



City of Arlington

Public Works

June 7, 2019

Annie Sawabini
Dept. of Ecology
Water Resources Program
PO Box 47600
Olympia, WA 98504-7600

RE: City of Arlington Comments on Net Ecological Benefits Guidance

Dear Ms. Sawabini:

Following our review of the May 6, 2019 publication of the Draft Final Guidance for Determining Net Ecological Benefit (Guidance), the City of Arlington has prepared the following comments and recommendations.

Comment #1 – Immediately upon its acceptance, the Guidance will be out-of-step with the Legislature.

Ecology is remiss in its tendency to lead based on what it *thinks* are its marching orders. Too often, it operates under its assumptions and interpretations of what the Legislature “*must have meant*”. In the current instance, two landmark court cases (*Hirst, Foster*) have turned Washington Water Law on its head, resulting in confusion at both state and local levels, and even moratoria on residential development. In response, the legislature in 2018 passed the Streamflow Restoration Act (ESSB 6091; codified as Chapter 90.94 RCW) to provide relief, including the introduction of a performance standard called Net Ecological Benefits (NEB). After nearly 18 months, the Department released draft final Guidance on achieving that standard. The entire Purpose section of the Guidance is a reluctant admission that the agency does not know what the Legislature is asking, and therefore it is limited in its application.

Much like Chapter 90.94 RCW, the legislature recognized in RCW 90.54.005 that an “effective way to meet the water needs of people, farms, and fish is through strategies developed and implemented at the local watershed level”. However, recognizing that in the appropriation of the waters of the State it is important to proceed with a reasonable degree of certainty, the legislature also added RCW 90.54.50 (2). “When sufficient information and data are lacking to allow for the making of sound decisions, ... [and] Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing

committees of the house of representatives and the senate having jurisdiction over water resource management issues.”

In addressing the creation of the NEB decision criterion for the purpose of evaluating out of kind and out of place mitigation, Ecology evidently did not consult the very legislators who charged them with their work. Instead, staff conducted a “thorough scientific literature review” and hired academic consultants to identify what the legislature must have intended. These efforts are not wrong in and of themselves, but to do so without legislative consultation is contrary to standing legislative direction, and, perhaps, an unintended waste of resources. What is particularly aggravating is that in the very same statute, the legislature established a legislative task force charged with evaluating, in part, the application of the NEB standard to the Foster pilot projects established under 90.94.030 RCW. Ecology could easily have consulted with this group over the last year.

Recommendation #1a – Prior to finalizing the Guidance, consult legislators active on legislative committees for water resources, natural resources, and building industry in order to clarify their intent for the use of NEB.

Recommendation #1b – Invite legislators whose districts include a WRIA (or a portion of one or more WRIs) with an active streamflow restoration committee to attend committee meetings as an observer and informal advisor. Since the legislative direction of using local watershed committees to develop solutions is common to both RCW 90.54 and RCW 90.94, including legislators as guests—and perhaps as residents within the WRIs—should be easily accommodated, while also providing a legislator’s personal opinion of legislative intent.

Comment #2 – The Guidance attempts to create a false distinction between:

- 1) NEB standards and evaluation procedures for permit-exempt water rights, and**
- 2) NEB standards and procedures for water rights obtained under permits.**

ESSB 6091 and RCW 90.94 certainly distinguish between domestic exempt wells in WRIs with existing watershed plans, the same wells in WRIs without watershed plans, and entities attempting to obtain water rights under the *Foster* pilot projects. These three distinct groups are indeed different in that the latter requires applications and permits to obtain water, whereas property developers using permit-exempt wells do not. However, they are very much alike in that they may face the need to mitigate water development impacts with water and non-water off-sets. This is the very thing that caused the legislature to address them all in the same bill.

