

**Mitigation that Works**  
**January 15, 2008 Meeting Summary**

**Introductions and Opening**

Elizabeth McManus welcomed Forum members and then reviewed the agenda for the day. (See Attachment 1 for meeting agenda) Topics included:

- a review of the current regulatory and process framework for mitigation;
- a discussion of potential areas/topics for Forum recommendations; and,
- a discussion of possible opportunities for improvement related to habitat and watersheds and their role in mitigation.

The January meeting marks a shift from the introductory phase of the process to the deliberations that will ultimately lead to recommendations. In order for the Forum to complete its work by September of 2008, a draft report likely is needed in, indicating a need to start to identify initial draft recommendations in the March/April timeframe. Forum members agreed with this timing and expressed an interest in moving into the next phase of the process.

**Legislative Activity**

Josh Baldi suggested that before the Forum address the identified meeting topics, it would be useful for Forum members to share any information regarding potential legislation that might impact the Mitigation That Works (MTW) effort. Forum members agreed they should keep the group informed of the status of potential legislation throughout session. Josh suggested that the Department of Ecology send an update regarding relevant active legislation to Forum members prior to the Forum's February meeting. He also suggested that time be reserved on the February agenda for legislative updates.

Gordon White and Lauren Driscoll then reported on two potential bills that Ecology tracking with the legislature.

- A bill related to Chapter 90.84 RCW – Wetlands Mitigation Banking. Senator Haugen has expressed concern that mitigation bank service areas may be too broad and may therefore be seeking to limit the serviceable areas to Water Resource Inventory Areas. Lauren noted that a provision in the bill allows for serviceable areas to be expanded where ecologically defensible. This bill has not been dropped, however Senator Haugen asked the Department of Ecology for proposed language and the Department drafted potential language.
- Senate Bill 5145 - Clarifying existing requirements for conservation of agricultural lands. Lauren explained that this bill attempts to minimize the impact of mitigation on lands of long term agricultural significance.

A Forum member asked if either of these bills preempted any part of the Mitigation That Works Forum effort. Josh Baldi explained that the bills originated with Senator Haugen and that the Department was responding to her requests. He observed that the legislative activity indicates the level of legislative interest in mitigation issues and validates the Forum's work.

Michelle Connor of the Cascade Land Conservancy then informed the group of another bill that might be relevant to the Forum's work. She asked Dennis Canty of Evergreen Funding Consultants to describe the second bill. He explained that it is a study bill to examine the potential for private farmers to develop

ecosystem services that could be provided in conjunction with (not as an alternative to) ongoing agriculture. The bill would help determine if there is a significant match between the potential supply that farmers could provide and demand. He noted that the bill calls out the Mitigation That Works Forum process and that there may be an opportunity for some coordination between the two efforts. Michelle noted that CLC has private grant funding to work on the conservation market concept, but that these funds are insufficient to complete the outreach and analysis necessary to take that concept forward on its own. If combined with the proposed State study however, there would be significant resources to apply to the concept.

A Forum member asked how this approach differs from banking. Dennis described it as a market that uses farmers as the suppliers, as they would provide the needed resources on their land. An observer noted that habitat services could be sold as an easement so that land is still in production and not actually converted. Dennis responded that transactions in such a market could possibly be executed through a banking structure or a fee based approach. He explained that there are approximately 24 similarly-operating markets in the United States currently. A Forum member noted that the leases for riparian buffers established as part of Conservation Reserve Enhancement Program (CREP) are set to expire. He observed that such a market could help keep/extend those buffers. He suggested that this is a good example of a creative tool that could be added to the mitigation toolbox.

