STREAMFLOW RESTORATION POLICY AND INTERPRETIVE STATEMENT

Contact: Program Development and Operations Support       Effective Date: xx/xx/2019

References: Chapters 18.104, 90.22, 90.54, 90.82, and 90.94 RCW; RCW 19.27.097, 89.08.460 and 90.44.050; Chapters 173-531A and 173-563 WAC.

Purpose: To ensure consistency, conformity with state law, and transparency in the implementation of chapters 19.27 and 90.94 RCW.

Application: This policy applies to the evaluation of building permit applications under RCW 19.27.097 and the implementation of activities authorized under chapter 90.94 RCW.

This policy supersedes any previous policy statement with which it conflicts.

1. Background

In February 2018, the Washington State Legislature passed Engrossed Substitute Senate Bill (ESSB) 6091 (session law 2018 c 1). This law was enacted in response to the State Supreme Court’s 2016 decision in Whatcom County vs. Hirst, Futurewise, et al. (commonly referred to as the “Hirst decision”)1. The law, now primarily codified in chapter 90.94 RCW, clarifies how local governments can issue building permits for homes intending to use a permit-exempt well for their domestic water supply. The law also requires that local watershed planning efforts take place in 15 WRIAs. Plans must be developed that will identify projects to offset the potential consumptive impacts of new permit-exempt well use on instream flows over the next 20 years, and provide a net ecological benefit to the WRIA. Additionally, the law provides opportunities for Ecology to issue water right permits to authorize pilot projects related to the State Supreme Court’s 2015 decision in Foster vs. Ecology, City of Yelm, et al. (commonly referred to as the “Foster decision”)2. Such permits may be issued if impacts on streamflows can be mitigated based on criteria provided in the new law.

This document provides policy statements as it relates to Ecology’s interpretation and implementation of the law. This policy applies to the interpretation and implementation of RCW 19.27.097 and chapter 90.94 RCW.

2. Acronyms

GPD – Gallons Per Day
LID – Low Impact Development

NEB – Net Ecological Benefit
NPDES – National Pollutant Discharge Elimination System
RCW – Revised Code of Washington
SEPA – State Environmental Policy Act
WAC – Washington Administrative Code
WRIA – Water Resource Inventory Area

3. Definitions

The following definitions apply in the context of this policy and the interpretation of chapter 90.94 RCW. Unless otherwise noted, Ecology does not apply these definitions to the interpretation of other statutes.

- **Action**: Any activity, articulated in a watershed plan, that is not a water offset project or non-water offset project that is included in the plan in order to offset impacts. Examples include but are not limited to: a recommended state rulemaking change or a recommended local ordinance changes.
- **Adaptive Management**: An iterative and systematic decision-making process that aims to reduce uncertainty over time and help meet performance goals by learning from the implementation and outcomes of actions.
- **Critical Flow Period**: The month(s) when low streamflows have the greatest likelihood to negatively impact the recovery of threatened or endangered salmonids or targeted fish species.
- **Domestic Use**: In the context of Chapter 90.94 RCW, “domestic use” and the withdrawal limits from permit-exempt domestic wells include both indoor and outdoor household uses, and watering of a lawn and noncommercial garden up to one-half acre in size.
- **Impact**: Effect(s) at both the WRIA-wide and subbasin scale, articulated in a watershed plan, which results from new consumptive water use, including but not limited to the effects on instream resources.
- **Instream resources**: Fish and related aquatic resources.
- **Net Ecological Benefit (NEB)**: Is the outcome that is anticipated to occur through implementation of projects in a plan to yield offsets that exceed impacts within: a) the planning horizon; and, b) the relevant WRIA boundary.
- **Net Ecological Benefit Determination**: Occurs only when Ecology, upon review of a locally approved watershed plan that has been submitted to Ecology for review, is reasonably assured that NEB, as defined in this guidance, will occur. Any such NEB determination will be issued by the Director of Ecology in the form of a plan adoption order.³
- **Net Ecological Benefit Evaluation**: A planning group’s demonstration, using this guidance and as reflected in their watershed plan, that their plan has or has not achieved an NEB.

³An order issued by the Director of Ecology is an appealable action as provided by Chapter 43.21 RCW and Chapter 371-08 WAC.
• **New Consumptive Water Use:** The consumptive water use portion of new permit-exempt domestic groundwater withdrawals anticipated to be initiated within the planning horizon. Water Resources Program Policy 1020 (1991) states, “Consumptive water use causes diminishment of the source at the point of appropriation,” and that, “Diminishment is defined as to make smaller or less in quantity, quality, rate of flow, or availability.” For the purposes described here, consumptive water use is considered water that is evaporated, transpired, consumed by humans, or otherwise removed from an immediate water environment due to the use of new permit-exempt domestic wells.  

