

## Sierra Club

Please find attached the Sierra Club comments on the draft NEB Guidance document.

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Dear Annie:

Thank you for the opportunity to comment on the Draft Guidance for Determining Net Ecological Benefits (May 6, 2019). As you know, the Sierra Club was deeply involved in the development of SB 6091 and is closely following the implantation of that law. Our comments focus on the watershed planning element of the guidance, rather than the “Foster” pilot process which governed by detailed language in the bill (and is the subject of a legislative subcommittee).

While the draft guidance contains helpful information for planning groups, there are portions of the document that we feel are inconsistent with the intent or language in 6091. The document is also unnecessarily vague in certain areas. While some deference to local planning groups is appropriate, there is a need for Ecology to provide more structure and technical advise so as to achieve some level of consistency from one planning unit to the next.

Context / Significance of “Net Ecological Benefit” Standard

In our view, the document does not clearly explain the relative importance and applicability of the term “net ecological benefit.”

In order to understand this term, it is useful to examine the legislative history of 6091. It is important to note that there were essentially two very different versions of Hirst legislation introduced and debated in the legislature. One version, supported by out of stream users, allowed for out-of-kind, out-of-time, and out-of-place mitigation for wells. Rather than replace water in-time and in-place, this approach substituted the standard of “net ecological benefit” for all mitigation. This standard was designed to facilitate the use of out-of-kind mitigation, the value of which could not be readily quantified and compared to the impacts associated with consumptive use impacts from wells. Ultimately, the legislature, in Section 203(3)(b) of 6091 mostly rejected that approach. The final version of that section requires that:

“at a minimum the plan must include those actions...necessary to offset potential impacts to instream flows associated with permit-exempt domestic water use. The highest priority recommendations must include *replacing* the quantity of consumptive water use *during the same time as the impact and in the same basin or tributary*. Lower priority projects include projects not in the same basin or tributary and projects that *replace* consumptive water supply impacts only during critical flow periods. The plan may include projects that protect or improve instream resources *without replacing* the consumptive quantity of water where such projects are *in addition to those actions that*

*the committee determines to be necessary to offset potential consumptive impacts to instream flows associated with permit-exempt domestic water use.”*

The legislature is explicit that, with regard to mitigation or “offsets” for wells, it must always be in-kind (i.e.-“replacing” or “replace” consumptive water). Moreover, they state a clear preference for in-time and in-place offsets (which are given higher priority). The only time the plan may consider projects that do not replace “consumptive quantity of water” is when those projects are essentially above and beyond offsetting the “potential consumptive impacts to instream flows associated with permit-exempt wells.” Given these explicit directives, the application of the “net ecological benefit” standard seems very limited. It no longer provides a standard for mitigation or offsets for permit exempt wells (i.e.- an alternative to in-kind, water for water mitigation of wells) but, rather, provides a benchmark to evaluate the overall plan, especially with regard to projects that are above and beyond the offsets for consumptive use associated with permit exempt wells.

While a reader can tease these points out of the guidance, providing clear context for the term up front in the document would be extremely useful.

#### “High” and “Low” Priority Projects

While section 3.2.3.5 (C) states that projects used to offset well impacts must replace water from the consumptive use, the guidance could make this point more clearly, particularly in the 3.2.3.5(B) description of “non-water offset projects.” As noted above, out-of-kind projects are limited by 6091, Section 203(3)(b) to those that are “in addition to those...necessary to offset potential consumptive impacts to instream flows.”

More importantly, we are troubled that the document does not provide direction to watershed groups on how they should conduct the prioritization of high and low priority projects. It is abundantly clear that the legislature intended in-kind, in-time, and in-place projects to be used prior to reliance on lower priority out-of-time and out-of-place projects. Moreover, it’s not appropriate for the technical details on how this is done to be spelled out in legislation. Ecology should provide direction in either rules or guidance on this topic. Preferably, Ecology would provide detailed guidance on this matter, but, at a minimum, the guidance should direct watershed groups should utilize in-time and in-place (i.e.-“higher priority”) offsets to the “greatest extent feasible.” Ecology should review plans to determine if a watershed group has done so.

In addition, the Department should provide a more detailed definition of a “subbasin,” a term that is critical in terms of defining what constitutes “in place” mitigation. Subbasins should be defined to be relatively small hydrologic units. At a minimum, each major tributary should be considered its own subbasin. The description in Section 3.2.3.2 defers completely to watershed groups to make these

determinations. That approach will lead to inconsistent application of the law across the state. While watershed groups should be allowed to draw the lines for these units, they should be given general direction by Ecology that is based on best available science. It seems to us that this is exactly the sort of thing that *should* be described in the Guidance.

Thank you for reviewing our comments. Please feel free to contact me should you have any questions or concerns.

Bruce Wishart  
Sierra Club