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June 7, 2019

Annie Sawabini
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Department of Ecology
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Re: Comments of the Washington Water Trust on Ecology's Draft Final Guidance for Determining Net Ecological Benefit.

Dear Ms. Sawabini,

Washington Water Trust (WWT) is a non-profit which for over 20 years has used voluntary, market-based transactions and cooperative partnerships to improve stream flows, protect water quality, and facilitate sustainable water management practices throughout Washington State. We lease and buy water from water rights holders, temporarily or permanently to improve and protect flows, especially during periods that are critical to imperiled salmon and steelhead. As our recent work in the Dungeness and the Yakima basins has shown, at the right time, at the right place, even a small amount of water left instream can have an immensely positive impact. WWT thanks Ecology for this opportunity to comment on its Draft Final Guidance (Guidance) for Determining Net Ecological Benefit (NEB).

Ecology Needs to Provide More Concrete Guidance in the Guidance Document

WWT recognizes that Ecology has an extremely difficult task in implementing Chap. 90.94, the Streamflow Restoration Act (SRA). The Legislature has saddled Ecology and local watershed planning units and committees (units)¹ with the near impossible task of allowing and planning for 20 years of permit exempt wells and designing the appropriate mitigation feasible under the circumstances. The circumstances depend upon the units determination of what actions are practically, technically, and financially feasible to offset future permit exempt wells within the water resources inventory area (WRIA). The highest priority offset actions seek to replace "the quantity of consumptive water use during the same time as the impact and in the same basin or tributary" which Ecology interprets as within the same sub-basin. Second priority is projects located out of the subbasin or that only address critical flow periods. Third tier projects are neither constrained by location nor by timing as long as the entire plan achieves NEB.

¹ For simplicity, WWT refers collectively to both watershed planning units under Section 202 of ESSB 6091 and watershed planning committees under Section 203 as "units."

Ecology commissioned the WSU Water Resources Technical Study to support watershed planning groups in the planning process—which was both necessary and commendable. But that study proposed five methodologies for NEB determinations based upon critical baseline data that is simply unavailable in many WRIAs.² In a preface to the study that acts effectively as a disclaimer, Ecology therefore has advised units that only one of the five suggested methodologies, replacing habitat capacity for specific species, is realistic for NEB assessments.³

This paucity of essential baseline data is only compounded by the financial uncertainty accompanying projects. Projects proposed in a plan—and necessary to achieve NEB—may or may not be funded. The SRA’s \$300 million allocation averages out to about \$20 million per year for projects across the 15 SRA watersheds—just over \$1 million per year in each WRIA --which is likely insufficient to fund the necessary projects to offset impacts or achieve NEB in perpetuity in any watershed. It is quite possible that in many WRIAs, projects necessary to achieve NEB for a particular watershed plan will not be completed due to lack of funding. And it is even more likely that there may not be requisite funds to keep projects operating with the promised efficacy in perpetuity.

Finally, potential projects to attain NEB, even when fully funded, face additional uncertainty as to their effectiveness. As pointed out in the WSU technical study, it is not certain that a planned mitigation project, once completed and operational, will deliver the full magnitude of the anticipated offset (“reduced magnitude of offset results”).⁴ WWT and Ecology’s joint work on aquifer recharge in the Dungeness exemplify this concern. Recent data from that successful recharge project indicates that one bucket of mitigation water results in less than a full bucket instream. Ecology may have similar data from other recharge projects or types of mitigation projects, as well as from the scientific literature. Ecology should amend the Guidance to inform units about what range of quantitative buffers to consider as to various types of projects to address the potential for reduced magnitude of offset results. The WSU study also noted that the full benefit from a mitigation project may take months or years to realize while the negative impacts of consumptive water withdrawals may occur in the near-term.⁵ Again, Ecology should share its direct experience accounting for time lags and its assessment of the relevant scientific literature to assist units in buffering for time lags in their planned projects.

In a nod to the difficulty of planning the number and types of projects necessary to make the NEB evaluation, given the lack of baseline data, uncertainty of funding, and uncertainties as to the magnitude and timing of benefits from mitigation projects, Ecology suggests tiering the projects—which is reasonable. Ecology’s suggestion should be stated as a recommendation. Moreover, Ecology should also make clear that

² WWT incorporates by reference its general comments on the Draft Interim Guidance which focus on the absence of baseline data and data gaps in the SRA WRIAs. See November 9, 2018 Comments of the Washington Water Trust on Ecology’s Interim Guidance for Determining Net Ecological Benefit. The relevance of those comments persists. WWT and the tribes, local governments, and other entities involved in SRA planning statewide recognize the need for better baseline data and would work with Ecology to raise these critical gaps to the Legislature and other funders.