• **Offset:** The anticipated ability, as articulated in a watershed plan, for a project to counterbalance some amount of impact. Offsets will need to continue in perpetuity since the new consumptive water uses are expected to continue in perpetuity.

• **Planning Groups:** A general term that refers to either a planning unit preparing a watershed plan update required by RCW 90.94.020 or a watershed restoration and enhancement committee preparing a plan required by RCW 90.94.030.

• **Planning Horizon:** The 20 year period beginning on January 19, 2018 and ending on January 18, 2038 over which new consumptive water use by permit-exempt domestic wells within a WRIA must be addressed.

• **Project:** A general term describing any activity, articulated in a watershed plan, including but not limited to water offset projects, non-water offset projects, and actions included in the plan in order to offset impacts.

• **Reasonable Assurance:** A planning group’s explicit content in their watershed plan are realistic in reaching its conclusions regarding the outcomes anticipated by the plan, and supported with scientifically rigorous documentation of their methods, assumptions, data, and implementation considerations used by the planning group.

• **Subbasins:** A geological basin within or as part of another basin. For the purposes of this document, the term “subbasin” refers to subareas or subbasins as opposed to entire WRIAs, and subbasin is equivalent to the words “same basin or tributary” as used in RCW 90.94.020(4)(b) and RCW 90.94.030 (3)(b). In some instances, subbasins may not correspond exactly with hydrologic basin delineations (i.e. watershed divides).

• **Watershed plan:** A general term that refers to either a plan update prepared by a planning unit required by RCW 90.94.020 or a watershed restoration and enhancement plan prepared by watershed restoration and enhancement committee required by RCW 90.94.030.

4. **Applicability**

RCW 19.27.097 establishes requirements as to what constitutes evidence of an adequate water supply for an applicant to receive a building permit from a local government.

Per RCW 19.27.097(5), water wells constructed before the effective date of the law (January 19, 2018) can serve as proof of adequate water supply for a building permit in WRIAs planning

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4 New consumptive water use in this document addresses new homes connected to permit-exempt domestic wells. Generally the new homes will be associated with wells that are yet to be drilled during the planning horizon. However, new uses could also occur where new homes are added to existing wells on group systems. In this document the well use discussed refers to both these types of new well use.
pursuant to RCW 90.94.020 or 90.94.030. These building permits are, therefore, not subject to requirements of chapter 90.94 RCW, regardless of whether water was put to beneficial use by operation of the well prior to January 19, 2018.

Geographic applicability is as follows:

- **In basins with instream flow rules that do not regulate permit-exempt uses**, evidence must be consistent with the statutory requirements established in RCW 90.94.020 and RCW 90.94.030, including requirements about a fee and water use restriction.

- In basins with instream flow rules that explicitly regulate permit-exempt uses, evidence must be consistent with requirements set forth in the rule.

- **In the Yakima basin**, additional requirements are required to satisfy adjudicated water rights.

- **In the Skagit basin**, additional requirements apply due to the *Swinomish* Supreme Court decision.

- **In the rest of the state**, a well report showing physical availability, proof of potability, and demonstration of meeting other requirements imposed by local governments of water is sufficient proof of an adequate water supply.

  - In WRIAs tributary to the Columbia River, a building permit application is subject to the requirements in the law relating to the respective WRIA in which the proposed well is located. If the proposed well is in an area governed by the Columbia River Rules (WAC 173-531A and/or 173-563) then RCW 19.27.097(1)(g) is applicable.
  
  - In WRIAs where existing instream flow rules only cover portions of the WRIA, requirements under chapter 90.94 RCW only apply to the geographical areas directly covered by the existing rule.

The requirements in RCW 90.94.020 and 90.94.030 only pertain to domestic permit-exempt withdrawals that require a new building permit, and do not affect other uses exempt from permitting under RCW 90.44.050.

If an applicant for a building permit or subdivision provides technical evidence that demonstrates a new domestic permit-exempt well will not cause impairment to an adopted instream flow or closure, then the applicant is relieved of having to comply with the requirements in chapter 90.94 RCW.

Chapter 90.94 RCW supersedes existing case law and rules pertaining to the issuance of building permits and new domestic permit-exempt well water use in the 15 WRIAs identified in the law.

