



# Water Rights and Mitigation in Washington

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## The Basics...

Washington water law (*RCW 90.03.290*; *RCW 90.44.060*) requires that Ecology apply a four-part test when evaluating water right applications.

Ecology must determine that:

- water is available for appropriation
- water will be applied to a beneficial use
- the proposed use will not impair existing rights
- proposed use will not be detrimental to the public interest

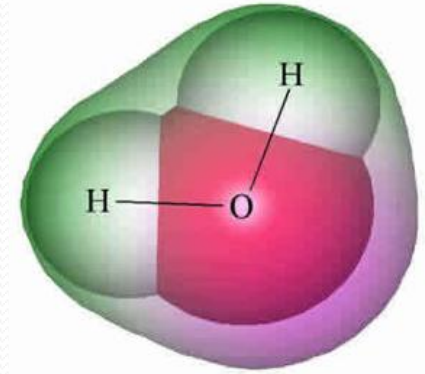
## **Some reasons why it can be so difficult getting new water rights...**

Near closed surface water bodies proposed groundwater withdrawals may fail “water availability” and “no detriment to public interest” tests.

In case of rivers with instream flows not being met proposed groundwater withdrawals may fail “no impairment to existing rights” test.



# Washington State Supreme Court Postema decision



Prior to Postema many applicants argued their groundwater applications should be approved because the effect on surface water was small.

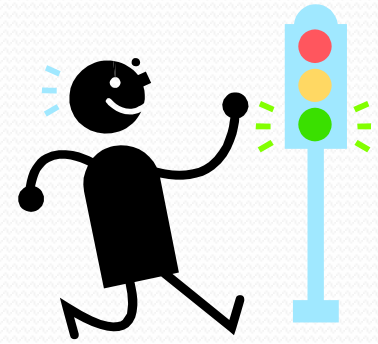
In Postema the court affirmed hydraulic continuity as a scientific fact which, once established in any degree, need not meet any further standard or test to be given full credit in Ecology's water allocation decisions.

The court also affirmed it is not necessary for there to be a measurable effect on surface water.

This decision effectively affirmed Ecology's authority to deny applications due to collective impact of many smaller affects and largely has driven the need to mitigate for new water rights.

## Ecology's authority to consider mitigation

The Legislature has explicitly authorized Ecology to consider “resource management techniques” when making water availability determinations or considering whether impacts of diversions or withdrawals can be offset. (RCW 90.03.255; RCW90.44.055).

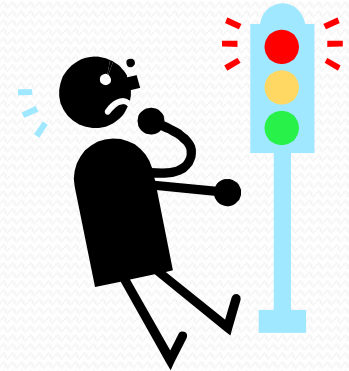


# Where do the statutes say that Ecology cannot require mitigation?

*RCW 90.44.055 states,*

*Provision for an impoundment or other resource management technique in an application shall be made solely at the discretion of the applicant and shall not be made by the department as a condition for approving an application that does not include such provision.*

Therefore on an applicant's request Ecology will engage in discussions regarding acceptable mitigation.



## ***RCW 90.74 – Aquatic resources mitigation provisions***

- Ecology and Department of Fish and Wildlife (WDFW) may not limit scope of mitigation options to areas on or near project sites, or to habitat types of same type.
- Mitigation plans shall:
  - Contain provisions that guarantee long-term viability of created, restored, enhanced, or preserved habitat
  - Contain provisions for long-term monitoring
- Ecology and WDFW shall give due consideration to proposals that improve overall biological functions and values of a watershed.
- Ecology and WDFW are not required to approve mitigation plans that do not provide equal or better biological functions and values.



**So what do we know about mitigation?**



## **All mitigation plans are **UNIQUE****

Many decisions have resulted from negotiated settlements following water right appeals, so there is a great deal of variability.

