Mitigation that Works
July 15, 2008 Meeting Summary

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

- A discussion of advance mitigation and how to address it in the Forum's recommendations;
- A discussion of Ecology's new mitigation compliance program;
- A review of draft recommendations and terms in the draft report; and
- A discussion of avoidance and minimization and how it should be addressed in the context of a watershed report and in the Forum's recommendations.

Advance Mitigation
Gretchen Lux gave a presentation on advance mitigation to remind Forum members what is and how it is typically used (See Attachment 2 for the presentation). Advance mitigation is compensatory mitigation implemented before, and in anticipation of, future impacts to aquatic resources. It is used by only one applicant for their anticipated impacts and is not a substitution for a mitigation bank. A Forum member asked what the motivating forces were behind creating advance mitigation. Gretchen replied that advance mitigation as been around for some time but has not been as broadly accepted because of a lack of framework and certainty in the process. Recently, it has been encouraged as a technique due to more assurances of success.

The environmental benefits associated with advance mitigation includes a reduction the temporal impact, allows development of mitigation at larger sites with more ecological value, and reduces risk to the environment. A Forum member inquired if the mitigated site will have the same function as the one destroyed. Gretchen replied that it is anticipated that advance mitigation will include the same standards as a typical mitigation strategy.

The permit process benefits of advance mitigation include reducing permit processing time, mitigation is pre-identified and approved by the agencies reviewing the permit, the functional value of the mitigation is known, and document and acceptance by agencies can be easier. Advance mitigation has the added benefit that the site can be constructed with present-day funds. Applicants that use advance mitigation experience cost savings and often achieve a better value per acre.

Gretchen stated that one of the challenges with advance mitigation is that there is no real guidance on what information is needed to identify which proposed projects should use advance mitigation. Further, there is limited guidance on assessing the value of an advance mitigation site and what the baseline requirements should be. If there is uncertainty about advance mitigation many applicants may choose not to use the tool.

The Washington Department of Transportation (DOT) feels that advance mitigation should be in the Forum's tool box. The Forum can provide recommendations that support the need for advance mitigation and direction to agencies to develop guidelines for the tool. The Forum can also support the need for staffing to work on drafting the guidelines. The guidelines need to address what a permit needs to get approval for advance mitigation and establish some certainty around the value of the mitigation. A Forum member asked if each agency is meant to have their own guidelines for advance mitigation. Gretchen responded that the guidelines should be developed jointly. Guidance was put out

in 2006 (with public input) but is not enough guide advance mitigation. Another Forum member inquired if DOT is the most typical applicant using the technique. Gretchen replied that the DOT is the most frequent applicant, but advance mitigation has also been used by the Port of Chehalis and the Port of Skagit County. Advance mitigation is a technique that seems more suited for a public entity; however it could also work for a developer that was large enough to have multiple sites. A Forum member asked why the DOT did not use advance mitigation for widening I-5. Gretchen responded that using a bank gave DOT more flexibility in that case and added that advance mitigation is for approximately known impacts. Banks typically have a wider service area, while advance mitigation is focused in a smaller area.

A Forum member asked if given DOT's long range planning if there could be a planning process that fits into advance mitigation. DOT representatives replied that the State Legislature has changed the funding process for transportation. The planning horizon for DOT has changed with individual projects being funded rather than batches of projects. When DOT got into banking, they had a 20-year plan and now that horizon is not as clear. DOT is looking at doing more advance mitigation rather than banks depending on which technique is more appropriate for a given project. However, if advance mitigation remains under the current guidance, there may be some people avoiding it because of the uncertainty (i.e. if the applicant does not get the mitigation right, they may have to pay to fix it or have it re-done). The guidance can also help add clarity to the impacts, functions and how to make appropriate compensation. There is also the option to do split mitigation, with some mitigation occurring on-site and some off-site. The guidance should also state that advance mitigation should be done within the watershed context to determine the best siting for the ecosystem and take specific concerns into account. Josh Baldi noted that the Ports' perspective is do not make if more complicated than it has to be and clear guidance would be welcomed.

