Making Mitigation Work

The report of the Mitigation that Works Forum

September 2008

[NOTE TO REVIEWERS: This document begins to develop the draft Mitigation that Works Forum report. In some areas it has draft text for review by Forum members (challenge/context, shared vision, recommendations on watershed based and recommendations on process efficiency). Items in [brackets] highlight questions or other points that warrant particular attention from Forum members. In other areas it has a list of bullet points cataloging ideas for recommendations to date – these will be developed into text before the August Forum meeting. This is an early draft and is being reviewed by all Forum members (including Ecology) at the same time. The table of contents will be generated at a later date, when more of the draft text is complete. The line numbers are to facilitate your review and discussion and will be removed from the final report.]

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6. Increase Support for Local Governments

The Charge to the Forum

Environmental mitigation presents a real opportunity for a win / win between economic vitality and environmental success. In 2007 project proponents spent approximately [DOLLAR AMOUNT] on wetlands mitigation alone in Washington State. State agencies spent approximately [DOLLAR AMOUNT] to administer programs, and local governments spent untold thousands. Aquatic mitigation associated with Hydraulic Permits cost approximates [DOLLAR AMOUNT]. All total, according to a study by Evergreen Funding Associates, in the Puget Sound Region there is approximately [DOLLAR AMOUNT] invested in mitigation annually. Despite these sizable investments, there is broad agreement among all stakeholders that we do not yet see adequate return on this investment.

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- Estimates very, but it is certain that the majority of mitigation projects have not actually achieved their intended goals and are not effectively replacing lost or damaged resources and habitats. We are not even close to achieving the goal of "no net loss."
- Mitigation decisions are not adequately informed by watershed-level information, so opportunities to invest mitigation dollars in large-scale conservation or restoration efforts likely are being lost. Local land use planning often can drive development into the very areas that are most ripe for restoration or conservation.
- The process for reviewing and permitting mitigation projects is widely viewed as too slow and unpredictable.
- Alternatives to on-site, in-kind mitigation have not been adequately explored or put into place, limiting choices and encouraging small, site-scale approaches even when these efforts are not likely to be sustainable over time.
- Decision making often is fragmented across multiple federal, state and local decision makers, making it difficult to see or act upon landscape level impacts and creating a confusing patchwork of permit requirements.
- There are not adequate opportunities to account for the multiple benefits that some mitigation projects, especially larger scale projects, may offer.
- Longstanding regulatory approaches to mitigation have not yet fully caught up to newer, watershed-based scientific approaches.

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Many of the problems with environmental mitigation are well studied and well understood – and over the years a number of multi-stakeholder groups have made recommendations to improve the mitigation process. While some progress has been made to improve mitigation as a result of these efforts, there remains broad dissatisfaction with mitigation programs and outcomes.

In this setting, the Mitigation that Works Forum was convened in December 2007 to agree on a shared vision for successful mitigation and identify a set of practical actions that could be taken to make all aspects of aquatic mitigation work better.

Our Shared Vision of Successful Mitigation

The key element of our shared vision for successful mitigation is that it *work* – communities should be assured that habitats and species are protected and, ideally, that the quality and quantity of environmental resources improve over time; businesses and development interests should have assurances that well designed projects can be permitted in a timely fashion and should be given better choices about how and where to mitigate impacts so they can get meaningful return on their sizable mitigation investments ; and regulatory and permitting agencies should have the confidence, tools and resources to put mitigation in the right place in the watershed, make decisions quickly and monitor implementation to assure desired results are achieved.

Mitigation that *works* will be recognized primarily by the results it achieves. Our shared vision is that successful mitigation:

- Takes a watershed approach to replacing lost ecosystem functions in the right ways and in the right places so there is no net loss of ecosystem functions and values.
- Is better integrated with local land use planning and regional transportation planning.
- Focuses mitigation investments on the areas and functions that have the highest need for protection and highest potential for restoration, so that the health of watersheds improves over time.
- Is timely and predictable – project proponents know what to expect and the standards and the permits required and processes for agency decision making are transparent and understood providing clear paths to approval.
- Makes use of a broad set of options such as banking, in lieu fee, and advance mitigation, in addition to traditional site-scale approaches.
- Relies on programmatic decisions where possible, to further streamline the process and focus resources.

