Mitigation that Works
February 19, 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:

- an update from Ecology staff regarding potential legislation that might impact mitigation practices/processes;
- a discussion of avoidance and minimization at the project level;
- a discussion of mitigation and conservation banking; and,
- a review of draft potential recommendations from the Forum's January meeting discussion.

Legislative Activity
Lauren Driscoll, Department of Ecology, provided an update on legislative activity associated with mitigation.

- SB 6691 – Establishing a marine habitat mitigation bank pilot program. Lauren reported that this bill passed out of the Senate Water, Energy and Telecommunications Committee and was referred to Ways and Means.
- SB 6761 – Regarding service areas for wetlands mitigation banks. The Senate vote on 3rd reading a final passage took place on February 16th. The bill was referred to the House Committee on Energy and Parks.
- SB 6805 – Promoting farmland preservation and environmental restoration through conservation markets. Revised for 1st substitute – Promoting farm and forest land preservation and restoration through conservation markets. Lauren reported that this bill was placed on second reading by the Rules Committee.
- SB 5145 – Clarifying existing requirements for conservation of agricultural lands. Placed on third reading by Rules Committee. Lauren explained that this bill, in part, "declares an intent to clarify the existing requirements of the growth management act that pertain to conservation of agricultural lands, in order to help assure that comprehensive plans and corresponding development regulation adopted by local governments conserve agricultural lands according to the original and continuing intent of the GMA."

The Department of Ecology will continue to e-mail legislative updates regarding mitigation bills to the Mitigation That Works Forum members.

Avoidance and Minimization at the Project Level
Margaret Clancy introduced three local government representatives: Lara Thomas, City of Duvall; Sandra Whiting, City of Tukwila; and, Cynthia Wilson, Thurston County, who were invited to present local perspectives on the avoidance and minimization steps of the permitting process.

Lara Thomas, Senior Planner, City of Duvall
Lara explained that the City revised its sensitive area regulations in 2006, these include performance based stream buffers and wetland buffers based on habitat score and class. She noted that most of the avoidance and minimization efforts focus on buffers as filling of class 1 and class 2 wetlands is

prohibited. Ms. Thomas explained that since the year 2000, only one applicant has had to go through the Corps' permitting process for a fill greater that 1/10th of an acre.

Ms. Thomas explained that the City works with applicants up front so that expectations regarding avoidance and minimization are clear. She noted that this helps to ensure that applicants do not use resources inefficiently. The City has its own consultants to assist in the implementation of avoidance and minimization. Lara stressed that it's challenging to know when an applicant has done "enough" to avoid and minimize. She noted that the lack of a bright line test around this issue makes it difficult for both planners and applicants. She suggested that some type of checklist for avoidance and/or minimization would be useful.

Ms. Thomas explained that the City's Toolbox includes the following:

- Performance-based buffers (In the lower watershed the buffers range from 50-100 ft and in the upper watershed, 25-100ft)
- Off-site mitigation
    - City receiving area – habitat in the lower watershed that has been set aside – which can be accessed by applicants in two ways:
        - In lieu fee program and the City completes the work (Ms. Thomas noted that this program was adopted in September of 2006 and has been used three times.)
        - Applicant completes a project in the receiving area.
    - Snohomish Basin Mitigation Bank. Lara explained that the City has had only one applicant use the bank.
- A great Critical Area Review Team (planner, engineer, peer review consultants)
- Wetland Mitigation Agreements. Ms. Thomas explained that the City requires applicants to enter into these agreements for performance monitoring and maintenance. She noted that these are legal documents that are recorded against the title at the county and that monitoring and maintenance are difficult as many applicants do the project and then have minimal or no follow-through. She explained that applicants are required to submit an annual monitoring report.