Elizabeth suggested that the Forum review the recommendations related to advance mitigation. Forum members agreed to keep advance mitigation in the toolbox. Members also agreed that within the recommendations, and that advance mitigation needs to be better defined and include clear guidelines. A Forum member requested that some language be included in the recommendations to acknowledge that this technique may be a lower funding priority for some in the larger scheme of the report. Elizabeth suggested that the report reflect this by adding language along the lines of this guidance should happen after guidance on banking and in lieu is done or explore guidance with the community that is most likely to benefit from it.

Forum members discussed how to define advance mitigation within the context of the recommendations and what guidelines might include. Members agreed that the definition of advance mitigation should also include a description of how the technique is different from banks and in what cases each technique should be used. A Forum member suggested that a sliding scale for credits, similar to banks, could be used to make advance mitigation more predictable. This would allow an applicant to know what mitigation value will be produced and provide more assurance. A Forum member asked if there should be criteria for what is an appropriate site for advance mitigation. Other Forum members responded that site selection for advance mitigation is important and there is the added benefit of having time to find the right site; however the same criteria for mitigation can be used for advance mitigation. A Forum member suggested that the advance mitigation guidelines contain a common approach to site selection based on watershed characteristics. It is important that the guidelines development process be transparent and based on technical rigor.

A Forum member asked if advance mitigation is a standalone tool or part of permitee responsible mitigation. Another Forum member responded that the group should be cautious in limiting who can

use what tools and focus instead on what the federal rule has set out. The group should be thinking about what processes we can recommend as part of a larger toolbox that will allow for some flexibility to do the best job for mitigation on a case-by-case basis. An additional Forum member wondered if the discussion around advance mitigation is because banking has not as successful and that the need for advance mitigation would be diminished if banking were "fixed". Gretchen responded that the scale of the project is more indicative of the selection of advance mitigation or banking. Having the mitigation value up and functioning is important, while banking takes time to decide how to use the credits in a large service area.

Forum members then discussed if there were any lessons from banking that can be applied to advance mitigation. A Forum member asked how sites are selected for advance mitigation and if imminent domain is ever used. Barb responded that imminent domain is rarely used for advance mitigation. DOT uses a series of processes to screen sites based on specific characteristics to find the best sites for mitigation. A Forum member suggested highlighting a connection between advance mitigation and advance planning. This would require a broader scale watershed and land use characterization and would allow local or county governments to have the best mitigation sites already identified. This can also help with permitting and provides documentation.

Elizabeth summed up the session a noted that the Forum reviewed the need for clear definition of advance mitigation, guidelines, and assurances.

Draft Recommendations on the Mitigation Tool Box

Elizabeth led the Forum members in reviewing the draft recommendations on the Mitigation Tool Box. She encouraged members to send her handwritten or track changes comments on the latest draft of the report.

Forum members then considered the section of the draft recommendations relevant to mitigation tools. Forum members had the following comments:

- Generally:
  - A Forum member suggested that the group think about what tools are geared toward local governments or provide local benefits and integrate this into the recommendations. If we do not educate, mandate, or incentivize then the report will not bring local government along. This should be considered for every recommendation.
- 4.1
  - Modify "best practices" with more specific language.
  - A Forum member commented that the group has not discussed programmatic mitigation and wanted to make sure the group was comfortable with the reference and that it is consistent with the federal rule. Another Forum member responded that the federal rule is flexible enough and is consistent with the guidance in the draft report. Programmatic mitigation is similar to advance mitigation on a city level and directs applicants to mitigation where it makes most sense. It is not a technique that is used very frequently. A Forum member suggested that programmatic mitigation may be a good candidate for a demonstration project.
  - Forum members agreed that programmatic mitigation requires additional definition and explanation.

