

Mitigation that Works
March 18, 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 legislation related to mitigation practices/processes;
- a discussion of watershed based planning as an approach to mitigation;
- a discussion of in-lieu fee; and,
- a review of draft recommendations to date.

Legislative Activity

Lauren Driscoll, Department of Ecology, provided an update on mitigation-related legislation resulting from the 2008 Regular Session.

- SB 6761 – Regarding service areas for wetlands mitigation banks. This bill was passed. Summary: The criteria for determining a service area for a wetland mitigation bank must include restricting the maximum allowable service area to the WRIA in which the bank is located. A service area may include parts of an adjacent WRIA if it is ecologically defensible. For wetland mitigation banks that have an application for a banking instrument filed January 1, 2008 or after the local government will have final approval over the certification of the mitigation bank.
- SB 6805 – Promoting farmland preservation and environmental restoration through conservation markets. This bill was passed. Summary: The State Conservation Commission (Commission) is directed to conduct a study on the feasibility and desirability of establishing farm and forestry-based conservation markets in Washington State. The bill specifically refers to coordinating with the Department of Ecology regarding its "Mitigation that Works" project, among other efforts. The Commission is to present its findings and recommendations on the conservation markets study to the Governor and the appropriate legislative committees by December 1, 2008. If the study determines that conservation markets are feasible and desirable, the Commission must conduct two demonstration projects. If the project proceeds to the demonstration project phase, the Commission is to report its findings and recommendations to the Governor and the appropriate committees of the Legislature by December 1, 2009.

Watershed Based Mitigation

Margaret Clancy provided an overview (*See Attachment 2*) of watershed based mitigation, including:

- What past efforts have said regarding watershed based mitigation
- Review of existing and ongoing efforts – what they are and what they include
- Can existing plans inform and improve mitigation
- Implementation obstacles.

Past Efforts

The discussion focused on the following past efforts:

- Statewide Wetland Integration Strategy. (1994) This effort recognized the value of using a watershed based approach and noted that *“Agencies can best determine overall mitigation*

policies by considering a watershed approach.” In addition, Recommendation #13 from this effort suggests developing an interagency task force “*to develop protocols for collecting, managing, and disseminating technical information in a watershed context.*” Margaret also noted that the National Academies of Sciences in 2001 found that a watershed approach would improve permit decision making. The NAS also suggested that functions be understood within a watershed framework and that site-selection should occur within the context of the watershed scale.

- Mitigation Optimization. (2005 Washington Department of Fish and Wildlife effort in cooperation with Ecology). Margaret noted that this effort echoed the NAS study regarding the role of a watershed based approach in permitting efficiencies. In addition, the effort recommended:
 - integrated permitting;
 - addressing multiple resource issues
 - understanding the priorities in a watershed, noting that addressing limiting factors and needs would make for better mitigation; and,
 - implementing actions from watershed plans. A Forum member noted that most watershed plans however do not contain information about wetland mitigation.
- Puget Sound Shared Strategy. (2006) This effort encouraged the use of off-site mitigation, stressing the importance of identifying where in a watershed potential mitigation opportunities are before the permitting process for individual projects begins. It recommended that mitigation efforts should draw on the scientific work of watershed and recovery plans and that environmental benefits should be determined at the project, site and management regime scales.
- Transportation Permit Efficiency and Accountability Committee (TPEAC – Final Report March 2006) Margaret suggested that this effort took the concept of watershed based the furthest. She highlighted some of the efforts recommendations:
 - the development of technical information and databases prior to making permitting decisions;
 - the need for watershed characterization tools;
 - the inclusion of tribal priorities;
 - the early identification of mitigation needs in land use and transportation planning;
 - the integration of watershed characterization tools and information into existing watershed planning efforts; and,
 - using restoration site lists in identifying candidate mitigation sites.

Margaret then highlighted the recurring themes that appear in each of the efforts identified above.

- The need to understand functions, limiting factor and ecological contributions in the watershed context.
- The concept of understanding issues and opportunities in advance.
- Need for the ability to match mitigation with recovery/restoration to improve success.