Ms. Thomas then addressed those areas that could use improvement. She highlighted the following:

- Improve skills at the local levels, including state-wide education on avoidance, minimization and mitigation issues. She noted that while there are educational opportunities currently available, they need to be provided at a lower cost and more frequently.
- Improve consistency of interpretation of requirements. She suggested that there should be a clearinghouse or other resource through Ecology or the Corps to improve consistency of interpretation. Another useful tool would be an example of when an applicant has done enough to demonstrate that avoidance and minimization have been met. Specifically, where is the line of avoidance and minimization drawn between resource protection and the applicant's right to build.
- Address lack of resources. Ms. Thomas noted that many cities don't have enough resources to send out mitigation plans for peer review and/or do not have the staff that has the technical skills to review them.

Sandra Whiting, City of Tukwila

Ms. Whiting explained that the City of Tukwila did not adopt Ecology's wetlands classification system, but that the City's system closely achieves the same levels of protection. The highest quality wetlands (Class I) require 100' buffer, Class II wetlands require an 80' buffer and Class III require a 50' buffer. The City does not allow any fill of Class I wetlands and will only allow 1/10 acre to be filled for their Class 2 wetlands. Class III wetlands can be filled, if mitigated.

Ms. Whiting explained that the City requires an applicant to produce a sensitive areas study to characterize the impacted wetland and that this study needs to include documentation regarding how to avoid and minimize project impacts. She noted that a fair amount of iteration is required to identify appropriate avoidance and minimization efforts. Ms. Whiting stressed that the there are no clear criteria regarding how much avoidance is enough and how much minimization is enough. She also stressed that most of the mitigation efforts involve buffers, not wetland fill.

Regarding available tools, she explained that off-site mitigation is difficult in Tukwila because of lack of space. She noted that the City has identified areas on City-owned property where off-site mitigation would be appropriate, but that off-site mitigation must be fully justified and that applicants have to pay the City a fee for the use of city land. To-date, no one has used the off-site mitigation program. Ms. Whiting explained that the City Council has not so far established an in-lieu fee program because the City is concerned about being in the mitigation "business." She explained that the there is a new wetland bank in Renton, operated by WADOT and the City of Renton, and that bank can sometimes be used for projects in Tukwila.

A Forum member asked if there are specific roadblocks to implementing avoidance and minimization at the local level. Ms. Whiting responded that requirements from public works and the fire department can create roadblocks as they determine how narrow streets can be, which can impact how far development goes into wetlands. She noted that in certain instances, it can also be challenging to convince applicants that there are other regulatory requirements beyond those of the City of Tukwila.

Cynthia Wilson, Thurston County

Ms. Wilson explained that for Thurston County there are both County and Urban Growth areas and that they have different techniques. She noted that there are bigger buffers in the Urban Growth Areas (100-300') versus the buffer requirements in rural areas. She further noted that there are very few wetlands fills in the county. She explained that the County uses both Reasonable Use exceptions and Administrative Variances.

Regarding off-site mitigation, Ms. Wilson explained that off-site mitigation is a possibility within the County; however the County isn't clear on where such off-site mitigation should go. Ms. Wilson noted that the county does not have an in-lieu fee program nor are there any mitigation banks in the County. She stressed that political will and clear expectations are the primary components of a developing a good wetland mitigation plan. She noted that there could be two jurisdictions with identical ordinances, but that the way those ordinances are applied could result in different outcomes around avoidance and minimization. She highlighted this lack of consistency as an issue that should be addressed. She suggested that a clear definition of mitigation and a checklist for what should be included in mitigation plans would be useful and help address the issue of inconsistency.

Ms. Wilson noted that educational opportunities for staff would be helpful, but that there are little resources for this at the county. She noted that staff does frequently contact Ecology for assistance in interpretation of reports and categories.