### **Regulatory and Process Framework- Context and Opportunities for Improvement**

Margaret Clancy then presented a brief overview of the regulatory and process framework for mitigation, highlighting previous efforts to identify potential improvements to the process. (*See Attachment2 for presentation slides*) The presentation reviewed the following:

*Mitigation Optimization*: As described in its final report, Mitigation Optimization was an effort by The Washington State Department of Fish and Wildlife, in cooperation with the Department of Ecology, to look at how to maximize the efficiency and effectiveness of mitigation decisions by implementing a process that synchronizes and integrates permitting programs and watershed-based planning efforts. Margaret noted that the effort considered how to leverage the scientific work being conducted for various planning efforts to improve mitigation effectiveness. She reviewed the conventional permitting process then presented the Mitigation Optimization Alternative, noting that the alternative process emphasizes coordination, facilitation and planning. The efforts recommendations included:

- Online Joint Aquatic Resources Permit Applications (JARPA)
- Online Permit Assistance (OPA) case managers to aid coordination
- Multi Agency Permit Team
- Utilize tools like banking and characterization
- Enhanced use of watershed plan projects to mitigation development impacts
- State in-lieu-fee program with appropriate statutory basis

*Puget Sound Shared Strategy*: A collaborative effort to restore and protect salmon runs across Puget Sound. Margaret explained that recommendations regarding mitigation from the Shared Strategy effort included:

- Identify off-site mitigation prior to permitting
- Encourage mitigation sites that benefit more than one resource.
- Utilize the science work of watershed plans.
- Meet regulatory mandates by selecting sites with highest benefit to affected resources.

Margaret summarized that the emphasis on the recommendation was on planning, before actually entering into the permit process.

Transportation Permit Efficiency and Accountability Committee (TPEAC) – Watershed Based Mitigation Subcommittee: The Subcommittee was tasked with creating a watershed approach to environmental mitigation. Margaret explained that this effort looked at mitigation from the perspective of transportation projects. It considered how to better coordinate land use planning with transportation planning to result in the most effective mitigation. Some of its recommendation included:

- Development of statewide or regional environmental plans
- Involve resource agencies in land use and transportation planning
- Consider SEPA non-project analysis for planning level
- Improve cumulative effects analysis
- Refine alternative and advance mitigation policies and initiatives
- Use Office of Regulatory Assistance leadership to improve permitting

RCW 90.74 – Aquatic Resources Mitigation: This Washington State law recognizes the lack of a statewide comprehensive mitigation policy and identifies several liabilities associated with traditional mitigation including:

- On site mitigation, in kind may provide fewer benefits than innovative mitigation.
- Regulatory decisions related to innovative mitigation proposals can take longer, be more uncertain and more expensive.

This law recognizes the above drawbacks to innovative mitigation and provides the flexibility to look at more creative mitigation tools. It authorizes:

- Innovative measure when timed, designed, and located to provide equal or better functions and values.
- Local governments to accommodate the goals of the chapter.

Megan White suggested that it would be beneficial for the group to know what has happened since the recommendations were developed. She provided a brief summary of the status of some of the TPEAC's recommendations. She noted that while the development of statewide/regional environmental plans hasn't occurred yet, the Department of Transportation is considering how to better integrate the resource agencies into transportation planning. In addition, DOT recently produced a cumulative effects study, so that recommendation has been completed. She added that her participation in the MTW Forum and other efforts is to help refine alternative and advance mitigation policies.

Dennis Canty offered some information regarding the Shared Strategy. He explained that much of the Shared Strategy's effort around mitigation focused on mitigation location. The Strategy worked on a method for evaluating the availability of mitigation resources on sites identified in salmon restoration plans. This method looked at both quality and quantity. He explained that the method was tested at approximately 60 different sites. He noted that the development of this method culminated as the Shared Strategy effort came to a close and that it would be beneficial for another entity to adopt this work. He further noted that the methodology is published, but could be provided to the MTW Forum.

A Forum member noted that the Mitigation Optimization report represented a snapshot in the overall mitigation process improvement conversation. She noted that some of the recommendations have been implemented. For example, there is online JARPA, a MAP team has been utilized for transportation projects, and there has been an expansion of the Office of Regulatory Assistance. In

addition, she explained that much work has been done around specific tools and making them available on the ground. Another Forum member asked if the tools can be used at a smaller scale and can their use be accelerated. He suggested the Forum take advantage of the existing recommendations and build upon them. Another member observed that local governments might have more flexibility to use certain tools like in-lieu-fee and wondered if such a tool could be implemented at the local level. An observer responded that there are some local governments who are using in-lieu-fee, including the City of Seattle for the Ship Canal. A Forum member asked if the necessary regulatory framework exists to implement the recommendations and directions provided by the efforts discussed. Another Forum member responded that it's important to not just utilize watershed plans and their list of projects, but to look beyond those efforts to more comprehensive efforts such as Birch Bay. A member observed that a key question to consider is the technical and legal thresholds necessary to support innovative and coordinated mitigation measures/approaches, such as off-site mitigation. Elizabeth noted that the Forum would need to prioritize what it wants to work on and consider how to make the broader concepts captured in the recommendation of past efforts come to fruition.