She noted that key questions for the Forum to consider are:

- What is hampering our ability to fully implement the above recommendations; and,

- How can/should the Forum move these recommendations forward?

Potential obstacles in implementing a watershed based approach may be:

- Tendency to want to start over from the beginning
- Lack of resources/funding for follow-up
- Inability to let go of resource/regulatory “silos”; I.e., wetlands people think about wetlands, fish people think about fish, regulations often narrowly tailored
- Focus on no net loss of wetlands limits our view of the broader ecosystem. For example, should we be focusing on no net loss of ecological functions. A Forum member noted that the Shoreline Guidelines call for no net loss of ecological functions. Margaret responded that while this regulation incorporates the broad concept of no net loss of ecological functions, the regulatory authority is quite narrow, focusing only on the area 200 feet from the shorelines of the state.
- Agencies don’t feel they have the authority to direct where mitigation happens.
- Lack of support for “out-of-jurisdiction” mitigation at the local level.
- Expected benefits have not been proven.
- Characterization methods not fully vetted.
- Disconnect between agency management and field/permit review staff. A Forum member asked what the nature of the disconnect is between management and staff. The discussion among Forum members identified the following issues: lack of tools and time to allow staff to approach permitting decisions in an innovative manner, potential technical tools are not tried/vetted enough for staff to use reliably, a desire to minimize risk, lower level of success with no net loss may send signal to apply current procedures in a more thorough way, and lack of time may lead to a path of least resistance. A meeting observer suggested that applicants may be more willing to choose a creative approach, if they can be assured that such an approach will be acceptable and not trigger a more time-consuming permitting process. Ecology staff noted that while it would be useful for an applicant to be able to rely on a certain outcome, that agencies cannot be pre-decisional with regard to project proposals.

A Forum member noted that another obstacle is that until there is a watershed based framework in place for making decisions, regulators still need to make decisions project-by-project. She noted that while it might be easier to be creative with smaller projects, bigger development projects are harder to address innovatively without an established framework in place for doing so.

A meeting observer asked if a watershed approach would require individual codes for individual watersheds, based on watershed needs. She noted that this could prove to be highly cumbersome and difficult for both government to implement and applicants to address. Margaret responded that there could potentially be different regulations for different watersheds based on watershed needs or linked to development plans. She noted that there is a fairly broad range with respect to watershed based approaches and that they could but would not necessarily have to include individual development codes for individual watersheds.

Existing and Ongoing Efforts

Margaret then identified existing/ongoing planning efforts which might/could support watershed based approaches to mitigation. These include:

- Watershed Management Plans (ESHB 2514)
- Salmon Recovery Plans (HB 2496)

- Shoreline Restoration Plans (RCW 90.58)
- Ecoregional Assessments
- Biodiversity Plans
- Comprehensive Irrigation District Management Plans

Margaret observed that these planning efforts have some information and attributes that could support watershed based approaches to mitigation, but that there also are barriers to using these plans as a basis for mitigation decisions. These barriers include:

- Generally the plans are intended to serve a specific and single resource need/regulatory requirement
- Not developed for mitigation purposes
- Don't always define full suite of benefits
- Hard to translate how implementing projects will achieve no net loss
- Plans are often at a larger scale than smaller applicant could use

Margaret further noted on the plus side, many projects identified as benefitting salmon production have additional ecosystem benefits that would contribute to the overall health of a watershed. A meeting observer asked what would be the likely reaction if there were a policy in place that required developers to use these plans when planning a project. Margaret responded that it is her perspective that developers would be willing to engage in such a screen of existing plans and that it would be helpful in getting a sense of what potential benefits might be. A Forum member suggested it might be useful to have a menu for the initial screening of the plans. In effect, the agencies could do an initial screen and indicate what type of plan might be the best to review for the type of project being proposed. Another member suggested that there already is a significant incentive for developers to engage in such a screening process given the costs associated with identifying off-site mitigation opportunities. The plans could also assist in providing a regional perspective, for example helping to determine where to locate a conservation bank.