These words may seem familiar and are in fact common to any number of past efforts to improve environmental mitigation. We emphasize that, in our view, this shared vision is NOT yet being

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widely achieved by regulatory agencies, permit decision makers, or project proponents. Many projects continue to be poorly sited, poorly designed and implemented, and poorly maintained (if they are maintained at all). Ecological values and functions continue to be lost and the cumulative impacts of many poor decisions (or failure to mitigate at all) increasingly imperil watersheds, especially in developing areas.

To achieve our vision of successful mitigation we expect and embrace that significant changes in the way that mitigation is done are needed. Policy and implement direction both must be different. These changes include:

- Better, more consistent use of existing information in watershed characterizations, and watershed and salmon recovery plans, and completion of characterization efforts so we have an information-basis for good mitigation decisions.
- More reliance on natural systems – so that mitigation projects are more likely to be naturally sustainable over time.
- Emphasis on larger, consolidated mitigation opportunities rather than small, piece-meal projects and, where mitigation is needed, more offsite mitigation through mechanisms such as banking, in lieu feel and advance mitigation, so that mitigation occurs in the locations that are most ecologically appropriate and beneficial to the watershed.
- More out-of-kind mitigation – so investments are made in the places and for the ecosystem functions that are most ripe for protection / restoration.
- More consideration of how mitigation planning fits into comprehensive planning and regional transportation planning.
- More predictable permit decisions both for mitigation providers and for project proponents, and more programmatic mitigation agreements and general permits.
- Agreements among regulatory and permitting agencies to integrate decision making across levels of government and environmental programs.
- Additional investment in compliance monitoring and enforcement so we know where mitigation projects are working and can fix the ones that are not.
- Additional investment in training and support for the local government permit writers and planners who are on the front lines of mitigation decision making.

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Bringing about the changes necessary to achieve our shared vision of successful mitigation forms the basis for our recommendations.

Building on Recent Improvements

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In our deliberations on successful we heard stories of failed programs and projects but also stories of progress. These include:

- Ecology, for the first time, has dedicated resources for mitigation compliance monitoring and enforcement.
- Ecology, EPA and the US Army Corps of Engineers are working on joint guidance to address when off-site mitigation may be appropriate and how to make decisions about off-site mitigation.
- Other?

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Successes like these begin to create a foundation for more improvements to mitigation programs and outcomes.

1. Establish a Watershed Based Approach to Mitigation

Establishing a watershed-based approach to mitigation means that decisions about where and how to make mitigation investments will be based on an understanding of watershed processes and their effects on ecosystem functions. Mitigation efforts that are watershed-based are more sustainable than those that account only for site-scale factors and are more compatible with land use decisions related to conservation, restoration and development. By approaching mitigation at the watershed level we will steer mitigation investments to the places and ecosystem functions that are most likely to be successful and meaningful, leveraging mitigation efforts to improve ecosystems over time.

SHORT TERM ACTIONS

1.1 Compile and Expand Watershed Characterization Information. [Ecology] should compile existing watershed characterization information and complete watershed characterizations for [all?] watersheds in the Puget Sound Basin and for [high-growth watersheds outside the Basin, including east of the Cascades]. Watershed characterization information should be compiled (or where information is not available, developed) at a level of detail necessary to [identify high-priority areas for protection; ecologically important areas that are minimally altered and can be effectively restored; unique, rare or otherwise intrinsically valuable resources; and areas where more intensive development can occur without major additional adverse effects on water quality, water flow or habitat.] The characterization information should be used to help identify areas that are priorities for acquisition (or protection via conservation easements), areas that are appropriate for mitigation/conservation banks, and areas/resources around which in-lieu fee programs could be structured. These areas should be mapped and maps provided to federal agencies and local governments and made available to project proponents and the public. This information, essentially, forms a baseline from which we can measure whether we are achieving no net loss.

[Do you want to say anything more detailed about the level of characterization needed based on the update at the last meeting? Anything about potential costs?]