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5 Local governments may impose additional requirements.
5. **Local Government Obligations**

Under chapter 90.94 RCW, Ecology interprets local governments to have the following obligations:

- Collect a $500 fee for each development permit authorizing a new domestic permit-exempt well water use that is regulated by chapter 90.94 RCW, unless established otherwise by rules adopted under chapter 90.94 RCW. The law does not specify whether local governments must collect the fee at the time of a subdivision or building permit application. Local governments are expected to annually remit $350 from each fee collected to Ecology. The $500 fee is in addition to existing well drilling fees required under chapter 18.104 RCW.

- Record water use restrictions on the title of affected properties. Ecology recommends local governments use the following language: “Domestic water use at this property is subject to a water use limitation of a maximum annual average withdrawal of [three thousand or nine hundred and fifty or other amount specified by rule] gallons per day, per connection, subject to the five thousand gallon per day limit in RCW 90.44.050.”

- Record possible water use curtailment during drought emergencies on affected properties regulated under RCW 90.94.030. Ecology recommends local governments use the following language: “If a Drought Emergency Order is issued pursuant to RCW 43.83B.405, domestic water use at this property may be curtailed to no more than three hundred and fifty gallons per day per connection [or other amount specified by rule], for indoor use only. Notwithstanding the drought restriction to indoor use, a fire control buffer may be maintained.

6. **Water Use Limits under RCW 90.94.020 and 90.94.030**

RCW 90.44.050 establishes permit-exempt withdrawal limits for domestic water use, watering of a non-commercial lawn or garden, industrial use, and also authorizes stock watering with no limits. The water use limits under chapter 90.94 RCW further restrict the limits identified in RCW 90.44.050 for domestic water use and watering of a non-commercial lawn or garden.

Chapter 90.94 RCW includes water use restrictions for new domestic permit-exempt withdrawals for “domestic use” to a maximum annual average of up to 950 gallons per day (GPD) in basins planning under RCW 90.94.030 and 3,000 GPD per connection in basins planning under RCW 90.94.020. The numerical limit depends on the specific WRIA the withdrawal is located in.

- In the context of chapter 90.94 RCW, “domestic use” and the GPD withdrawal limits include both indoor and outdoor household uses, and watering of a lawn and noncommercial garden up to one-half acre in size.

- Water withdrawal restrictions are based on a maximum annual average withdrawal. Ecology interprets this to mean that a home’s water use cannot exceed 950 or 3,000 GPD as the daily average over the entire year.

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• Homeowners are still limited to using no more than 5,000 GPD for domestic use and one-half acre as set forth in RCW 90.44.050. As an example, under 90.94.020 and 90.94.030 RCW, a homeowner could withdraw 4,000 gallons on a summer day, so long as they did not do so often enough that their annual average exceeds the 950 or 3,000 gallon limit.

A rule adopted pursuant to chapter 90.94 RCW for a specific WRIA may change the withdrawal limit(s) in that WRIA, but those limits cannot exceed limits in RCW 90.44.050.

*Ecology v. Campbell & Gwinn, LLC, et al* (2002)\(^6\) specifies that a development project, such as a residential subdivision, is considered to be supplied with water by a single withdrawal of groundwater. Well(s) supplying water for all the homes in the project are subject to the withdrawal limits under RCW 90.44.050 in aggregate. Though the water use restrictions in chapter 90.94 RCW are specified as “per connection,” the limits under *Campbell & Gwinn* also apply. Thus, while an individual home within a subdivision may withdraw an annual average of 950 GPD or 3,000 GPD [or other amount specified by rule] under chapter 90.94 RCW (depending on the WRIA), the entire project is still restricted to no more than 5,000 GPD for all domestic use for all the homes in the project, and irrigation of no more than one-half acre of lawn and noncommercial garden, collectively, in the subdivision.

### 7. Planning under RCW 90.94.020 and 90.94.030

For WRIAs planning under RCW 90.94.020, Ecology will work with existing planning units and initiating governments formed under chapter 90.82 RCW, where those groups are still active. In a WRIA where a planning unit created under chapter 90.82 RCW is no longer active, Ecology will work with the respective WRIA’s initiating governments to reestablish a planning unit that includes the range of representation identified under chapter 90.82 RCW, to the extent practicable. RCW 90.94.020 does not specify that Ecology is required to follow the process in RCW 90.82.060(6) to reestablish a planning unit for the purpose of implementing RCW 90.94.020.