Megan White, WDOT, noted that it has been DOT's experience that existing environmental plans are not necessarily the best way to identify specific wetlands mitigation opportunities. WDOT staff explained that while some sites WDOT have considered are great for recovery, they aren't beneficial from a wetlands credit perspective. Forum members then discussed the concepts of "no net loss" and "restoration" and how specific actions might be accounted for given that no net loss isn't being achieved. It could be difficult to delineate whether a project should receive mitigation credits or restoration credits. The Forum discussed that even if a project contributed, at a practical sense, to both mitigation (i.e., prevent further loss of ecosystem functions and services) and restoration (i.e., increase/restore damaged functions and services), in general "credit" should be apportioned so there is not double counting.

Margaret posed two questions for Forum members to consider:

- Is it possible and appropriate to consider using projects and plan information to satisfy mitigation needs?
- What evaluation tools and/or criteria would we need to know when and how to do so?

Dick Gersib from the Washington State Department of Transportation (WDOT) then gave an overview of the Department's experience with a watershed based approach to mitigation. (*See Attachment 3*) He explained that the TPEAC Watershed Based Mitigation Subcommittee recommended a strategic process

that places project impacts and mitigation opportunities in a landscape context. He highlighted the important difference between compiling a list of potential mitigation sites in a watershed and viewing opportunities in a landscape context. He noted the importance of using landscape attributes to understand ecological processes, and stressed that a landscape perspective includes all resources, not just wetlands.

WDOT engaged in watershed/landscape characterizations with projects related to SR-522, I-450 and SR-167. Dick reviewed lessons learned from WDOT's SR-167 experience.

- Uncertainty exists when predicting future mitigation needs; in general the transportation planners were able to avoid more impacts than the originally thought they would be able to
- Watershed characterization results can be used to help identify a potential bank site
- Local jurisdictions tend to have more restrictive permit requirements, reducing the number of available mitigation options and sometimes limiting the application of the results of a landscape characterization effort, particular when landscape characterizations cross jurisdictional boundaries
- Some of the new policy-level approaches to watershed mitigation have yet to gain favor among project permitting and implementation staff
- In managing risk, WDOT can put itself into a box – that is concerns about managing risk lead to resistance to trying new approaches, the incentive is to provide permit decision makers with something they are very familiar with and can, therefore, hopefully review quickly and with relatively predictable results.

A Forum member asked how risk is defined at WDOT. Megan White noted that the project priorities are scope, schedule, and budget. These are the factors around which staff attempt to minimize risk. Another Forum member asked whether a better coordinated system would reduce cost risk associated with mitigation. Dick replied that WDOT has developed a screening tool that allows project managers to be forewarned if mitigation costs will be out of the normal range. This creates an opportunity for using watershed characterizations or other techniques to help identify better options. Another Forum member observed that the WDOT planning timeline itself is long, however the period for mitigation proposals and permit processing are a short segment of that longer timeline.

Regarding what it might take to advance watershed based mitigation, Dick suggested comprehensive mitigation planning, beginning with putting individual sites in a landscape context. He noted that growth, mitigation and habitat should be considered and addressed together. He further suggested that there needs to be the proper regulatory balance, noting that existing regulations have forced both agencies and applicants to look at the narrower site scale.

Dick noted that the WDOT landscape characterization site database is oriented toward identifying potential mitigation sites, focusing on a suite of options based on the amount of mitigation required and the type of mitigation required, among other factors. He suggested that recovery plans differ from watershed plans, which differ from wetland restoration, as each focuses on different issues. Margaret responded that this differentiation varies based on the watershed. She noted, for example, that in Whatcom County, many of the staff who worked on recovery plans also worked on the watershed plans, so there is a fair amount of integration. A meeting observer wondered why it wasn't possible to zone for mitigation. The Forum discussed that watershed characterization/ mitigation don't necessarily line up with local planning, zoning and ordinances and down zoning would be politically difficult. Josh Baldi noted that Ecology cannot tell local jurisdictions where to mitigate and that a watershed based approach to mitigation would require the support and participation of local jurisdictions. A Forum

member suggested that the with respect to watershed characterizations, it should be considered how costs for characterization activities are distributed to the public versus developers.