  - Forum members discussed the role of local government in the recommendations. Members acknowledged that there may need to be two approaches for what is needed at the state/federal and local levels. It might be better to show success at state/federal level and implement at local level by building on the Birch Bay model
- 4.2
  - A Forum member suggested adding text about why on-site mitigation is not included. Forum members agreed that on-site mitigation is dealt with early on in the draft report and does not need to be added here.
  - Include dates or a timeline.
  - The federal rule was implemented June 9, 2008. The US Army Corps of Engineers (USACE) is looking at conducting national trainings. The Northwest Division is further ahead because there is already a team in place to determine the implementation of the rule. A Forum member noted that trainings are important and the Forum should think ensuring that the resources to conduct them exist. Compliance and enforcement programs also need to be brought up to speed on their role.

- 4.3
  - Forum members agreed that the recommendation should also include guidance on what could be included in a critical area ordinance to allow the use of the mitigation tools. It is also possible to create model code for in lieu fee programs. An inter-local agreement was also suggested as an option.
  - After the mention of the "mitigation menu" call out specific activities that could be undertaken in local jurisdictions.
- 4.4
  - A Forum member noted that training has begun on the Mitigation Rule.
  - Members discussed creating a curriculum and part of education and outreach.
  - Michael Szerlog mentioned that EPA has program money available to do watershed-level projects. This could be used to do a pilot or training at a watershed. Gordon White noted that the Department of Ecology is doing a lot with their outreach program in Neah Bay and have a vehicle to reach out to local governments. The Washington State Department of Community, Trade and Economic Development (CTED) also has workshops. Jodi Slavik helps develop a lot of programs in environmental areas for the Building Industry Association of Washington.
- 4.5
  - A Forum member suggested that the group discuss banking in more detail. The draft report addresses banking but also leaves important elements of banking unspecified depending on who reforms the rule. Another Forum member suggested that 4.5, 4.6, 4.7, and 4.8 could be populated with model ordinances that allow the banking system to work.
  - It takes approximately one year to get a bank approved depending on how the time is measured.

  Elizabeth suggested that the group read the banking rule and work with their agencies to draft a proposal on their perspective on banking for the August meeting. She also noted that the Banking Advisory Group held its last meeting just before the Forum started meeting. The draft rule went out in May and the Banking Advisory Group has it now. There is significant cross-representation among the Banking Advisory Group and the Forum. A Forum member

noted that before rubber-stamping the Banking Advisory Group's interpretation, the Forum should decide if it aligns with the group's vision. Another Forum member asked that Dave be present for the Forum's reaction to the Banking Rule.

- 4.6
    - A Forum member mentioned that Steve Landino is having a meeting to effectuate multi-resource banks transactions. He may be able to provide information on multi-resource versus single resource banks. Steve will bring an example of what a multi-resource crediting system looks like to the August meeting.
- 4.7
    - Chris Townsend gave the Forum and update on the fee in lieu program. The fee in lieu workgroup met to talk about the programmatic approach to the fee in lieu program. Both public and private entities are eligible to use in lieu fees. Dennis Canty is looking into multi-resource fee in lieu programs. Dennis is also analyzing the banking metrics to determine if ecosystem credits or function and value credits are preferable. There was no agreement on the metrics, so Dennis will come back with a proposal for the Forum to discuss. The workgroup decided that the service area should be at the watershed level, but there wa some confusion about what is needed at the watershed level. The fee schedule and temporal loss were also discussed by the workgroup as well as the estimated costs for the fee in lieu work versus the stewardship costs. Dennis is looking at what a recommended fee schedule would look like. A suggestion was made to create a pre-capitalization of a fee in lieu system, which ends up looking very similar to advance mitigation. Dennis is examining the pros and cons of a pre-capitalized fee in lieu program. The site and project selection will use existing plans on a watershed based approach. There is general agreement that the administrator of the fee in lieu program should be public or nonprofit entities, but that the implementers and/or maintainers could be public, private or nonprofit. Discussion is still needed about how to pay for the long term management of the sites. Dennis is developing a conceptual model for the next meeting and an MOU for state, federal and local governments to adopt a fee in lieu program. The fee in lieu workgroup will convene again before the August meeting.
    - A Forum member mentioned that there are some topics that are similar to other workgroups and asked if fee in lieu workgroup is consciously talking about how some issues are based in common performance measures versus specific measures. Chris noted that the workgroup is conscious of the dynamic and will verify that Dennis is in line with the Forum's thinking.
    - A Forum member asked for a description of Dennis' process for figuring out the economics. Dennis is taking into consideration all of the costs associated with the mitigation site (e.g. selection, design, acquisition, development, etc). There are challenges to developing a per unit fee that is competitive with what the developer is doing. An additional challenge is taking into consideration that current mitigation methods do not work a majority of time. The mitigation tool has to be accompanied with an enforcement program, an opportunity value for better predictability and reduced risk in long term maintenance.
- "Programmatic Mitigation" was inserted as Short Term Action 4.9.
- 4.10