**Minimum plan/plan update requirements:**

RCW 90.94.020 and 90.94.030 establish requirements for updating a Watershed Management Plan (plan update) or completing a Watershed Restoration and Enhancement Plan (plan), respectively. Plans and plan updates must identify projects necessary that *at a minimum*, offset the consumptive use of new groundwater permit-exempt domestic withdrawals over the next 20 years and achieve NEB. Ecology has developed guidance for determining whether a plan or plan update meets the NEB requirement\(^7\).

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\(^6\) *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002).

\(^7\) *Interim Guidance for Determining Net Ecological Benefit* (Draft Publication 18-11-009; June 2018) applies to planning groups with 2019 deadlines, or which planned in accordance with the Interim NEB Guidance due to those planning groups’ accelerated schedules with Ecology’s prior agreement; *Final Guidance for Determining Net Ecology Benefit* (XX Publication 19-xx-xxx; TBD 2019) pertains to all other WRIAs identified in chapter 90.94 RCW.
A complete update of all the elements of the original watershed management plan is not required for WRIAs planning under RCW 90.94.020. The requirement to update an adopted watershed management plan applies specifically to the objectives of the new legislation.

Projects identified in plans or plan updates are not limited to those that can provide strict in-time, in-place offsets, though projects in the same sub-basin or tributary (within the same WRIA), and during the same time that the use occurs are prioritized. Projects in other sub-basins or tributaries that replace water only during critical times for fish may also be recommended.

- Though the statute requires the offset of “consumptive impacts to instream flows associated with permit-exempt domestic water use” (RCW 90.94.020(4)(b)) and 90.94.030(3)(b)), plans and plan updates should address the consumptive use of new permit-exempt domestic withdrawals. Ecology recommends consumptive use as a surrogate for consumptive impact to eliminate the need for detailed hydrogeologic modeling, which is costly and unlikely feasible to complete within the limited planning timeframes provided in chapter 90.94 RCW.

- RCW 90.94.020 and 90.94.030 have various references to how plans and plan updates are to project, offset, or account for “water use.” Ecology interprets these subsections of the law (RCW 90.94.020(4)(b), 90.94.020(4)(c), 90.94.030(3)(b), 90.94.030(3)(c), 90.94.030(3)(d), and 90.94.030(3)(e)) to relate to the consumptive water use of new permit-exempt domestic groundwater withdrawals that come on line during the twenty-year planning horizon.

SEPA review, in the form of a non-project SEPA analysis, is necessary prior to Ecology adopting a plan or plan update. SEPA may be completed by Ecology or by a local government. In general, this allows for projects identified in adopted plans or plan updates to be implemented without further SEPA analysis. However, some individual projects implemented under chapter 90.94 RCW may also need SEPA review, depending on how projects conform under the criteria provided in RCW 89.08.460.

Acceptable projects:
Projects identified in plans or plan updates should meet the intent of chapter 90.94 RCW for development of new projects and actions that benefit instream resources, offset the consumptive use of of new permit-exempt domestic wells that come on line during the twenty-year planning horizon, and achieve NEB in the WRIA.

- Projects or phases of a project with a signed funding contract or agreement after January 19, 2018 may count towards the required consumptive use offset and/or providing NEB.

- New regulations or amendments to existing regulations adopted after January 19, 2018, enacted to contribute to the restoration or enhancement of streamflows may count towards the required consumptive use offset and/or providing NEB.

- Projects completed before January 19, 2018 will not count towards the required consumptive use offset and/or providing NEB.
• Ecology will not consider mitigation required by existing environmental regulations such as critical area buffers, shoreline setbacks, stormwater/LID, floodplain management, forest practices, NPDES requirements, etc. as contributing to towards the required consumptive use offset and/or NEB. Ecology understands that regulations required by other laws or programs would apply regardless of the passage of chapter 90.94 RCW. This is irrespective of whether or not a building or project had yet been constructed under the regulation.

All funding decisions for projects will be made pursuant to Chapter 173-566 WAC – Streamflow Restoration Funding Program.

**Plan approval, review, and adoption:**
For the purposes of chapter 90.94 RCW, Ecology defines plan and plan update approval as an action taken on the local level (i.e. by the WRIA planning group) to document support for the WRIA’s respective plan or plan update. Plan and plan update review is an action taken by Ecology to examine and evaluate an approved plan or plan update. Plan and plan update adoption is a formal action taken by Ecology after review, if the agency determines the plan or plan update meets the requirements of RCW 90.94.020 or 90.94.030. These steps must occur sequentially, meaning that Ecology will not begin its review until the plan or plan update is formally approved by the local planning group.