1.2 Compile Watershed and Salmon Recovery Plan Information to Create an Inventory of Potential Mitigation Sites/Projects. [Ecology?] should mine existing plans, including watershed restoration plans, biodiversity and salmon recovery plans, to create an inventory of sites and projects that might be candidates for mitigation. This effort should start with the Puget Sound Basin and other areas under intense development pressure. The mitigation site identification tool created by Evergreen Funding Associates and Parametrix in 2007 as part of the Shared Strategy might serve as a starting point for this identification. Good candidate sites for mitigation should be mapped on the watershed characterization maps recommended above.

1.3 Establish clear expectations about what information is needed to make various types of mitigation decisions. [Ecology and the Department of Fish and Wildlife] should work with local government planners and permit writes to produce guidance on the types of information needed to support different types of mitigation decisions, including identification of priority areas for acquisition (or protection), areas that are appropriate for mitigation/conservation banks, and areas/resources around which in-lieu fee programs might be structured. The guidance should acknowledge that not all mitigation decisions require the same level of information and should encourage confidence in decision makers that they can recognize when information is adequate. The work this Forum did to outline a "sliding scale" of mitigation-related information and decisions might for the basis for this guidance.

1.4 Use Watershed Characterization Information to Expedite Mitigation Decisions. [Ecology, the Department of Fish & Wildlife, and ???] should make a clear policy statement to encourage the use of watershed characterization information, including the inventory of potential mitigation sites for decision-making at the project level. This means state government would establish the expectation that watershed characterization information will be used in state mitigation decisions, and encourage local planners and permit writers and the federal mitigation agencies to rely on watershed characterization information in their decision making. [Ecology and other agencies] should establish policies and guidance to describe how permit applicants and other project proponents (e.g. bankers) can qualify for expedited mitigation approval by proposing projects that are consistent with the areas/sites identified in the watershed characterization maps recommended above.

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LONGER TERM ACTIONS

1.5 Use watershed characterization to inform land use planning. Where information on high-priority areas for conservation, restoration and development do not match existing land use planning and zoning, [CTED and Ecology] should enter into a dialogue with the affected local jurisdictions to encourage them to consider this information in future critical area ordinance and comprehensive planning updates. This dialogue should include both opportunities to more closely align planning with watershed characterization, to encourage consideration of watershed characterization in decisions about where development will be place, and strategies to maintain the total amount of buildable land available and to value the water quality, water flow, and habitat services that conserved lands may provide. [Ecology and other agencies] should indentify one or more local jurisdictions that to participate in a pilot project designed to fully integrate the characterization information into a local land use and comprehensive plan (similar to the Birch Bay watershed planning effort) and should support the pilot project with funding and technical assistance. This should include exploration and testing of concepts such as transfer of development rights, conservation markets and other mechanisms to monetize the value of conserved.

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[QUESTION: do these recommendations adequately get at the information piece?]

2. Reinforce and Strengthen the Importance of Avoidance and Minimization for Resources that Provide High Ecological Function

- Use watershed/landscape assessment to identify priority areas for protection
- Track avoidance and minimization efforts (e.g., when are projects changed)
- Develop a check-list of practical avoidance and minimization best practices for project proponents and local governments
- Increase funding for acquisition and protection of priority areas
- Need for education / support for local governments

3. Develop More Coordinated, Predictable Approaches to Reviewing Mitigation Projects

By expanding use of inter-agency agreements, lead agency approaches, programmatic agreements and general permits we can reduce the transaction costs association with mitigation, make decisions more reliably and more quickly and ease tensions on all sides of mitigation efforts.

SHORT TERM ACTIONS

3.1 Document up front coordination of mitigation decisions. [Ecology?] should reach out to the Federal mitigation agencies to determine how the federal agencies can rely on the watershed characterization information compiled and developed under Recommendation 2. Ideally, this will result in a set of memoranda of understanding or agreement that maximize reciprocity for mitigation decisions across agencies and among levels of government. As part of this effort, [Ecology?] also should actively seek to develop local government support for the state/federal agreements to promote consistent implementation at all levels of government.