- A Forum member suggested that the recommendation be agnostic on on-site versus off-site mitigation.
- A data exchange was suggested for watershed level data. Michal Szerlog offered to find out more information about the Oregon data exchange and report back to the group.

Ecology's New Mitigation Compliance Program

Lauren Driscoll gave a presentation on Washington State Department of Ecology's (Ecology) new mitigation and compliance program. Ecology got a three year grant from EPA to set up a new mitigation compliance program and establish a new database for permit information. Ecology also received funding from the State Legislature to make compliance part of the core project. The goal of the program are as follows: (1) get 100% of data into the database; (2) go out to a project within 18 months of notification of construction; (3) go out to the site at the midpoint of the monitoring period; and (4) go out to the site at the close of the monitoring period. Part of the program is to have dedicated staff to examine monitoring reports.

A Forum member inquired if Ecology calls to see if a site is being constructed. Lauren responded that Ecology is not consistently notified when a project begins construction. The applicants include those parties that were issued permits or orders with mitigation requirements. Applicants are also asked to submit an as-built report. Ecology is getting a lot voluntary compliance when the applicant is called to see if the site is built and reminded to submit the as-built report. Ecology staff also goes through a compliance checklist with the developer or consultant. This simplifies evaluating compliance with permit conditions. Ecology staff then follow up with a letter that states that the applicant is either in complete compliance or what was found out of compliance and suggestions for how to remedy the situation. Ecology staff focus on voluntary requirements to ensure a successful mitigation. At this point, Ecology is not able to draw any major conclusions about the overall success of the program because the current sample size is too small; however, sites are doing better with invasives and most are complying with grading requirements. Ecology is expecting to see better successes from sites because staff are visiting the sites early and will have more of a presence in site construction. The program has also been helpful in identifying areas where more specificity is needed in the permits and creating better coordination with partner agencies. Both Ecology and USACE use the same checklist. Margaret Clancy asked if the checklist is available online as it might be helpful for the consultant community. Lauren responded that she would check on the availability of the checklist.

Lauren also noted that as part of the new mitigation compliance program, Ecology also worked with Attorney General's office to create a deed restriction. A Forum member asked if the deed restrictions are widely distributed. Lauren stated that she is not sure, but will find out. The next steps for the mitigation compliance program are to provide more guidance and training to local government and developers and to do more monitoring during the construction period. Elizabeth noted that increased guidance and training and additional compliance visits could easily be turned into recommendations to other agencies for funding.