#### What Isn't Working with the Current Regulatory Process?

The group then considered what doesn't work with the current regulatory system. For example, what might make off-site mitigation easier/more routine? It was observed that embedded in this question are several potential problems with the current regulatory system, such as off-site mitigation isn't happening enough and isn't happening consistently. A meeting observer commented that one issue around off-site mitigation is a lack of guidance within the Agencies.

A Forum member suggested that under the current process, mitigation is not meeting its objective of true compensation for systems/functions lost. The Forum considered potential reasons for this failure, including:

- poor site selection
- poor design and/or construction
- not the right performance standards in place
- cumulative effects not anticipated
- sites not maintained and/or monitored
- lack of Agency resources around compliance
- mitigation not as important as economic development

Josh Baldi responded that many of the issues raised above are historical reasons for mitigation failure and that there has been significant work done to respond to these issues. He identified:

- Joint Corps, EPA, and Ecology guidance on mitigation siting
- The creation of Ecology's Office of Compliance
- Watershed characterization guidance and projects
- Anticipated mitigation banking rule in 2008 [*I think it's okay; Ecology will cover as part of the banking presentation*]

The group then considered what else might be an obstacle to successful mitigation. Other issues identified include:

- WFDW has little compliance and enforcement capacity.
- Lack of an ability or interest on the part of agencies in providing direction. . Application responses too narrowly defined as approved or denied with little dialogue/interaction regarding what might work. A Forum member noted that this issue is a result of capacity and the existing

legal framework. Another Forum member suggested that there may be a lack of incentives for applicants to direct their efforts in the most effective way.

- Too many conditions contained in stormwater and 401 permits. These may not be the most effective tools for detailing conditions.
- The process is not transparent.
- Tribal governments are not always brought into the process at the right time.
- Inability/lack of willingness to cross over within the legal and policy framework of different agencies. For example, an applicant may discover that what is acceptable for one agency is not for another.
- Lack of clarity regarding emerging/developing policies
- The need for applicants to address multi-species/habitats. Layered on top of this are different agency policies.
- The conversion of agricultural land.
- Lack of clarity around agency authority. I.e., who creates/sponsors mitigation projects
- Lack of clarity regarding how mitigation is quantified and by whom.
- Lack of predictability in process.

Forum members then discussed more specifically the legal structure. A Forum member asked if there are any opportunities to coordinate statutes. He asked if it is sometimes an issue that there is a lack of legal direction/authority or is there more of a concern that certain actions would be subject to legal action. He asked if statutes were actually in conflict with one another or if it's a matter of better coordination. Ecology staff responded that there are some common threads ("red threads") among statutes. Another Forum member observed that the Multi Agency Permit (MAP) Team was a good example of how the different threads among statutes and agency policies can be coordinated at the project level. It was also noted that watershed characterization information developed to-date is also contributing to the decision-making process. Another Forum member informed the group that the resource agencies participating in the MTW process are also working on a pilot project in Clark County to, in part, coordinate more effectively. She suggested that details on this effort would be available for discussion in approximately a month or two. Another Forum member observed that there have been many conversations over the years regarding improving coordination among agencies/policies and wondered if any recommendations ever proved successful. He suggested that it would be useful for the Forum to know what hasn't worked, what has worked, and if so, is it scaleable.