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3.2 Expand use of the lead agency concept. [Ecology?] should expand use of the lead agency concept for project-level mitigation decisions. For projects that will require more than one permit, the lead agency approach should clearly identify what permits are needed, who is the decision maker for each permit, and establish a single point of contact, or lead agency, for the project proponent to interact with the permitting agencies. [More on this? Specific types of permits/decisions for which to highlight use of the lead agency approach?]

3.3 Expand use of programmatic agreements and general permits. Ecology, the US Fish and Wildlife Service, NOAA Fisheries, the US Army Corps of Engineers and US EPA should identify opportunities to expand use of programmatic agreements and/or regional general permits for common types of development projects that often require mitigation. These agencies should work together to identify common mitigation situations that may be candidates for programmatic agreements and/or regional general permits based on the number and types of permits issued in the past [number?] years. Our hope is that at least one new programmatic agreement and one new regional general permit could be completed within a year of this report.

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3.4 Continue, Expand and Mine the Office of Regulatory Assistance's Integrated Project Review and Mitigation Tools Initiative. In a pilot project with Clark County, ORA is working to create an on-line system to help project applicants identify permit requirements and permit review coordinate their review process. This project has great potential and should be continued and expanded. Expansions might address: making the system available to additional communities or statewide, adding more mitigation functions to the system (currently it is focused on wetlands), making the system work for the marine environment, and addition more permits, such as stormwater and shorelines.

3.5 Mine the Office of Regulatory Assistance's Integrated Project Review and Mitigation Tools Initiative. As the Integrated Project Review and Mitigation Tools Initiative, ORA is gathering information about the consistency of permit conditions across permitting programs (e.g., if a condition is meant to address the same type of action whether it is worded in the same way), and about overlaps and conflicts between environmental requirements and permits of various agencies. This information, if acted upon, has the potential to greatly improve permitting programs. ORA should report to the other State Agencies, including the Departments of Fish and Wildlife and Ecology, about their findings and convene these Agencies to resolve discrepancies in permit conditions and identify ways to resolve overlaps and conflicts among environment requirements and permits.

[Is this enough on the Clark County pilot? You also had talked about the possibility of a Report to the Legislature on lessons learned and opportunities to expand the tool – should we include that?]

LONGER TERM ACTIONS

3.4 Reform and streamline mitigation regulations. Working with local government planners and permitters, [Ecology and the Department of Fish and Wildlife] should explore creation of a single, integrated, streamlined set of state regulations for environmental mitigation that might be used by both state and local permitting authorities. The goal of this effort would be [what?] [And, which regulations/statutes would the forum like to highlight?]

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4. Develop and Implement a Wide Variety of Compensatory Mitigation Tools as Alternatives to Site Scale Mitigation

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Successful mitigation will require a wide variety of tools and options for decision makers and project proponents including multi-resource banks, in-lieu fee programs, advance mitigation, and traditional site-scale approaches. By working together to improve the effectiveness of all the mitigation approaches and to clearly identify how decisions about use of alternatives to on-site mitigation will be made, Ecology, EPA, the US Army Corps, the Department of Fish and Wildlife, the US Fish and Wildlife Service and National Marine Fisheries Service (collectively "the Agencies") can increase the predictability and performance of the entire mitigation process.

SHORT TERM ACTIONS

4.1 Create a well-defined menu of options for mitigation describing best practices for both the traditional site scale approach and off-site approaches. The Agencies should issue joint guidance describing best practices for mitigation and multi-resource banks, in-lieu fee programs, programmatic mitigation, advance mitigation, and traditional site-scale mitigation. This guidance should serve as a resource both to local government permit reviewers and as a guide for project proponents.

4.2 Publish clear guidance on when off-site mitigation may be appropriate. The Agencies should issue joint guidance describing the circumstances under which off-site mitigation may be appropriate, the specific information needed to approve an off-site mitigation approach, and how decisions to approve off-site mitigation are made. This guidance should create a predictable set of expectations about where off-site mitigation might be used and how decisions to do off-site mitigation will be made. Every effort should be made to leverage the watershed characterization information described in Recommendation 1 to create as much predictability as possible around where off-site mitigation may be appropriate in individual watersheds.