Based on the presentations and group discussion, Forum members then made several observations and identified some questions regarding a watershed based approach to mitigation:

- There is a big educational opportunity with watershed characterization and that it's important to do for purpose of planning.
- Local jurisdictions are critical as state and federal permitting agencies can't and shouldn't engage in land use planning.
- This approach requires decisions to be made in advance, which is much different than the current approach to mitigation.
- Issues of scale are a challenge. The translation from a big characterization area to a specific site scale is difficult. Characterizations could be done at various levels, with the state providing a course framework that the locals then fill in with more detail. Need enough of a framework to support local efforts. The framework needs to be consistent but also flexible.
- Ownership should be at the local level. Need local government leadership mandates/expectations
- There is a need for a decision-making structure.
- It would be useful to identify the potential benefits of a watershed approach as well as the risks that are reduced by using such an approach. Examples of the value of a watershed based approach are helpful.
- Need a lead agency, entity, champion for this approach (Trustee-type approach from Superfund)
- Need to provide direction to local jurisdictions regarding who might do the planning, what kind of functions are good to have, what want to restore, etc.
- The current incentives/disincentives need to be turned around as they reward the traditional approach to mitigation.
- Good watershed characterizations could support market based approaches. In a characterized watershed one, in essence has a perfect market because it is clear that there is a constrained set of products/resources. Everyone then has an asset of value, and prime wetland should have economic value.
- Work from the end state to identify programmatic/advance approaches
- Need to shorten the permitting timeline as an incentive.

Forum members then quickly discussed the draft strategic recommendations related to a watershed approach to mitigation. The project support team will be in touch with Forum members to discuss their reactions to the recommendations in more detail.

In-Lieu Fee

Gary Cooper, Department of Ecology, provided an overview of in-lieu fee. *See Attachment 4)* He explained that in-lieu fee programs a permittee provides funds to an in-lieu fee sponsor instead of either completing project specific mitigation or purchasing credits from a mitigation bank. The sponsor is then responsible for establishing and maintaining mitigation sites/projects. The permittee does not do the mitigation, but provides the financial resources to do so. A sponsor can be a government agency, a private firm or a NGO. There is a significant amount of variability among different in-lieu fee programs regarding who administers the programs, what they mitigate for and who the sponsors are. Although programs across the country have evaluated the factors of success from an administrative viewpoint, there is not much actual analysis regarding the ecological success. Features of good programs include:

- Programmatic approaches versus ad hoc
- Transparency and accountability
- Detailed agreements between program administrators and sponsors, to ensure that the mitigation sought is realized.
- Significant analysis of resource replacement values and program administration costs used to establish meaningful fee schedule.

Gary then highlighted some of the pros and cons of in-lieu mitigation:

Pros

- Committed mitigation provider
- Potential for better site selection and long-term stewardship
- Better ability to meet local needs and address small impacts
- Better oversight than project-specific mitigation

Cons

- Lag time between impacts and implementation of mitigation
- Unrealistic plans for financing mitigation
- Disconnect between goal of key regulators and mitigation sponsors

Clint Loper, King County Department of Natural Resources and Parks provided an overview of King County's in-lieu fee program. (See Attachment 5) He noted that in-lieu fee is another track to meet off-site mitigation needs. He explained that the King County program was established as a pilot program, that the demand has been less than originally anticipated and that the County is still in a learning mode. He noted that within King County, different planning efforts have lead to the acquisition of many sites for in-lieu fee. He explained that the program is responsible for on ground maintenance and monitoring for a few years, and then those responsibilities are turned over to the County land managers.

Clint explained that the County used a stakeholder review committee to develop its in-lieu fee formula. He noted that it uses a unit-cost methodology and takes into account the following costs:

- Design and construction
- Land acquisition
- Long-term maintenance and monitoring
- Program administration (This includes the costs of the program manager and the staff used in site selection. He noted that these costs are prorated and shared across applicants.