A Forum member suggested that if innovative off-site mitigation is going to occur, there needs to be more of a focus prior to the actual mitigation process. She pointed to the Birch Bay effort as an approach that developed useful landscape/watershed information. This information can then be incorporated into land use planning and allows for an analysis that stresses avoidance. She suggested that this information and the appropriate set of tools would make it simpler for landowners and developers to get mitigation needs/values met while continuing on with their work. Another Forum member noted that the current process is almost the reverse. He suggested that a critical question is how to flip the process around so that planning is not occurring during or after characterization. Josh Baldi suggested that Washington State is moving toward "flipping" the process as watershed knowledge and technical abilities increase. It was further noted that the Birch Bay analysis was extensive and comprehensive and might not be appropriate and/or feasible everywhere. Also, if a watershed has a similar analysis, what is the impact on property owners if local governments rezone based on that analysis? Forum members recognized that if/where zoning changes occurred, landowners would need to be compensated in some way to ensure an element of fairness.

A meeting observer then suggested that mitigation fails due to four root causes. He identified the following:

- An implied/tacit preference for on-site, in-kind mitigation and a lack of alternatives to this. He noted that existing watershed plans are used, in essence, as site specific analyses to support mitigation approvals.
- The system makes the developer responsible for figuring out and implementing mitigation projects. He suggested that developers generally do not have this expertise and that mitigation projects should be identified and implemented by those that do have the necessary expertise so that there is better design, construction and maintenance.
- Lack of follow-thru. He suggested that third parties should provide maintenance.
- An emphasis on one resource at a time. He suggested “ecosystem neutral development” supported by a single set of integrated resource regulations.

Forum members identified additional issues, including:

- Identifying clearly what agency/ies are in charge. She suggested that resources be directed to these entities so that the mitigation process can be more efficient and effective.
- Where large-scale, upfront planning occurs, there is a need to reduce the amount of obstacles and back-end review related to smaller scale projects.
- Conflicts between local jurisdictions and local regulations.
- Not enough options for applicants and a resistance to alternative options to the traditional mitigation approaches.
- The permitting process is too slow. There are too many agencies involved and too many opinions.
- A need for assistance/solutions for developers with smaller projects.
- Lack of clarity/definition regarding what a “watershed approach” actually looks like. It was suggested that the criteria for a watershed approach needs to address different parties’ needs and different species/habitats. A meeting observer suggested that the resource agencies should commit to defining what a watershed-based approach is and to developing an interagency rule to engage in watershed-based mitigation. This would allow the agencies to work off of the same watershed-based planning document.
- A need for more mitigation options for developers that also allow ecosystem functions to be fully met. Fee-in-lieu might provide an opportunity for such a win-win.

A Forum member asked how others at the table were considering predictability in the permitting/mitigation process. She noted that her perspective is that predictable doesn’t imply a cookbook approach as all projects are a little bit different from one another. She suggested that “predictability” could be defined around types of activities. E.g., home building. Josh Baldi suggested that an element of predictability is when and how alternatives to in-kind mitigation might be used while at the same time demonstrating that ecosystem needs are being met. Forum members observed that there needs to be predictability with respect to the process – cost, time, and outcome – and with respect to the environmental outcomes. A meeting observer responded that while each development project is a little bit different, they are not necessarily that different from one another. A Forum member suggested that it would be useful to identify where impacts are similar and where it might be possible to standardize the process to meet the impact/ecosystem “debt.” One possible approach for a standardized process would be development of programmatic permits by activity. Josh Baldi suggested that it’s also important to consider the “credit” side of the process, such as what tools can be used to

build a line of credit. He further suggested that it's important to consider how to bring ecosystem debt together with any established credit in a way that is technically and legally supportable.

### **Potential Areas/Topics for Forum Recommendations**

Forum members then considered a draft Mitigation Forum Project Map developed by the support team. *(See Attachment 3 for Draft Project Map)* The document was developed in light of individual Forum interviews and group discussion to-date. It attempts to organize the main topic areas identified by the group (light blue circles) and then key areas/issues Forum members indicated an interest in addressing in recommendations (individual bullets), within each of the main topic areas. The questions identified in the "deliberations" box are meant to assist the group by guiding its discussions/areas of inquiry for each of the main topics and related areas of interest. In addition, the support team produced a more detailed document to compliment the draft project map. The purpose of this document is to provide greater detail/explanation regarding the main topics and areas of interest as identified by Forum members. *(See Attachment 4 for Draft Topics List)* The group then considered the following three questions regarding the main topics and areas of interest:

- Are the main topic areas right?
- Are there any big topic areas or areas of interest missing?
- What is the best sequence of topics for Forum discussion?