The Guidance attempts to describe these “fundamentally different” NEB standards and processes, for example, in Appendix B, Background, second paragraph. It also attempts to distinguish them by using enumerated subsections under Section 2.2, and bullets under Section 4.1. This only adds to the confusion. Different paths have brought these three groups to the same decision point, but they all have in common the need to demonstrate, for the water appropriation to occur: a

quantification of impacts, if any; mitigation or offset of impacts using water; and if needed, additional mitigation or offset of remaining unmitigated impacts using non-water projects that produce an overall positive NEB.

In addition, a review of the legislature's use of NEB in 90.94.090 (water right permits) does not demonstrate any clear distinction from the context in which it is used in 90.94.020 RCW and 90.94.030 RCW (permit-exempt water rights).

Recommendation #2 – Re-write the text to clarify that despite the differences in the desire to put water to beneficial use, the one definition of NEB, and the NEB determination process, are essentially the same. If this observation is truly in error, the attempt of the draft final Guidance to describe this distinction is not adequate. In this case, a table comparing and contrasting the NEB evaluation processes and criteria for each of the three groups would be extremely helpful.

Comment #3 – Actual water consumption is characterized as total well withdrawals less water offsets, and is quantified as equal to net consumption. The effort to make these distinctions is appreciated. However, the detail with which permit-exempt consumption is quantified probably provides a false degree of certainty because of the large differences in spatial and temporal variability at those scales.

Much effort is spent in Appendix A and Appendix B to educate committee members in the effects of well withdrawals on streamflow. However, whereas pumping rates of well withdrawals (say, in gpm) and pump cycling are described, the return flows of septic drain fields (say, in gpd) are ignored. In addition, the proximity of streams to various new well locations provides for rough estimates of stream depletion, but there is no discussion of the morphology or scale of the mapped streams. For example, first order streams incised in bedrock will respond differently than the riffle-pool channel in outwash gravel. Also, some areas have streams mapped with greater resolution than others, falsely communicating a sense of vulnerability to impacts in that area. Many zero- and first-order streams affecting watershed hydrology are not mapped at all.

The detail of the NEB parameters and evaluation process may communicate a false degree of certainty. Don't minimize the documentation of procedures, but some discussion of parameter sensitivity is warranted.

Recommendation #3a – Re-write the text to clarify the appropriate level of accuracy and precision that is expected despite the detail of parameters considered. Include a table that ranks or at least describes the sensitivity of the various parameters.

Recommendation #3b – Include as an appendix an example of a WRIA mapped with a small number of new permit-exempt wells. Show the math. Alternatively, release as an example a concise summary of an approved NEB evaluation whose Ecology-determination resulted in a favorable order.

Recommendation #3c – Based on Ecology expertise and completed NEB evaluations, generate a series of multipliers to inform other committees and evaluators what the range and influence of the various parameters are on the NEB quantities and outcomes.

Comment #4 – Guidance ignores the influence of technological improvements and cultural trends that will no doubt occur even in the first 20 year cycle. Without a formal recording of decisions, the balance sought through an NEB evaluation will not be sustained.

Technological advancements could easily increase the low-risk recycling and reuse of domestic gray water. Similarly, the trend of an increase in accessory dwelling units and tiny homes on a single parcel has already begun. In these cases, the net consumption of water on a parcel will increase. Other practices, including adaptive management, could decrease consumption. Tracking the results of an NEB determination through time will be no easy task.

The Guidance indicates that a committee-approved watershed plan may not require an amendment to an instream flow rule, but that an Ecology-approved watershed plan that was previously not approved by a committee would definitely require an amendment to an instream flow rule. However, the rationale for this is unclear. It would appear the only difference is the failure of the committee to meet an arbitrary deadline.

Recommendation #4a – All domestic construction relying on permit-exempt wells and all water appropriations should have a document of NEB assumptions recorded with the title and/or water right file. Periodic reviews would then be able to evaluate the need for adaptive management.

Recommendation #4b – All approved watershed plans, along with their NEB evaluations and determinations, should be appended to amended instream flow rules.

Thank you for the opportunity to comment.

Sincerely,



Michael D. Wolanek
Water Resources Planner