

Mitigation as a Tool to Facilitate Water Rights Permitting

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Mitigation

When is Mitigation Required for a Water Right Application or Change Approval?

- **4-Part Test (Impairment and Availability)**
- ***Postema v. PCHB*, 142 Wn.2d 68 (2000)**
 - Minimum Instream Flows are Water Rights (impairment)
 - Closed Streams (non-availability)
 - *No distinction between de minimus or significant impairment*
- **Authority to Consider Mitigation (RCW 90.03.255; 90.44.055)**
 - *Squaxin Island Tribe v. Ecology* – no rulemaking necessary to consider mitigation plans
- **For changes, impairment can result from reduction of return flow or increase in annual consumptive quantity**

Mitigation

What Kind of Mitigation is Acceptable?

Water for Water, or Functions and Values?

- **Simple water-for-water replacement: match quantity, timing, and location of impact**
 - Problem: not always available or feasible
 - Hydraulic changes from development not considered, but should be (*Manke Lumber v. Ecology, CPM Development v. Ecology*)
- **Functions/Values: mitigate the reduced instream functions instead of impact to a numerical flow**
 - Door opened by PCHB to consider mitigation for impacts to “values” instead of instream flow numbers (*Miller Land & Timber; OWL v. KGH*)
 - Problems: lack of statutory clarity; litigation to protect status quo; Ecology policy stuck in rigid numerical impairment standard
- **Compare to RCW 90.74 re wetlands mitigation: “equal or better biological functions and values, compared to the existing conditions”**
- **See Table 1 from POL-2035 (written materials)**

Mitigation

Water for Water Mitigation

- Relinquishing or placing existing rights into trust (cessation/reduction of existing consumptive use)
- Discharging reclaimed water to enhance flows?
 - 90.46.130 may require mitigation for use of reclaimed water, offsetting the benefit (senior rights downstream)
- Transferring water into basin
- Water banks/pooled mitigation (Upper Kittitas)
- Streamflow augmentation (pump and dump)
- “Resource management techniques” per RCW 90.03.255/90.44.055
 - Vegetation Removal and Septic Tanks: not yet acceptable despite RCW 90.03.255 and 90.44.055
- Safety factors – consider degree of uncertainty/risk

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Out of Kind Mitigation (replacing lost functions and values)

- Water quality or habitat improvement, removing fish barriers, etc. as opposed to replacing lost water
- With few exceptions, Ecology has shied away from mitigation flexibility
- Authorized in Columbia Basin via alternative consultation process: WAC 173-563-020
 - *OWL v. Ecology and Kennewick Gen. Hosp.*
 - Habitat Restoration/Enhancement Requires Approval of Fisheries Managers (WDFW, USFWS, NMFS and Tribes)
- May require “OCPI” finding in other basins
 - *Foster v. Yelm* case, 12-part test and OCPI finding
 - Problem: overuse of OCPI causing close scrutiny and litigation

Mitigation

Ecology Guidance: POL 2035

- **POL-2035 Evaluating Mitigation Plans (Feb. 2013)**
 - Defines “Impairment” of instream flow water right as “caus[ing] the flow of the stream to fall below the instream flow more frequently, for a longer duration, or by a greater amount than was previously the case”
 - Mitigation plans are optional; prepared by applicant
 - In-kind, in-place, in-time mitigation is required in most circumstances, moving the department away from the opportunity to develop policy and science favoring out-of-kind or functions/values mitigation.
- **Mitigation Plan Requirements (see POL-2035 for checklist)**
 - Requires detailed hydrological analysis, incl. analytical or numerical model
 - Reliability analysis, including enforceability and sources of uncertainty
 - Measuring, monitoring and reporting plans
 - Contingency measures/adaptive management

Mitigation

Guidance from PCHB/Court Decisions

- **Foster v. Yelm: 7 criteria for choosing best mitigation alternatives: (see written materials)**
- **Foster v. Yelm2: 12 criteria for evaluating OCPI findings for out-of-kind mitigation: (see written materials)**

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Other Guidance/Opportunities

- **Ecology Rural Water Strategy – legislation is needed to expand mitigation opportunities or alter impairment standards; science is needed to support legislative effort**
- **Assemble Mitigation Portfolios, years in advance**
- **Watershed plans may provide mitigation projects or guidance for specific WRIAs**
- **Negotiate with Tribes and Stakeholders to avoid appeals**
- **Every Mitigation Project is Unique**

Questions ?????

Tom will be co-chairing the LSI Water Law Seminar on July 27 & 28 in Seattle. Among the topics is *“Science vs. the Precautionary Principle: When and How Can More Study Lead to Different Decision-making.”*

Contact Chelsie Irish to register: 206-414-6190

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