A Forum member asked if the planners thought they were achieving "no net loss" of wetlands in their jurisdictions. Ms. Wilson responded that Thurston County is doing well at no net loss of wetlands; however, their may be some loss of wetland functions, in areas for example where buffers are impacted or where cumulative impacts of development have changed the hydrology. She indicated that a lack of resources and manpower makes follow-up difficult, and that additional functions may be lost over time. Ms. Whiting explained that she though Tukwila was doing well with no net loss of higher functioning wetlands, but that not necessarily achieving it for smaller wetlands. She explained that the focus is largely on enhancement of existing wetlands as there is little or no room left in the City for wetland creation. Ms. Thomas responded that is was also a mixed result for the City of Duvall. She noted that it was her perception that the City was unsuccessful at no net loss when trying to mitigate through creation of wetlands but that it was more successful at restoration/rehabilitation. She noted that difficulties in achieving the goal of no net loss included lack of resources and follow-through. Ms. Wilson, Ms. Whiting and Ms. Thomas all emphasized the lack of resources for follow-through on monitoring and maintenance is a significant issues

A Forum member asked what would make a difference in terms of helping local jurisdictions be consistent within their own jurisdictions and across jurisdictions. Ms. Wilson suggested that it might be useful to have 3rd parties to assist/support in the development of mitigation plans. These parties could help plan and help with follow-up such as the monitoring reports, inspections, etc. She suggested that the 3rd party could be the state or a private entity. It was also suggested that criteria/guidance or a checklist to help evaluate when enough minimization has occurred and when achieving avoidance would help address consistency issues. In addition, further education of the community, planners and developers would be useful.

A Forum member asked what a checklist for avoidance and minimization might look like. Margaret Clancy suggested that a checklist could include questions such as: did you reduce lot size, did you reduce the number of lots, did you downsize retention, road-size and road lay out. She suggested that an applicant consider these issues and provide documentation as to why it might be feasible or not to make such changes, and if it is feasible, that they do so to the extent possible. Ms. Wilson noted that this is essentially the process they use at the County but that it isn't necessarily formalized and that an official checklist might help. Ms. Whiting noted that issues arise when considering the scale of development. For example, if an applicant is planning on building 10 homes and then needs to reduce the number to two, that will result in a lot of conflict. A Forum member noted that for every housing unit taken away, the cost of the houses that can be built increases and this raises an affordable housing issue. A Forum member asked what kind of economic analyses are completed when a developer files an application. Ms. Whiting explained that Tukwila doesn't generally ask for this type of information. Ms. Thomas responded that it was her understanding that the City of Duval doesn't have the legal authority to ask for that type of analysis.

A Forum member asked if the local jurisdictions are able to look beyond the specific parcel being developed. Ms. Whiting responded that the City of Tukwila asks applicants as part of their initial report to describe the hydrology and that the City often looks at the role a wetland plays in a sub basin but that it isn't a formalized process. She noted that a key problem is that many wetlands are fragmented already. Ms. Wilson noted that Thurston County addresses mitigation on a project by project basis and that it's difficult to look at the cumulative impact. She further noted that the County hasn't been able to do a landscape-type analysis, but it would be incredibly useful. Ms. Thomas explained that Duvall does

a semi-look at the system and beyond the parcel. She noted that this view is generally technical (e.g., stormwater impacts) versus ecological.

Forum members wondered if local jurisdictions had their watersheds assessed and prioritized in order of importance, would that provide more flexibility and allow for more off-site mitigation. Ms. Wilson responded that she feels strongly that avoidance should be a first and very important focus, and that dealing with the basins would be a second priority. She expressed concern that if developers knew that they could simply write a check versus avoid as much as possible, that many would choose to do so. She explained that it would be useful to identify sending and receiving areas. She noted that the County does map its wetlands and that information is contained in a geodata system. Ms. Whiting responded that Tukwila maps those wetlands it knows about, but that doesn't necessarily mean they've captured everything. Ms. Thomas explained that in Duvall, the City knows about were approximately 10% of its wetlands are.

The planners noted that a wetland/landscape layer map would be incredibly helpful, but to rezone based on such a map likely would not be politically palatable. A Forum member wondered if it were possible to bring value to other parcels of land, such as transferring development rights. Ms. Thomas noted that transfer of development rights are a good idea, but challenging because of lack of resources. She also observed that any zoning changes would have to be amenable to neighboring property owners. Ms. Wilson noted that the transfer of development rights does happen in Thurston County, but not often. A Forum member noted that resources are a big issue for cities and counties. He suggested that the state strategically think about what areas should be set aside for development and which for conservation.

