



6/8/2019

Ms. Annie Sawabini
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RE: Comments on Draft Final Guidance for Determining Net Ecological Benefit

Dear Ms. Sawabini,

The Center for Environmental Law and Policy (CELP) and the Deschutes Estuary Restoration Team (DERT) appreciate this opportunity to provide comments on the Department of Ecology's June 2018 Draft Final Guidance for Determining Net Ecological Benefit (NEB).

CELP recognizes that the hasty process underlying the development, adoption, and implementation of ESSB 6091, codified at RCW 90.94, has put the Department of Ecology (WDOE) in a difficult position. However, we believe that it is vital that WDOE get this right, and that Ecology could have allowed additional time for public comment on this document, in order to ensure all parties had adequate time to evaluate the draft guidance and the underlying assumptions it relies on. Since WDOE has declined to extend the deadline, CELP is now submitting the following comments for consideration.

General comments on the document as a whole

- Contrary to its title, overall this document provides insufficient guidance to the watershed planning groups. The only significant discussion of how benefits or impacts of water depletion might be quantified or compared is in the WSU Study provided as a supporting document, but WDOE appears to peremptorily dismiss the practical applicability of this technical document. The flowcharts contained in Appendix C are an example of the practical tools that might be provided to the watershed groups to guide their decisions.
- The final guidance must include a strong statement that non-water projects are *supplemental* to projects that provide water offsets, and that they may not be used to *substitute* for offset water.
- The document states that NEB will not be used to evaluate funding proposals (p. 3), but that the plans (which depend on their included projects) must be evaluated for NEB (p. 4). This creates an inconsistency, if projects are to be evaluated on the basis of a scoring system. Evaluating each plan as a whole for NEB, by calculating impacts from expected new water use and value of offsets, appears to require that the projects themselves be evaluated for ecological benefits and detriments.
- The final guidance should more explicitly direct watershed groups to consult with state and tribal fish managers (and potentially the National Marine Fisheries Service, where ESA-listed fish are present) on all decisions potentially affecting fish habitat, not limited to listed salmonids. Fish managers are uniquely qualified to provide information on the effects of streamflow, water temperature and habitat features throughout fish lifecycles, which is an essential aspect of evaluating the impacts of consumptive water use, as described in section 3.2.3.4 of the guidance.

Undefined phrases and terms in the document will lead to misunderstandings and potential litigation

- The definition of “Critical Flow Period” (p. 5) is unclear and very subjective. Appendix A has a much better discussion of factors to be considered in determining critical flow periods.
- The “Net Ecological Benefit Determination” definition (p. 5) appears to apply only to a plan submitted by the watershed group to WDOE – what about the case where the group can’t reach an agreement and Ecology has to come up with one? This raises the larger question of how Ecology will provide assurances that an WDOE-developed plan will actually provide offsets. The “supporting document” accompanying the Draft Nooksack Rule, for example, appears to be non-binding, raising the risk that offset water would not actually be provided. How can a NEB determination be made based on non-binding offset recommendations?

The guidance relies on the assumption that watershed plan projects will be completed and have the predicted effects

- Ecology fails to provide adequate guidance as to how to address the risks of uncertain projects, uncertain funding, poor data, inaccurate estimates, etc.
- For water right acquisitions, the plan should include assurances that the right acquisition will actually produce a decrease in the amount of water consumptively used.
- The planning units and watershed committees can only adopt plans on the basis of mitigation projects that have been proposed. If insufficient projects are proposed, it will be difficult for the plans to realistically meet the statutory requirements. If WDOE anticipates that units and committees will take an active role in designing, soliciting, or proposing projects, the guidance should explicitly encourage them to do so.
- Whether the plans will actually provide NEB should be evaluated against baseline conditions projected into the future, not present conditions. Climate change is having profound effects on how water is distributed, and it is important to protect streams based on the projected future conditions.
- The supporting document (Appendix C) conflates out-of-kind mitigation projects with out-of-time or -place water offsets (see pp. 24-27; also pp 30-31). The discussion of in-kind, in-place mitigation (p. 31) appears to contemplate that offset water might be provided at a location different from the point of impact; this can no longer be considered “in-place.” While WDOE has generally emphasized – correctly – that RCW 90.94 requires replacement of water for water before turning to out-of-kind mitigation, the guidance should avoid any confusion on the part of planning groups by clarifying that out-of-kind mitigation projects are to be supplementary to full in-kind offsets of new consumptive water use.