One Forum member observed that not all of the main topic areas were weighted equally. He asked the group to consider where they might make the biggest difference in actually improving environmental outcomes related to mitigation. He suggested that monitoring/compliance/enforcement might result in the greatest results. Another Forum member suggested that the "toolbox" topic area was the most important for the group to focus on.

The group then discussed what might be the most effective sequence; to start with the planning/process elements and then cycle in a discussion of mitigation tools, or to begin with a discussion of the tools. A Forum member noted that she didn't think it would be useful to discuss tools without the right context. I.e., what needs to be in place in order for a tool to work? Another Forum member suggested that both the planning/process element and the toolbox element be discussed in parallel. (I.e., elements of both topics would be discussed at each Forum meeting.) Another Forum member responded that in order for the group to tackle both planning/process and tools at each meeting, Forum members would need to moderate their own comments in order to stay on track and use their limited time efficiently.

A Forum member suggested that the group recognize that it will not be able to resolve all implementation details, however might identify important implementation areas for focus and provide direction with respect to what useful next steps might be. She further suggested that the group discuss how to move the watershed/ecosystem approach to the next level. Another Forum member suggested focusing on the Birch Bay outcomes/results, costs, etc. to determine if it's possible to reproduce that effort and, if so, identify where such extensive analysis should occur. A Forum member responded that she would like to see/have information regarding the actual implementation/practical application of the Birch Bay process. She noted that in some cases, high level recommendations are problematic for agencies as they don't necessarily have the resources to move from the higher level recommendation to the more detailed practical applications. The group agreed that it would be useful to have local government representatives participate in relevant meetings, particularly representatives from Bellingham and Whatcom County to share how the Birch Bay results are being used at a practical level.

Margaret Clancy suggested that it might also be useful to have a representative of the Birch Bay citizens group available.

A Forum member observed that other planning processes/planning activities appeared to be missing from the documents. He suggested processes such as the Biodiversity Council should be looked at/included in the Forum's discussions. A meeting observer suggested moving monitoring to the technical category.

The group then considered how to address/incorporate the issue of not attaining the desired environmental outcomes from mitigation. Josh Baldi suggested that much of the activity around mitigation in the last three-four years has been a response to the low numbers associated with meeting environmental objectives. He noted that the group should be cognizant of some of the ongoing efforts developed to improve the environmental outcomes of mitigation and, if possible, in their recommendations, identify which of those efforts might need further work. Another Forum member suggested it might be useful for the group to acknowledge these other efforts, describe them, and where necessary provide comment. A Forum member suggested that some of the ongoing efforts might be considered tools. For example, the restoration element required under Shoreline planning might be an opportunity for mitigation.

The group completed its discussion and Elizabeth asked Forum members to e-mail any additional thoughts or comments on both the draft project map and topics list.

**Wrap-up**

The group then considered which topics should be addressed at its next meeting. It was suggested that for the toolbox element of the meeting, the group discuss mitigation banking. The discussion could focus on what's working, what isn't, and what the Forum might want to take on. Forum members suggested that there be some discussion of lessons learned, various perspectives presented, and inclusion of national and regional efforts. A Forum member noted that she would like to know: 1.) What banks are in place? 2.) Who has credits? 3.) Who has credits for sale? 4.) Who can purchase these credits or has access to them? Another Forum member suggested that an area for consideration is multi-resource banking. A Forum member also suggested that it would be useful to have another mitigation banker at the meeting to provide a broader perspective.

With respect to the planning/process element, the group indicated a preference to discuss avoidance and minimization. Forum members noted that Birch Bay would be useful for the avoidance and minimization elements and that the Clark County pilot effort would be useful in discussing agency/policy coordination. A Forum member observed that the group should also discuss avoidance and minimization within the project by project context. Another member suggested that it would be helpful to have local representatives talk about avoidance and minimization on a project by project basis and then at the watershed level. The group agreed to discuss avoidance and minimization from a project perspective at the February meeting, with a larger discussion of watershed characterization and planning (including information on the Birch Bay effort and, if available, the Clark County pilot) in March.