Clint noted that the fee schedule is particularly challenging. Fees need to cover costs, but also be politically acceptable, and competitive with the cost of on-site mitigation. He noted that for smaller projects, project proponents are surprised by the cost, but that for larger projects, developers seem pretty accepting of the fees. The larger fees generally begin with the fee schedule but are ultimately negotiated. He indicated that King County is still considering its fees -- he explained that the program is designed to be fully supported by program fees, but that to-date that hasn't occurred yet, and that it is still considered a pilot program.

Clint indicated that the County hasn't yet been able to evaluate the monitoring element of the program, because the program and its associated projects haven't existed long enough to make such an assessment.

In determining mitigation for a specific site, the County looks at the site, its functions and values, and the ratio required under the code if a project proponent were doing the mitigation itself. Clint noted that for larger projects having critical area impacts, there are local, state and federal involvement and performance standards. He suggested that a more streamlined process with consistency across all three levels of government would be helpful.

Clint noted that in identifying sites and implementing projects, there is the challenge of inter-jurisdictional issues. He further noted that there is a strong interest taking a watershed perspective and that any direction, support, actions that the Forum can develop around a watershed based approach to mitigation would be useful.

The Forum discussed the King County in lieu fee program and noted that at a number of mitigation sites shown, the mitigation was structured to mimic the functions and services of the sending site (i.e., the project site) and that these functions and services might not always be the most needed or appropriate for the watershed, or for the particular receiving sites (i.e., the mitigation locations).

Wrap-up

The group then briefly reviewed the topics for its April meeting.

The topics for the April meeting are:

- April:
 - More on a watershed based approach to mitigation. Review and refining of draft recommendations
 - Focus on mitigation toolbox – what does the Forum want to say about the tools discussed thus far and what else would the group like to deliberate on

Next Steps

- Forum members should consider, and e-mail to the project support team, any additional issues regarding a watershed approach to mitigation that they would like to discuss. Forum members should be thinking about how to turn the concept of watershed based mitigation into an action plan. Think about who does what to implement.
- Project support team will get in touch with Forum members regarding the draft recommendations.
- Project support team will develop/refine recommendations based on Forum discussion.
- The next Mitigation Forum meeting is April 15, 2008 and will be held in Olympia (Location to be determined)

Attending Forum Members

Dee Arntz, Washington Wetlands Network

Josh Baldi, Washington State Department of Ecology

John Carleton, (for Tim Smith, Washington State Department of Fish and Wildlife)

Michelle Connor, Cascade Land Conservancy

Steve Davison, (for Dave Remlinger, Skykomish Habitat, LLC)

John Grettenberger, US Fish and Wildlife

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

Bill Robinson, The Nature Conservancy

Michael Szerlog, Environmental Protection Agency, Region 10

Chris Townsend, (for David Dicks, Puget Sound Partnership)

Muffy Walker, US Army Corps of Engineers
Megan White, Washington State Department of Transportation
Zelma Zieman, (for Faith Lumsden, Governor's Office of Regulatory Assistance)

Forum Members Not in Attendance

Allison Butcher, Master Builders Association of King and Snohomish Counties
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
Steve Landino, NOAA Fisheries
Faith Lumsden, Governor's Office of Regulatory Assistance
Chris McCabe, Association of Washington Business
Andy Meyer, Association of Washington Cities
Dave Remlinger, Skykomish Habitat, LLC
Ron Shulz, Washington State Conservation Commission
Jodi Slavik, Building Industry Association of Washington
Rick Slunaker, Associated General Contractors of Washington
John Stuhlmiller, Washington Farm Bureau

Guest Speakers/Participants

Dick Gersib, Washington State Department of Transportation
Clint Loper, King County Department of Natural Resources and Parks

Audience Members

Barb Aberle, Washington State Department of Transportation
Kendall Bossert, University of Washington
Gary Cooper, Washington State Department of Ecology
Lauren Driscoll, Washington State Department of Ecology
Mike Ryherd, Clear Valley Environmental Farm LLC
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