A Forum member mentioned that the prioritization of enforcement for sites that do not have permits would be worth noting in the draft report. It is a disincentive for developers to apply for permits and have to go through compliance if their neighbors do not even apply for a permit and are not penalized. Another

Forum member noted that it is very labor intensive and expensive to go after people and there is often a workload issue as well. A second Forum member added that it seems important from a lay person perspective that people do not get away with not getting a permit and asked if there are any agreements with local jurisdictions. A Forum member responded that there are agreements with local jurisdictions for construction and there is a grading inspector or civil infraction authority. Another Forum member noted that Ecology has a grant program for environmental compliance and there is the possibility of dovetailing the grant program with the idea for agreements with local jurisdictions on compliance. A Forum member stated that while it is the duty of permit writers to do compliance, they often do not have time or the civil authority to punish the individuals that are out of compliance. Permit writers can only fine someone up to $100 per day. Ecology is looking at field citation authority for stormwater. A Forum member mentioned that EPA gets involved with compliance assistance and holds joint workshops with the USACE and state to develop workshops. EPA also does enforcement and inspections in specific geographic areas for wetland mitigation compliance. Compliance needs to be a collective effort, but it makes more sense for states or local governments to go after the offenders.

An observer suggested the idea of a compliance incentive. DOT contractors only get paid for certain elements if the work is done correctly and the agency has given thought to offering environmental incentives. Forum members discussed the options for incentives, including offering contractors more points in bid competitions if their record is clear or requiring less monitoring for applicants with good records to focus energy on applicants that are not in compliance.

Elizabeth summed up the discussion and noted that it is good to have a compliance monitoring program with the ability to follow-up on a permit. It is also important to go out on site visits during construction and consider how local agreements could be beneficial. Compliance and enforcement efforts should be balanced to ensure that illegal activities can be followed up on and local authorities have the tools to more effectively enforce permit terms. US Fish and Wildlife also needs civil enforcement capabilities.

Avoidance and Minimization

Muffy Walker and Lauren Driscoll gave a presentation entitled, *Permit Options for addressing Avoidance and Minimization using a Landscape Approach*. Muffy noted that there is nothing in the rule that eliminates the need for avoidance and minimization. A special area management plan (SAMP) is the only way to get around some elements. The goal is to not get bogged down in low quality wetlands but aim to achieve the high quality and important restoration by protecting the highest quality wetland. The landscape approach to avoidance and minimization helps to identify areas that provide better environmental gain early, provide pre-decisional guarantees, and gives a level of predictability regarding allowable impacts and where mitigation is appropriate.

There are two permit options for addressing avoidance and minimization within the landscape approach; a regional general permit and a programmatic general permit. A regional general permit is issued for similar activities within a designated area. A programmatic general permit is issued for similar activities within the boundaries of a state or local regulatory program. The state or local program administers the permit while the USACE retains oversight. Both permit options allow for watershed-based management plan with the added benefit of greater predictability. Once applicants are through ESA and the Section 106 consultation, the programmatic general permit also reduces the duplication of efforts. It does,

however, take the USACE some time to develop general permits as consultations are needed for site specific information. The following information is needed to complete a regional general permit or a programmatic general permit: (1) landscape characterization; (2) known world on impacts covered under the general permit; (3) reasonably sized service area; (4) a delegate entity for program (programmatic general permit only); and (5) staff resources to develop information needed and general permit specifics.

Based on the information presented, a Forum member inquired how the group planned to define "high ecological function." Another Forum member suggested including language about the cumulative impact development and watershed threshold in the recommendations. Muffy added that applicants can still get a conventional permit, but the programmatic and regional general permits make it easier to deny them. Margaret Clancy noted that it is important from a development perspective to know what ecological systems can be retained and still have a high level of function in the watershed.

A Forum member suggested ending Long Term Action 2 at "minimization" (page 12). Another Forum member suggested having a checklist for avoidance and minimization activities, as they are hard to document. A Forum member asked how the group should weigh the benefits of essential restoration to achieve no net loss or focus on a functioning system instead; something that may be altered but has a good chance of being restored. Margaret cautioned referencing "high" or "low" level in reference to wetlands because other factors can change the value of a wetland from an ecosystem perspective.

