

## Thomas Pors

These comments are submitted on behalf of the Cities of Sumner and Port Orchard, two of the ESSB 6091 Section 301 pilot projects. I recently attended the October 26, 2018 meeting of the Washington Water Utility Council at which Ecology's David Christensen provided comments about, among other things, Ecology's "net environmental benefit" or NEB Guidance.

During Mr. Christensen's presentation, he stated that Ecology staff felt there was little or no distinction between two different terms used by the legislature in the tiered mitigation standard for pilot projects at ESSB 6091, Section 301(8). Specifically, you stated or implied that in the second "minimizing impacts" tier at Section 301(8)(b) the standard "no net detrimental impact to fish and related aquatic resources" was essentially the same as the standard "net ecological benefits to fish and related aquatic resources...", which appears in the "compensating impacts" tier at section 301(8)(c). I strongly disagree with this interpretation and believe that it is inconsistent with a plain reading of the statutory text and legislative intent. I hope that you will communicate this comment and my own interpretation of these standards to the management and permitting teams working on NEB guidance and pilot project application review.

Section 301(8) of ESSB 6091 provides a path for the permitting of five pilot projects pursuant to a flexible mitigation sequence that allows variance from the perfect mitigation standard resulting from the *Foster v. Ecology & Yelm* decision. The sequence requires avoidance before minimization of impacts, and minimization before compensation, which includes the potential for out-of-kind habitat mitigation. The terms used by the legislature in each of the sections are unique, however, and the legislature clearly contemplated a three-tiered approach, not a two-tiered approach. It is critical to the success of the pilot projects, a one-time opportunity to demonstrate mitigation flexibility to the Joint Legislative Task Force that, the terms used by the legislature to define the three-tier mitigation sequence be interpreted consistent with the language in the statute and legislative intent.

Tier 1 – Avoidance involves avoiding impacts by complying with instream flow rules or making permits subject to applicable minimum flows. Tier 2 – Minimization provides that where avoidance is not "reasonably attainable," impacts be minimized by providing trust water rights or other replacement water resulting in "no net annual increase in the quantity of water diverted or withdrawn from the stream" and "no net detrimental impacts to fish and related aquatic resources." Tier 3 – Compensation provides that where avoidance and minimization are not "reasonably attainable," impacts be compensated by providing "net ecological benefits to fish and related aquatic resources in the water resource inventory area... that improves the function and productivity of affected fish populations and related aquatic habitat." This latter tier includes out-of-kind mitigation measures that improve or enhance water quality, riparian habitat, or other instream functions and values for which minimum flows or closures were established in that WRIA. The legislature's use of the terms "net ecological benefits to fish" and "in the water resource inventory area" in Tier 3 indicate their intent that compensatory mitigation provides for improvements over the baseline condition of the entire WRIA, rather than each potentially-affected creek or other surface water body.

Ecology's Interim NEB Guidance (June 2018, Ecology pub. 18-11-009), at page 2, states that "A Net Ecological Benefit determination means anticipated benefits to instream resources from actions designed to restore streamflow will offset and exceed the projected impacts to instream resources from new water use." This may make sense in the context of Sections 202 and 203 watershed plan

updates and watershed restoration and enhancement plans, but it does not make sense in the context of Section 301 pilot projects, because NEB is only used Section 301(8)(c), the compensation tier. The Interim NEB Guidance does not provide a distinct interpretation of NEB for Section 301, despite the different context in which it is used there. In Sections 202 and 203, NEB is used as a standard for approval of plans that identify instream flow enhancement projects that offset impacts to instream flows from, at a minimum, new permit exempt wells. In Section 301, however, NEB is used only as a standard for approving compensatory mitigation after accounting for all "reasonably available" avoidance and minimizations measures. The legislature could have included NEB in the tier 2- minimization subsection but it did not.

A plain reading of Sections 301(8)(a to c) demonstrates that each sequence prescribes a distinct and separate mitigation standard. This is clearly the case between (b) and (c).

The standards for the minimization tier (subsection b) are "no net annual increase in the quantity of water diverted or withdrawn from the stream" and "no net detrimental impacts to fish and related aquatic resources." The use of the term "net" in the context of "annual increase in water diverted" requires replacement water that, at a minimum, is equivalent to the proposed additional annual quantity (Qa) diversion or withdrawal. To achieve a "no net annual increase" means to compare impacts from the application to an existing baseline flow in the stream or other surface water body. To achieve "no net detrimental impacts to fish and related aquatic resources" requires some rational assessment of baseline conditions and a comparison of the post-project environment to those conditions. Section 301(8)(b) neither states nor implies a requirement to improve baseline conditions. The text of (b) cannot be interpreted as requiring mitigation that creates a net improvement, enhancement, or "benefit."

For the pilot projects, the legislature reserved the standard of "net ecological benefit" for the compensation tier (subsection c). This tier involves the mitigation of impacts to regulated or closed streamflows for which avoidance and minimization measures are not reasonably available. It focuses on the function and productivity of affected fish populations and related aquatic habitat and the use of "out-of-kind" mitigation measures that "improve or enhance existing water quality, riparian habitat, or other instream functions and values." It would violate standard rules of statutory construction for Ecology to construe the mitigation standards of (b) and (c) as basically equivalent. They are clearly distinct in the statute in both language and purpose and must be implemented consistent with the plain language of the statute.

Thank you for your consideration of these comments in the process of developing permanent NEB guidance relating to the pilot projects.

Thomas M. Pors  
Attorney for the Cities of Sumner and Port Orchard