Jay Manning then joined the discussion, thanking Forum members for their participation. He stressed the importance of the Forum's work and his desire to ensure that the group's work is incorporated into the functions of the different agencies. He asked Forum members if it would be useful to include Agency principals at appropriate times throughout the process, such as when there are key decisions to be made. A Forum member suggested that it would be more useful to bring the principals in a bit later

in the process once the group has identified key action pieces around significant topic areas. It was also suggested that this timing correlated with Agency budgeting processes, which might be useful. A Forum member highlighted the importance of local governments in the mitigation process and asked how to best incorporate the local governments so that any practical applications of mitigation improvement might be implemented. Jay recognized the importance of individual local governments and the difficulty in incorporating all local governments in any process. He pointed to the inclusion of both the cities and counties through their association representatives, but also suggested that the Forum itself can create the table and energy that will interest local governments at all levels. Jay thanked the Forum members once again.

The Group agreed that its next meeting (February 19, 2008) will be at the Ecology building in Lacey as the legislature will still be in session. After that, other meeting locations will be considered, including potential locations north of Seattle.

The topics for the February and March meetings are:

- February:
  - Mitigation banking (not just wetlands)
  - Avoidance and minimization at the project level
  - Legislative update
- March:
  - Baseline/watershed characterization
  - Fee-in-lieu
  - Local government visits
  - What work to present to Agency principals

### **Next Steps**

- Forum members should consider who from their organizations are best to assist Ecology staff in developing a mitigation banking presentation and contact Lauren Driscoll and Gary Cooper with that information.
- Forum members should contemplate and consider their perspectives regarding avoidance, minimization and mitigation banking and be prepared to discuss these at the Forum's next meeting.
- The Draft Mitigation Forum Project Map will be revised to incorporate Forum member comments, including a version that lays out the sequence. Any additional comments on this document or the Draft Topics list should be e-mailed to the support team.
- The next Mitigation Forum meeting is February 19, 2008 and will be at the Ecology building in Lacey.

### **Attending Forum Members**

Jennifer Aylor (for Dave Remlinger), Wildlands

Josh Baldi, Washington State Department of Ecology

Allison Butcher, Master Builders Association of King and Snohomish Counties

Margen Carlson (for Tim Smith), Washington State Department of Fish and Wildlife

Michelle Connor, Cascade Land Conservancy

John Grettenberger, US Fish and Wildlife

Steve Landino, NOAA Fisheries

Faith Lumsden, Governor's Office of Regulatory Assistance

Doug Peters, Washington State Department of Community, Trade and Economic Development

Bill Robinson, The Nature Conservancy

Jodi Slavik, Building Industry Association of Washington

Ron Shulz, Washington State Conservation Commission  
Michael Szerlog, Environmental Protection Agency, Region 10  
Muffy Walker, US Army Corps of Engineers  
Megan White, Washington State Department of Transportation

**Forum Members Not in Attendance**

Dee Arntz, Washington Wetlands Network  
David Dicks, Puget Sound Partnership  
Rich Doenges, Washington State Department of Natural Resources  
Jim Fox, Washington Recreation and Conservation Office  
Mike Grayum, Northwest Indian Fisheries Commission  
Eric Johnson, Washington Public Ports  
Eric Johnson, Association of Counties  
Bob Kelly, Nooksack Tribe  
Chris McCabe, Association of Washington Business  
Dave Remlinger, Skykomish Habitat, LLC  
Rick Slunaker, Associated General Contractors of Washington  
John Stuhlmiller, Washington Farm Bureau  
Andy Meyer, Association of Washington Cities

**Audience Members**

Barb Aberle, Washington State Department of Transportation  
Dennis Canty, Evergreen Funding Consultants  
Gary Cooper, Washington State Department of Ecology  
Jenni Creveling, The Watershed Company  
Lauren Driscoll, Washington State Department of Ecology  
John Mehoves, Student, University of Washington  
John Mehoves, Self  
Don Stuart, American Farmland Trust  
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**Project Support Team**

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