4.3 Support local governments in establishing policies, regulations and processes for using the full suite of mitigation tools including off-site mitigation. Local governments are critical in implementing mitigation policies. The Agencies and the Department of Community, Trade and

Economic Development should work closely with local governments on development of the mitigation menu described in 4.1 and the off-site mitigation guidance described in 4.2 to ensure that these policies can be implemented by local governments and should work with local governments to prepare model local policies, regulations and guidance for individual jurisdictions to consider adopting into their local codes.

4.4 Train project proponents, local government permit writers, and agency staff in when off-site mitigation may be appropriate and assist local governments in establishing off-site mitigation programs. The success of improved mitigation tools depends on implementation – the best guidance on tools will not improve mitigation outcomes if the tools are not embraced and used by project proponents and mitigation decision makers. We believe that joint training – where all interested parties can learn about mitigation tools and how they may apply to their individual circumstance – is the best way to build acceptance and encourage use.

4.5 Improve the wetlands banking system. Ecology should complete and expand ongoing reforms to the wetlands mitigation banking process to ensure that banks can be efficiently identified, permitted and used.

4.6 Establish multi-resource banks.

4.7 Placeholder for something on in lieu fee

4.8 Placeholder for something on advanced mitigation

LONGER TERM ACTIONS

4.9 Track and monitor use of alternatives to on-site mitigation. Just as the Agencies must track and monitor the implementation of traditional on-site mitigation, they should pay attention to how and when off-site mitigation approaches are being used. This tracking should consider whether off-site mitigation approaches are being used in appropriate circumstances and whether they are meeting their performance standards and achieving no let loss (where that standard

applies). The tracking also should consider where traditional on-site mitigation efforts are not functioning as well as an off-site approach might have. (For example, if a smaller, lower grade, isolated on-site wetland is not maintained or so separated from hydraulic processes that it does not contribute to system function.) This tracking information should be used to make adjustments to the policies and guidance on mitigation approaches and to refine training and outreach.

5. Support Mitigation Efforts with Compliance Monitoring and Enforcement

We must know what we are getting for our investments in mitigation and we must be able to identify and correct mitigation projects that are not working so we can achieve no net loss and, ideally, recover watersheds over time.

SHORT TERM ACTIONS

5.1 Account for no net loss of ecological function.

[What should we say specifically about this? Who does what?]

5.2 Develop and track a suite of standard evaluation metrics and monitoring approaches. Ecology should work with the Washington Department of Fish and Wildlife, the US Army Corps of Engineers, the US Environmental Protection Agency, NOAA Fisheries and the US Department of Fish and Wildlife to develop a set of common evaluation metrics or performance standards for different types of mitigation projects (e.g., wetlands, shorelines, habitat) and some common approaches to monitoring for these metrics. Metrics should be focused on determining whether ecological functions are truly being replaced and on gauging the sustainability of the mitigation project over time. Use of common metrics and monitoring approaches across projects over time may allow for comparison over time of the success of various mitigation design, construction and maintenance strategies. We emphasize that on a project-by-project basis common metrics would need to be supplemented with project-specific metrics.

5.3 Allow for adaptation/adjustments in mitigation efforts as needed.

[What should we say specifically about this? Who does what?]

5.4 Dedicate sufficient human and financial resources to monitoring and adaptive management programs at all levels of government. This is critical. Ecology, for the first time, has dedicated staff and resources for compliance monitoring and enforcement for mitigation projects We understand that resources at all levels of government are limited and are pulled in many, many

directions. At the same time, it just doesn't make sense to rely on a mitigation to protect and (ideally, over time) recover the ecological health of our watersheds, spend a lot of money getting projects built, and then not check to see how they are doing. The results of this are predictable and have been experienced – failure of many projects and catastrophic failure of mitigation system to achieve no net loss. Ecology should convene the mitigation agencies and local governments to develop a strategy to create sustainable resources for compliance monitoring and enforcement of mitigation projects. This should include exploration of opportunities for cooperative monitoring involving local, state and federal agencies based on mutual aid or interlocal agreements, and of options for more third-party implementation of monitoring.

6. Increase Support for Local Governments

- Work with local governments to understand and provide what they need to increase the predictability of project review.
- Additional training and coordination support for local governments so they can network more effectively.
- Other?

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