A Forum member suggested that the first bullet under Long Term Action 2 identify areas that are most appropriate to accommodate development and conservation in the watershed. Another Forum member stated that it is important that local government step in and that the recommendations encourage them to do so. Muffy noted that a regional general permit is often preferable to a programmatic general permit because it requires a little less effort. A Forum member added that regulations can change land values for owners and, in some cases, can force them to do something that is not as desirable. Another Forum member noted that unless a high value proposition is established people will try to get out ahead of permit options for avoidance and minimization and this effort will backfire. A Forum member suggested state and federal agencies, the USACE and Ecology especially, examine what it would look like if a pilot programmatic general permit was conducted in Clark County or Birch Bay.

Elizabeth summed up the discussion and noted that pilots are very important as they create a model of success. She will work on the language in the draft report to avoid the pitfall of "ecological function" and describe avoidance and minimization in the context of a watershed approach.

Wrap-up

The group briefly reviewed topics for the August meeting and the focus of its remaining time together.

- August:
    - Review the entire updated report which will incorporate comments from this meeting as well as those sent by Forum members.
    - Discuss all recommendations that have funding implications.
    - Discuss the recommendations that ask agencies to develop policies or guidance to determine if what the Forum is asking is realistic (Note that agencies should have

advance conversations about this and representatives should come prepared to present their agency's perspective.)
  - An update on the Banking Report.
  - Proposals and updates on the fee in lieu program.

Next Steps

- Ross & Associates will pull together all the recommendations that deal with funding so the group can look at them at the August meeting.
- Forum members representing agencies will have an advance conversation with their agency about the recommendations that ask agencies to develop policies or guidance.
- Forum members will review the draft report and send comments back to Elizabeth by the last week in July. Forum members are asked to focus special attention on the following areas:
  - The Charge to the Forum (p. 4-5)
  - Our Shared Vision of Successful Mitigation bullets (p. 6-8). The bullets are organized as follows:
    - 1st set of bullets: Results
    - 2nd set of bullets: Mitigation Techniques
    - 3rd set of bullets: Recent Improvements (*Please include any language suggestions to fill these out in greater detail*)
  - Establish a Watershed Approach to Mitigation (p. 9-11)
  - Develop More Coordinated, Predictable Approaches to Reviewing Mitigation Projects (p. 13-14). Faith Lumsden will look at the Clark County language in this section.
  - An updated version of the draft report will be sent out to the Forum on August 12th.
- USACE and Ecology representatives will consider what it would look like to pilot a programmatic general permit in Clark County or Birch Bay and come back to the Forum with a proposal
- Michael Szerlog will investigate the Oregon data exchange and report back to the Forum on how it is organized and what caused the business community to provide some financial support.

Attending Forum Members

Dee Arntz, Washington Wetlands Network
Josh Baldi, Washington State Department of Ecology
Allison Butcher, Master Builders Association of King and Snohomish Counties
Michelle Connor, Cascade Land Conservancy
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
Michael Szerlog, Environmental Protection Agency, Region 10
Chris Townsend, Puget Sound Partnership
Muffy Walker, US Army Corps of Engineers
Bob Warner, for John Grettenberger, US Fish and Wildlife

Forum Members Not in Attendance

Jessi Belston, Washington Public Ports
Rich Doenges, Washington State Department of Natural Resources
Jim Fox, Washington Recreation and Conservation Office
Mike Grayum, Northwest Indian Fisheries Commission
Rahi Gupta, Association of Washington Counties
Bob Kelly, Nooksack Tribe
Steve Landino, NOAA Fisheries
Chris McCabe, Association of Washington Businesses
Andy Meyer, Association of Washington Cities
Dave Remlinger, Skykomish Habitat, LLC
Ron Shultz, Washington State Conservation Commission
Tim Smith, Washington State Department of Fish and Wildlife
Rick Slunaker, Associated General Contractors of Washington
John Stuhlmiller, Washington Farm Bureau
Megan White, Washington State Department of Transportation

Guest Speakers/Participants

Gretchen Lux, Washington State Department of Transportation

Audience Members

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Lauren Driscoll, Washington State Department of Ecology
Ken Risenhoover, Washington State Department of Transportation
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