

# WASHINGTON STATE DEPARTMENT OF ECOLOGY ISSUES INTERIM GUIDANCE ON “NET ECOLOGICAL BENEFIT” FOR WATER RESOURCE MITIGATION

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On June 18, 2018, Ecology issued an *Interim Guidance for Determining Net Ecological Benefit* (Ecology Publication No. 18-11-009), intended to assist local watershed groups with near-term planning mandates and to guide the development of mitigation pilot projects authorized under Engrossed Substitute Senate Bill (ESSB) 6091. The legislation requires watershed planning in 15 basins resulting in “net ecological benefit to instream resources,” and authorizes pilot projects with compensatory mitigation providing “net ecological benefits to fish and related aquatic resources” through in-kind and/or out-of-kind mitigation that improves the function and productivity of affected fish populations and habitat. Because the Interim Guidance appears to identify “net ecological benefit” based solely on “actions designed to restore streamflow,” it raises questions about whether and how it will accomplish the Legislature’s broader intent in ESSB 6091.

## **Background: A “fix” for *Hirst* and *Foster***

In January 2018, the Washington Legislature enacted Engrossed Substitute Senate Bill (ESSB) 6091 to address two recent decisions of the Washington Supreme Court: *Whatcom County v. Hirst*, 186 Wn.2d 648 (2016), and *Foster v. Ecology*, 184 Wn.2d 465 (2015). *Hirst* upended land use planning in some counties by requiring local governments planning under the Growth Management Act to restrict new permit-exempt domestic groundwater wells affecting regulatory minimum instream flows or surface water bodies closed to further appropriations. *Foster* rejected the Department of Ecology’s reliance on “overriding considerations of the public interest” to approve new water right permits with comprehensive mitigation programs.

ESSB 6091 addressed *Hirst* by authorizing new permit-exempt domestic wells under various circumstances and regulatory frameworks. To address the impact of such wells, the Legislature required updates to existing watershed plans in seven basins and new “watershed

restoration and enhancement plans” in eight additional basins. Each plan must include recommendations for actions to enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids. Before approving each plan, Ecology must determine that actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a “**net ecological benefit** to instream resources within the water resource inventory area.”

ESSB 6091 addressed *Foster* by establishing a Joint Legislative Task Force on Water Resource Mitigation. To inform the task force’s work, ESSB 6091 directs Ecology to issue permit decisions for up to five water resource mitigation pilot projects, using a prescribed sequence of avoiding impacts, minimizing impacts, and then compensating for impacts by providing “**net ecological benefits** to fish and related aquatic resources” in the basin “through in-kind or out-of-kind mitigation or a combination thereof, that improves the function and productivity of affected fish populations and related aquatic habitat.”

### **Ecology’s Interim Guidance**

Ecology has attempted to address in one document the agency’s mandate to determine “net ecological benefit” for watershed plan updates under Section 202 of ESSB 6091, watershed restoration and enhancement plans under Section 203, and water resource mitigation pilot projects under Section 301. The *Interim Guidance* will be used to evaluate the mitigation pilot projects and to evaluate watershed plans during the next twelve months. A final guidance is anticipated in 2019.

#### ***How is “net ecological benefit” defined?***

The Legislature did not define “net ecological benefit” in ESSB 6091, so the agency is attempting to fill in that gap with the *Interim Guidance*. However, the document defines “net ecological benefit” inconsistently. On page 2, it is defined as follows:

“A Net Ecological Benefit determination means anticipated benefits to instream resources from actions designed to restore streamflow will offset **and** exceed the projected impacts to instream resources from new water use.” (Emphasis added.)

On page 11, Ecology reiterates this definition, with a key difference:

“Ecology will determine that a plan or pilot project meets the ESSB 6091 Net Ecological Benefit (NEB) requirement if anticipated benefits to instream resources from actions designed to restore streamflow will offset **or** exceed the projected impacts to instream resources from new water use.” (Emphasis added.)

This discrepancy is potentially significant, because the question whether an action must “offset and exceed” projected impacts to instream resources or just “offset” those impacts creates ambiguity over whether and under what circumstances a simple “offset” could result in a “net” benefit.

### ***What gets factored into “net ecological benefit”?***

More problematic is Ecology’s focus on “actions designed to restore streamflow” as the only basis for anticipated benefits to instream resources. Neither the plans required under ESSB 6091 nor the mitigation pilot projects are so narrowly circumscribed. The legislation encourages the watershed plans to include recommendations for a wide range of actions and projects “that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids.” Plans may include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure such as floodplain restoration, off-channel storage, and aquifer recharge. See ESSB 6091, Sections 202(4) and 203(3). However, Ecology’s language suggests that only “actions designed to restore streamflow” will be counted toward net ecological benefits.

In the context of mitigation projects, ESSB 6091 explicitly identifies out-of-kind mitigation that improves the function and productivity of affected fish populations and related aquatic habitat as part of the evaluation of net ecological benefit. Such out-of-kind mitigation is not limited to actions designed to restore streamflow; instead, it may include the following:

“Out-of-kind mitigation may include instream or out-of-stream measures that improve or enhance existing water quality, riparian habitat, or other instream functions and values for which minimum instream flows or closures were established in that watershed.” (ESSB 6091, Section 301(8)(c).)

Here as well, Ecology’s language in the Interim Guidance is problematic, suggesting that some out-of-kind mitigation measures that are not focused on restoring streamflow might not be factored into net ecological benefits.

In effect, Ecology’s proffered definition focuses on net streamflow benefits – which appears inconsistent with the concept of “net ecological benefits” intended by the Legislature.

### **Conclusion and Implications**

Ecology has stressed that its *Interim Guidance for Determining Net Ecological Benefit* is intended only for short-term use, and a final guidance is anticipated sometime in 2019. However, because entities developing mitigation pilot projects need to clearly understand right now the universe of actions that can be counted toward net ecological benefits, it is possible that Ecology will consider issuing an interim clarification to the *Interim Guidance*.

*Interim Guidance for Determining Net Ecological Benefit* (Ecology Publication No. 18-11-009). See <https://fortress.wa.gov/ecy/publications/documents/1811009.pdf>.