A Forum member asked if it would be difficult for a City to do off-site mitigation in its county, wondering if the county could provide ecosystem services to the cities. Ms. Whiting thought it would be difficult to do so in Tukwila as the City Council doesn't like to go out of jurisdiction – although they have at least once used a mitigation bank in Renton. The City of Duvall is already going outside of its jurisdiction with the mitigation bank, however doesn't want to go outside of the WRIA.

The key themes raised in the discussion with the local representatives included:

- Avoidance and minimization are focused largely on impacts to buffers, not necessarily fill
- Education for planners, consultants and the development community would be useful and would help to address some inconsistency issues.
- A "best practices"/bright line/checklist for avoidance and minimization would be useful
- Monitoring and follow-through is difficult
- There is significant variety with respect to how off-site mitigation is addressed and how much of it is being done

Based on the group's discussion, potential areas of recommendation for the Mitigation That Work Forum include:

- A statement regarding the importance of avoidance and minimization
- An interest in the idea of landscape assessments/mapping and the relationship of specific projects and areas to the larger system
- An interest in the idea of guidance and criteria to assist in determining when enough avoidance and minimization has been done

- The importance of education for both the community and for planners, local jurisdictions and developers. Coordinated and integrated educational opportunities would be helpful.
- Supporting efforts to improve monitoring and enforcement

Mitigation and Conservation Banking

Several Forum members presented various perspectives on current mitigation and conservation banking processes.

Steve Landino, NOAA Fisheries

Steve described NOAA Fisheries process to evaluate and – hopefully – approve a conservation bank. Mr. Landino explained that NOAA Fisheries' efforts are, necessarily, focused on recovery of threatened and endangered species under the Endangered Species Act. In the past, they have not had a lot of time to spend exploring banking approaches, but see this particular conservation bank effort as an opportunity to get some experience with conservation banking concepts and to actually get a bank established relatively quickly and efficiently. Past efforts to streamline, or provide additional options, for minimizing or mitigating impacts on species have focused on establishing programmatic agreements to pre-define general project and mitigation parameters. Programmatic agreements remain a focus for NOAA Fisheries.

Mr. Landino noted that conservation banks are a great opportunity to address project impacts when mitigation can't occur on site. He suggested that it would be useful to have banks that address a variety of issues including wetlands and species. A Forum member suggested that the Forum consider if different banks were created to address different issues, would specific legislation be required for each, or could a bank be multi-objective.

A Forum member asked if Mr. Landino's staff was working with the Mitigation Bank Review Team (MBRT). Mr. Landion responded that he supports the MBRT process generally, but didn't necessarily have the staff to coordinate with that effort and would need to consider further how the conservation bank effort fit with the MBRT effort.

John Grettenberger, US Fish and Wildlife

Mr. Grettenberger explained that US Fish and Wildlife is quite active with conservation banks and has a specific policy regarding such banks. He noted that the Sacramento US Fish and Wildlife office is engaged in several conservation banks but that to-date, there are none in Washington State that the Agency is involved with. He explained that the NOAA Fisheries effort was leading the way on the conservation bank concept in Washington State and that he assumed US Fish and Wildlife would ultimately use the same/similar concept for its protected species. A Forum member suggested that it is important for developers to be comfortable with the notion of conservation banks and that there would need to a clear connection regarding what is required for credits and how they can be obtained.

Elizabeth then took a straw poll of the attending Forum members. She asked if there were any members opposed to the development of conservation banking and no one voiced and objection. She then asked if the group would like to support exploring other types of banks. Forum members did not respond negatively, but did caution that the Forum effort should avoid naming a significant number of different kinds of banks. One member asked for clarity around the effectiveness of mitigation banks. She wondered whether mitigation banks themselves are not working or if actual wetland replacement isn't as effective as possible. Lauren Driscoll noted that wetland mitigation is not working well but that should not be extrapolated to infer that banking is not working. She suggested that banks need two

attributes to work effectively, they need to be useable and they need to actually replace the functions lost.

