the mitigation activities or the employment of contingency plans.
- (16) Mitigation banking may be an acceptable form of mitigation. The term mitigation bank is defined as habitat creation, restoration, or enhancement project undertaken by a project proponent to act as a bank of credits to compensate for habitat impacts from future development projects. Credits and debits shall be based on area or a scientifically valid measure of habitat function and value such as the Habitat Evaluation Procedure (HEP) or the Instream Flow Incremental Methodology (IFIM), or other method acceptable to the council. The use of credits from a mitigation bank as a form of compensation shall occur only after the standard sequencing of mitigation negotiations (avoid, minimize, rectify, reduce, and then compensate).