For plan/plan update approval:
• In WRIAs planning under RCW 90.94.020, the planning group (planning unit and initiating governments) must determine plan or plan update approval procedures. The approval procedure identified under RCW 90.82.130 is not specifically required under RCW 90.94.020, so planning groups can elect to follow different approval procedures, if preferred.

• In WRIAs planning under RCW 90.94.030, the planning group must follow the specific approval procedures outlined in that section of the law.

For plan/plan update review:
• Ecology will not edit or provide feedback on draft plan updates in advance of approval by the planning group and submittal to Ecology. Ecology will base its review on what has been approved and submitted to Ecology.

• Ecology will not consider a draft plan or draft plan update, or portions thereof, which were not approved by the planning group.

For plan/plan update adoption:
• Ecology will not adopt a plan or plan update contingent upon specific revisions to the plan or plan update.

• Planning groups may include plan or plan update components which they believe help ensure that the projects/actions will be completed successfully (e.g. conditions to allow
for adjustment of the plan or plan update in the future) as an “adaptive management” element. However, Ecology cannot adaptively change statutory-defined requirements, such as water quantities or the connection fee, at some future date if certain projects are not completed. Such a change requires rulemaking. Ecology could not include such a “potential conditional rulemaking” for adaptive management as part of a plan or plan update adoption.

- Ecology will review locally approved watershed plans submitted by planning groups within a reasonable time for Ecology review prior to the relevant statutory deadlines.  

- Chapter 90.94 RCW requires Ecology to determine that a Net Ecological Benefit (NEB) will result prior to adopting watershed plan updates, as required under RCW 90.94.020, and watershed restoration and enhancement plans, under RCW 90.94.030.

- The NEB guidance notifies planning groups of the standards Ecology will apply when reviewing any locally approved watershed plan submitted by a planning group to Ecology, and that the plan must be submitted within a reasonable time for Ecology review and possible adoption prior to the relevant statutory deadlines.

- Watershed plans must identify projects intended to offset impacts. Planning groups may, at their discretion, opt to identify projects in their plans that offset water use and anticipated effects beyond those associated with new consumptive water use initiated over the next 20 years. However, watershed plans are not required to include such projects, and the planning groups are advised that should they opt to do so, they should be very cautious to understand that any work undertaken beyond the specific planning minimums increase risk that time, and funds, are spent on matters that will not necessarily yield a locally approvable or adoptable plan within the very tight timeframes of the law.

If Ecology does not adopt the WRIA plan or plan update on or before the statutory deadlines in RCW 90.94.020 or 90.94.030, the agency must initiate rulemaking consistent with the provisions in the law (see Section 8). Ecology cannot adopt a plan or plan update that has not been approved by the planning group.

8. **Rulemaking under RCW 90.94.020 and 90.94.030**

RCW 90.94.020 and 90.94.030 establish that Ecology *must* adopt rules to incorporate plan or plan update provisions under the following circumstances:

(a) If the adopted plan or plan update recommends a change to the fee or the water use restriction prescribed in the law; or
(b) If the plan or plan update is not adopted by Ecology by the prescribed timeline.
Ecology may amend or adopt rules if it believes it necessary for another reason.

If Ecology adopts a plan or plan update by the prescribed deadline, Ecology may commence a rulemaking process, depending on the contents of the adopted plan or plan update.

- Ecology will generally avoid rulemaking if an adopted plan or plan update does not include recommendations that require it.

- Ecology will begin rulemaking if an adopted plan or plan update recommends changing the statutory water use requirements, fees, or other measures that are in existing rules. The rulemaking may be limited to the scope of what is recommended in the plan or plan update. In general, Ecology will rely on plan or plan update recommendations supported by legal and scientific information when proposing the rule requirements. If additional information or analysis is developed during the public rulemaking process, Ecology will use that information, and may modify rule requirements as appropriate.

- Planning groups can recommend changes to instream flow levels and make other recommendations outside the scope of chapter 90.94 RCW. When part of an adopted plan or plan update, Ecology will evaluate these recommendations during rulemaking, but is not obligated to include such changes in a rule.

If a plan or plan update has not been adopted by the prescribed deadline, Ecology is required to commence a rulemaking process under RCW 90.94.020 or 90.94.030.