Lauren Driscoll, Washington State Department of Ecology
Ms. Driscoll explained that the Department of Ecology convened a Mitigation Banking Advisory Group to assist Ecology in the implementation of a Wetland Banking Pilot Program and to help Ecology develop revisions to the draft rule regarding wetland mitigation bank certification. She explained that the Advisory Group had its last meeting in November and that revisions to the draft rule are currently in progress. She anticipates a new draft rule being released the summer of 2008.

Ms. Driscoll explained that there are currently 11 existing mitigation banks in Washington State and 8 others are processing. Of the existing banks, there are approximately 413 credits and 20% of the released credits have been used. She explained that ratio of bank areas to credit is site specific and that the range identified in the banking rule is wide, which makes it difficult for bankers.

Ms. Driscoll identified areas where the banking process isn't working as well as it might.

- The process can be slow and cumbersome
- Requirements are not clear and predictable
- Legal review is time consuming
- Local governments do not have the capacity to participate in the review process
- It can be difficult to get other agencies engaged in the process
- It is time consuming to draft conservation easement language correctly

Areas that are working better include:

- Mitigation Banking Review Team works well together
- Good technical information is beneficial in facilitating review
- 30 day target turn-around time for document review help to ensure timely submission and review of documents
- Process has led to the development of templates for various aspects of banking including public notice and accounting ledger

Areas of potential opportunity include:

- Smaller bank in urban areas
- More multi-resource banking
- Incorporation in open space planning (e.g., Moses Lake)

A Forum member expressed concern regarding the feasibility of urban mitigation banks given the availability of land and the cost of that land. She suggested that one issue for the Forum to consider is how to incentivize urban banking in a way that works. Another Forum member suggested that the most appropriate tool for urban environments might be in-lieu fee. It was suggested that it would be useful to develop a map that would identify where the best places are for mitigation banks. Ms. Driscoll suggested that such a tool would be useful and might begin by focusing at the county level, at highly developing areas.

Some Forum members expressed concern regarding the feasibility of mitigation banking in Washington State, in particular the ability/capacity of local jurisdiction to embrace banking in light of resource issues.

Another member suggested that it could be problematic to put the onus on local jurisdictions to create and maintain big projects, particularly given the large management issues into perpetuity.

A Forum member suggested viewing the banking tool as two separate, but related components. He described the bank side of the equation as including a variety of potential functions, including wetlands, forest, and agriculture. He suggested key questions associated with this component include how are credits earned, how are efforts monitored, etc. The second component consists of local governments and regulatory agencies. Within this category issues include when to allow credits for mitigation, education and available resources, and what parties have what responsibilities, among others.

Dimensions raised/discussed by the Forum thus far regarding banking include:

- Acknowledgement of banking as a valuable tool
- Recognition of the significant implementation issues that need to be addressed
- Recognition that Ecology's Mitigation Advisory Group may or may not be the right place to work out some of the implementation issues
- More watershed characterization and landscape assessment information would be helpful in supporting banking as a viable and effective tool
- Identifying the right locations for mitigation banks and the right scale characterization
- Examining the market aspect of banks – how many are needed, how should they be distributed, where is the demand and, understanding the resources and local governments' approach in these jurisdictions
- Banks could provide multiple values/benefits in their communities. It is worth exploring the idea that banks could serve multiple functions.
- The notion of 3rd party providers for mitigation

The next steps for the banking element of the Forum's discussion include:

- Producing draft recommendations to reflect areas of convergence
- Identifying additional banking issues that the Forum may want to consider

Potential Recommendation Areas from January

Forum members then briefly discussed the draft recommendations produced by the project support team regarding the mitigation regulatory process. Elizabeth explained to the group a few characteristics of the draft recommendations:

- The recommendations were produced to assist the Forum in furthering deliberations toward final recommendations.
- They are not meant to be a complete list of all potential recommendations for the regulatory process. The Forum may want to develop additional recommendations in this area.
- Many of the recommendations are designed to identify the desired end game and do not necessarily identify how to meet those desired goals. These are issues the Forum still needs to discuss.