Accountability and review are vital for achieving Net Ecological Benefit

- While we welcome the inclusion of references to the importance of adaptive management in the guidance, we remain deeply concerned by the lack of provisions to substantively guarantee that Net Ecological Benefit (NEB) will be achieved over the long term. In light of the recognized uncertainties around both in-kind offsetting and out-of-kind mitigation strategies, mechanisms for monitoring, review and accountability are essential in order to fulfill the statutory requirements of RCW 90.94 (achieving NEB over a twenty-year period).

- As this guidance recognizes in its definition of the term, “[o]ffsets will need to continue in perpetuity since the new consumptive water uses are expected to continue in perpetuity.” However, the document gives little guidance as to what entities will monitor and enforce the adequacy of mitigation. This is an important part of ensuring that the mitigation projects on which the plans depend to achieve NEB function properly. We note that the WSU study (Appendix C) also calls for projects to include an “explicit effectiveness monitoring plan.”
- While the technical supplement provided in Appendix C makes several references to the general importance of adaptive management as a concept, the guidance itself weakly states that “[a]daptive management conditions should also be included [in plans] to address uncertainty,” while also disavowing any commitment to implementation of adaptive management, by stating that “[i]nclusion of adaptive management provisions will not be interpreted as obligating the planning group to continue its work after a plan is adopted, or for WDOE to continue supporting the work of the planning group after a plan is adopted.” Given that the framework established by RCW 90.94 provides the planning units and committees with no direct control over the design, funding, or execution of the specific projects which are to provide NEB by their inclusion in the plans, it is unclear how the concept of adaptive management can be practically applied to the committees’ planning process. This lack of clarity has the potential to produce a great deal of uncertainty and confusion in the planning process, and reduces the probability of the plans fulfilling the purpose of achieving NEB. Ecology should therefore work to ensure accountability both in its guidance to the committees and in the full range of actions it takes toward mitigating future consumptive water use. There are several approaches Ecology could take to accomplish this end.
- First, WDOE could use this guidance document to encourage planning units and watershed committees to adopt plans that explicitly incorporate an adaptive management component, such as periodic reporting of how much new water use has occurred and how much mitigation water has been provided. This information would be valuable in determining whether the NEB standard is being met. Alternatively, given the uncertainty over the committees’ authority and duties beyond the approval and submission of plans, the guidance could strongly encourage plans to achieve NEB via projects that contain monitoring, review, and adaptive management provisions. WDOE could then reinforce the planning process in its parallel role as project funder by prioritizing projects with those provisions.
- Secondly, WDOE could use its rule-making authority under RCW 90.22 and 90.54 to modify instream resource protection rules to require a periodic (perhaps every five years during the 20-year period mandated by RCW 90.94) review of new consumptive water uses and achieved water offsets.
- If the watershed plans are to be approved without accountability provisions, such as monitoring, review, and modification, the guidance should emphasize the importance of applying substantial multipliers to proposed offsets as a safety factor, in order to compensate for the significant uncertainties inherent in water mitigation approaches, and in future water supplies which will be heavily impacted by climate change.

CELP submitted comments on the Interim Guidance Document in November of 2018, many of which were directed toward clarifying how the watershed committees should approach the planning process and we believe WDOE missed an opportunity to incorporate the majority of those comments into the final guidance. As the Department is aware, if the planning units and committees are left without the proper

tools to adopt plans that will achieve NEB, Ecology will be left with the responsibility of drafting rules that will do so. We hope to see these concerns addressed more completely in the final document.

Please don't hesitate to contact CELP or DERT if you have questions about the above or would like any clarifications. Thank you.

Best Regards,

Handwritten signature of Trish Rolfe in black ink.

Trish Rolfe
Executive Director, CELP

/s/

Sue Patnude
Executive Director, DERT