# There are many types of mitigation

- **Simple water -for-water mitigation** where replacement water is similar in quantity, timing and location.
- **Out-of-time mitigation** - may provide same amount of water, but shifts time when water is present in a stream.
- **Out-of-place mitigation** - may provide same amount of water, but shifts location of water in a stream.
- **Out-of-kind mitigation** - non-water mitigation such as protection or enhancement of riparian areas or recharge areas.

In many cases mitigation types are mixed and matched.

# Water-for-water mitigation

Always preferred form of mitigation

Strategies have included:

- Transferral of senior water rights
- Relinquishing or placing existing water rights into trust
- Conservation
- Surface or ground water storage and recovery
- Transferring water into basins, and
- Streamflow augmentation (pump and dump)

Safety factor over 100% of replacement water can be required in an amount commensurate with degree of uncertainty/risk.



## **Reclaimed Water**

While using reclaimed water to enhance flows is not water-for-water mitigation, Ecology is evaluating allowing this as an element of mitigation in some cases in the future.

## Streamflow augmentation (pump and dump) faces many challenges:



- Must provide an actual benefit to stream equal to or greater than impact of pumping
- Performance monitoring typically problematic, since other factors affect stream flows
- Water quality (temperature, DO, etc.) must be comparable
- Augmentation must occur in perpetuity

Due to great uncertainty various types of passive mitigation are always preferred over streamflow augmentation.

# Water banks and other forms of pooled mitigation

- May allow for out-of-priority water use, including by permit exempt wells
- Mitigation water should be placed in trust whenever possible
- Beneficiaries should pay to play in order to replenish bank, at other than state's expense
- Ecology may expend state funds to seed water banks initially, then expect them to operate on revolving fund basis

# Out-of-time, out-of-place, out-of-kind mitigation

- Must produce a net environmental benefit
- Non-water mitigation such as habitat restoration or enhancement requires approval by fishery managers (WDFW and tribes)
- In some instances, rule changes and potentially statute changes would be required

# Mitigation Ecology will not accept

The PCHB ruling on Manke v. Ecology and Muckleshoot tribe affirmed Ecology's decision not accept vegetation removal or use of septic tanks as forms of mitigation.

This decision was based on damaging environmental consequences and uncertainty in:

- amount, timing and quality of water returned to groundwater
- how changes in water uses and vegetation would affect conditions over time
- how long future houses would remain on septic as opposed to hooking up to sewer systems.

## What has Ecology produced regarding acceptable mitigation?

Ecology has not developed guidance or policy in part because it wants to retain discretion.

Ecology has produced, “Mitigation Measures Used in Water Right Permitting” (April 2003), which describes some projects Ecology has accepted ([http://www.ecy.wa.gov/ programs /WR/instream-flows/Images/pdfs/mitmeas.pdf](http://www.ecy.wa.gov/programs/WR/instream-flows/Images/pdfs/mitmeas.pdf)).

This was put together after asking staff to recall what past projects included elements of mitigation.

Due in part to the age of many projects described, this document is not necessarily representative of what Ecology will accept as mitigation in the future.

# Factors Ecology considers when evaluating mitigation proposals

- Location issues
- Timing issues (seasonal, year-round, etc.)
- Water quality issues
- Implementation issues
- Maintenance issues/self-sustainability
- Monitoring issues (e.g. degree of uncertainty over what may be effecting stream flows)
- Degree of protection of mitigation water (e.g. is water placed in trust)

## **Factors Ecology considers when evaluating mitigation proposals (continued)**

- Uncertainty in impacts estimated with simple calculations, analytical or even numeric models
- Corrective action plan issues (in case mitigation fails)
- Provisions for termination of water use (challenging if home will already be dependant on a water source)
- Enforceability issues
- Existing water law (are there closures, MIFs, etc.)
- Is mitigation commensurate with degree of risk
- Effectiveness in perpetuity (what assurances will be in place)