A Forum member suggested that the group needs to be very clear regarding what it is trying to achieve and how that would change the status quo. Another member suggested it would be useful, particularly with respect to the "Developing a Shared Vision of Successful Mitigation Program," and "Establishing a Watershed Based Approach to Mitigation" recommendations, to have guiding principles or a framework and an identified problem statement regarding the current process. Forum members agreed that it would be particularly important to identify why a watershed based approach is preferred over a project

by project approach and that developing a clear framework to explain such a preference would be necessary to help ensure acceptance of a watershed approach. Another member agreed, noting that the Forum should clearly identify what the problem is with the status quo and then clearly identify why a watershed approach is preferred. Josh Baldi noted that the fourth bullet under this recommendation, "Ensure mitigation leverages existing watershed planning information, define a process and/or criteria for when/how existing plans can be implemented in a mitigation context," is particularly important and that the Department of Ecology hopes the Forum can provide more detail around this specific element. Forum members agreed it's important for the group to decide where it really wants to focus. Josh suggested that a watershed planning/based approach affords an opportunity for significant change to the current process and that the Forum should consider focusing its deliberations through the lens of a watershed approach.

Wrap-up

The group then discussed the topics it will address at its March meeting. For the toolbox element of the meeting, the group will focus on in-lieu fee and for the planning/process element of the meeting, watershed based/integrated planning. A Forum member suggested it would be useful to know how the Birch Bay project is actually being implemented. She noted that any information regarding practical application of the Birch Bay approach would be helpful.

The topics for the March meeting are:

- March:
    - Baseline/watershed characterization
    - Fee-in-lieu
    - What work to present to Agency principals and when to involve principals

Next Steps

- Forum members should consider, and e-mail to the project support team, any additional issues regarding mitigation banking that they would like to discuss.
- Project support team will revise draft recommendations presented at the February 19th Forum meeting.
- Project support team will prepare draft recommendations, based on the Forum's meeting discussion, for the Forum's consideration.
- The next Mitigation Forum meeting is March 18, 2008 and will be at the Edmonds City Hall, 121 5th Avenue North, Edmonds 98020

Attending Forum Members

Dee Arntz, Washington Wetlands Network
Josh Baldi, Washington State Department of Ecology
Jessi Belston, Port of Vancouver (for Eric Johnson, Washington Public Ports)
Allison Butcher, Master Builders Association of King and Snohomish Counties
Michelle Connor, Cascade Land Conservancy
Jim Fox, Washington Recreation and Conservation Office
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
Dave Remlinger, Skykomish Habitat, LLC
Bill Robinson, The Nature Conservancy

Ron Shulz, Washington State Conservation Commission
Tim Smith, Washington State Department of Fish and Wildlife
Jodi Slavik, Building Industry Association of Washington
Cullen Stephenson, Puget Sound Partnership (for David Dicks, Puget Sound Partnership)
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
David Dicks, Puget Sound Partnership
Rich Doenges, Washington State Department of Natural Resources
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
Rick Slunaker, Associated General Contractors of Washington
John Stuhlmiller, Washington Farm Bureau
Andy Meyer, Association of Washington Cities

Guest Speakers/Participants
Lara Thomas, City of Duvall
Sandra Whiting, City of Tukwila
Cynthia Wilson, Thurston County

Audience Members
Barb Aberle, Washington State Department of Transportation
Jennifer Aylor, Wildlands
Gary Cooper, Washington State Department of Ecology
Lauren Driscoll, Washington State Department of Ecology
Lynn Helbrecht, Washington Recreation and Conservation Office
Sky Miller, Wildlands
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