- Ecology will not write a plan update for WRIAs identified in RCW 90.94.020. Ecology will initiate rulemaking (as required under law) and develop rule supporting documents that meet the intent and requirements of RCW 90.94.020. At a minimum, the rule supporting documents will include: a WRIA-wide estimate of consumptive use from new permit-exempt wells over 20 years, a list of projects and actions that Ecology is reasonably assured could be completed to offset the consumptive use, and a NEB determination.

- For the WRIAs identified in RCW 90.94.030, Ecology will follow the procedures specified in RCW 90.94.030(3)(h). Ecology will submit the final draft plan to the salmon recovery funding board for a technical review, and provide recommendations to amend the final draft plan, if necessary. Ecology shall consider the recommendations and may amend the draft plan without committee approval prior to adoption.

9. Foster pilot projects

RCW 90.94.090(8) authorizes Ecology to issue permit decisions for up to five water resource mitigation pilot projects. Ecology expects the pilot projects to consist of applications for new water right permits and/or applications to change existing water rights. Ecology retains the authority and obligation to review each pilot project water right decision and approve or deny the application based on sufficiency of technical information and compliance with the law. Decisions on applications for Foster pilot project permits are appealable following the same
procedure as for other water right permit decisions under the Administrative Procedures Act, chapter 34.05 RCW.

Under RCW 90.94.090, Ecology is not authorized to issue permits that will impair senior consumptive rights. Additionally, under chapter 90.03 RCW, Ecology is only authorized to issue permits for water rights that will be put to beneficial use.

Pursuant to RCW 90.94.090(8), permits for the pilot projects may mitigate for the impact to instream flows and closed surface water bodies through an established “mitigation sequence,” as described in RCW 90.94.090(8)(a) through (c). To determine whether the proposed withdrawals and diversions of water would impair senior instream flows, or whether water that would otherwise impact closed surface waters, Ecology will assess whether the applicants have properly followed the established mitigation sequence, rather than applying the traditional test for impairment and availability of water subject to senior instream flow water rights and closures.

The mitigation sequencing of RCW 90.94.090(8) should be followed in order. Applicants may only proceed along the sequence when the previous step was not “reasonably attainable.”

Avoiding impacts, under RCW 90.94.090(8)(a), refers only to compliance with minimum flows adopted by rule or making the water use interruptible in favor of the rule. To show that avoidance is not “reasonably attainable,” an applicant must explain why the water use cannot be subject to otherwise-applicable minimum flows.

Minimizing impacts, under RCW 90.94.090(8)(b), refers to mitigating the impacts to impacted instream flows or closures by replacing the water supply.

- This can include acquiring existing trust water rights that are not already committed to mitigation, placing water rights into trust; or other types of replacement water supply.

- Mitigation rights that are not placed into trust should be secured with adequate legal provisions, such as permit conditions, to ensure that the water use is fully contingent on the supply of mitigation water.

- These measures must ensure both (1) no net annual increase in quantity of water diverted or withdrawn and (2) no net detrimental impacts to fish and related aquatic resources.

To show that minimizing impacts is not reasonably attainable, applicants should:

- Explain what efforts have been taken to identify replacement water rights; and

- Whether it would be technically feasible to mitigate with those rights.

If applicants attest that “water for water” mitigation is not reasonable because of cost, they should explain how the cost of potentially obtainable water was determined.

Compensation, under RCW 90.94.090(8)(c), should provide a “net ecological benefit” through replacement of water, habitat improvements, and/or other measures that improve instream
functions and values. Under RCW 90.94.090(8)(c), Ecology will evaluate projects consistent with the published NEB Guidance (Final Guidance for Determining Net Ecology Benefit (XX Publication 19-xx-xxx; TBD 2019).

Ecology has sole discretion, and will use its best professional judgement, in assessing the technical merits of projected impacts of the proposed project and whether the mitigation sequence was properly followed. Ecology will document its findings in the draft Report of Examination, which must be posted for public review and comment, under RCW 90.03.290.

Mary Verner  
Program Manager  
Water Resources Program  

Special Note: These policies and procedures illustrate existing law and encourage consistency to guide water resources program staff in administering laws and regulations. These policies and procedures are not formal administrative regulations adopted through a rule-making process. Therefore, while this policy provides general guidance, it is not intended to supersede the applicable statutes and rules or control in all situations where staff may exercise discretion as to how best to apply the law.

The policies indicate Ecology's practices and interpretations of laws and regulations at the time they are adopted and may not reflect later changes in statute or judicial findings. If you have any questions regarding a policy or procedure, please contact the department.