

Thomas Pors

I am submitting these comments on behalf of Pilot Project participants City of Sumner and City of Port Orchard. These comments are limited to Section 9 of draft POL-2094, pertaining to pilot project water right application procedures.

First, I appreciate and agree with the statement relating to the legal standard under RCW 90.94.090 (8) that "Ecology will assess whether the applicants have properly followed the established mitigation sequence, rather than applying the traditional test for impairment and availability of water subject to senior instream flow water rights and closures."

Second, with respect to the Tier 2 "minimizing impacts" standard, the draft guidance provides: "To show that minimizing impacts is not reasonably attainable, applicants should: Explain what efforts have been taken to identify replacement water rights; and Whether it would be technically feasible to mitigate with those rights."

No guidance is provided in the draft policy regarding the scope of this feasibility investigation, which leads me to believe that it is project-specific and depends on the circumstances prevailing in the area of potential impact to surface water. In the suburban/rural fringe encountered by most pilot projects, there may be hundreds or thousands of permit-exempt water uses and dozens of agricultural properties in the vicinity of affected streams. The effort to canvas each property and determine the feasibility of acquiring its water rights may itself be infeasible without some rationale methodology for focusing on properties most likely to generate replacement water mitigation that meets the other standards of (1) no net annual increase in quantity of water diverted or withdrawn and (2) no net detrimental impacts to fish and related aquatic resources. It would be helpful for the final policy guidance to acknowledge and accept the concept that applicants be allowed to justify limiting the scope of this "reasonably attainable" investigation based on generally accepted principles of feasibility and a rule of reason.

Third, with respect to the Tier 3 "compensation" standard, the draft policy indicates that Ecology will evaluate projects consistent with the published NEB Guidance (Final Guidance for Determining Net Ecology Benefit). This referenced "final guidance" is not yet published in final form and is subject to revision after Ecology reviews public comments due simultaneously with this draft policy. My comments on the draft "final" NEB Guidance is copied below. However, the reference to use of the "final NEB Guidance" is inconsistent with the earlier statement in the June 2018 Interim NEB Guidance (Ecology publication 18-11-009) that the Interim NEB Guidance will apply to the processing of the pilot projects. Please clarify whether the interim or final NEB Guidance publication will be used in the evaluation of Tier 3 "compensation" plans for the pilot projects.

Copy of Thomas Pors' public comments on "Draft Final Guidance for Determining Net Ecological Benefit (Draft for Public Comment – May 6, 2019)":

Pages 13-14 of the draft Final Guidance (section 4.1) describes elements of the NEB analyses for Pilot Project Proposals. The list of elements is not problematic but it lacks description of required analytical methods. Appendix C cites to two formalized analytical methods as examples: Habitat Equivalency Analysis (HEA) and PHABSIM. PHABSIM is especially data intensive and is not expected to be an effective analytical tool when comparing small flow reductions in large river systems. Ecology should add language to the draft Final guidance document and/or to Appendix C

to more clearly state that alternative analytical frameworks to HEA and PHABSIM are acceptable. A well-documented analytical framework to account for equivalencies between flow depletion and habitat should be allowed.