³ Guidance at 27. Ecology suggests that another methodology, in-kind-in place habitat replacement, is appropriate for managed aquifer recharge evaluation. *Id.*

⁴ Guidance at Appendix C at 12.

⁵ *Id.*

projects should be tiered as to their uncertainty of achieving their mitigation goals *as well as* their uncertainty of being funded.⁶

WWT is concerned that Ecology's Guidance offers little substantive guidance to units navigating the planning process. The Guidance identifies many of the uncertainties that make SRA watershed planning so challenging without any concrete direction as how to address them. Ecology's reticence in telling units what to do is extreme deference to local planning that falls short of providing units with even high-level direction as to how to formulate watershed plans that have a hope of achieving NEB. And that lack of high-level guidance is puzzling since ultimately Ecology will judge the adequacy of units' NEB determinations as a prerequisite to watershed plan approval or if units do not submit a NEB determination⁷. Furthermore, as part of the SRA funding process, Ecology will inevitably assess lesser priority individual projects for their ability to improve salmonid habitat or fish and aquatic habitat generally within a WRIA—in other words whether the project helps the watershed attain NEB. See WAC 173-566-150 (2), (3).

Ecology's reluctance to provide more substantive direction as to how it evaluates NEB is even more perplexing because Ecology has considerable experience in evaluating NEB. Ecology testified before the Pollution Control Hearings Board that the Yelm-Lacey-Olympia mitigation plan met NEB in *Foster et al. v. Ecology et al*⁸. Ecology additionally opined on the merits of specific mitigation projects and the anticipated benefits of those projects. For example, Ecology's witnesses testified during *Foster* that the purchase of twenty acres of woodlands provided a two to one mitigation value.⁹ Is that the same benefit ratio units should consider for forest acquisitions? Could Ecology at least include a range for the expected benefit ratio for forest acquisitions in the Guidance depending upon local conditions? Despite the lack of peer reviewed science on NEB, Ecology must have applied various multipliers to account for the layered uncertainties in the various components of the Yelm plan to render its NEB opinion to the PCHB. Again, the Guidance should expound on Ecology's thinking and internal metrics.

Likewise, Ecology recently approved the Nisqually amended watershed which found that that, as conditioned by the agency, the Tier 1 actions identified in the plan will result in NEB over the next 20 years.¹⁰ Ecology presumably applied a multiplier or divisor to the proffered projects to account for the scientific and other uncertainties inherent in the watershed planning process. What multipliers did Ecology use and why?¹¹ By simply explaining its own reasoning in dealing with its prior NEB assessments Ecology could provide units with a better idea of the metrics they should employ in their own NEB assessments which, in turn, will be ultimately judged by Ecology. As it is now, the Guidance leaves units in the position of largely guessing what standards Ecology will employ.

⁶ Guidance at 12.

⁷ Guidance at 7. "Planning groups may choose not to include an [sic] NEB evaluation."

⁸ Findings of Fact, Conclusions of Law, and Order, PCHB 11-155 (2013) at 23.

⁹ *Id.* at 13.

¹⁰ Ecology Order Adopting the Nisqually Amended Watershed Plan (2/1/19).

¹¹ If the Nisqually unit provided those multipliers, similarly, Ecology should explain why it deemed them appropriate.

In sum, while WWT sympathizes with the difficulty of providing substantive guidance to units on NEB when the determination encompasses so many uncertainties, and suffers from critical data gaps, the current Guidance could be significantly improved if Ecology shared its internal reasoning on its prior NEB determinations, including the amount by which it determined benefits should exceed impacts. The Guidance would also benefit if Ecology expounded on the uncertainties it encountered in funding or implementing various types of mitigation projects throughout the state and proffered its assessment of how best to address them. Units would not have to learn from Ecology's experiences with NEB and mitigation projects, but they could, and their planning would likely benefit. Moreover, the plans generated would more likely achieve a more uniform NEB standard as the SRA clearly contemplates.

Thank you again for the opportunity to submit comments to the Guidance.

Very Truly Yours,



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