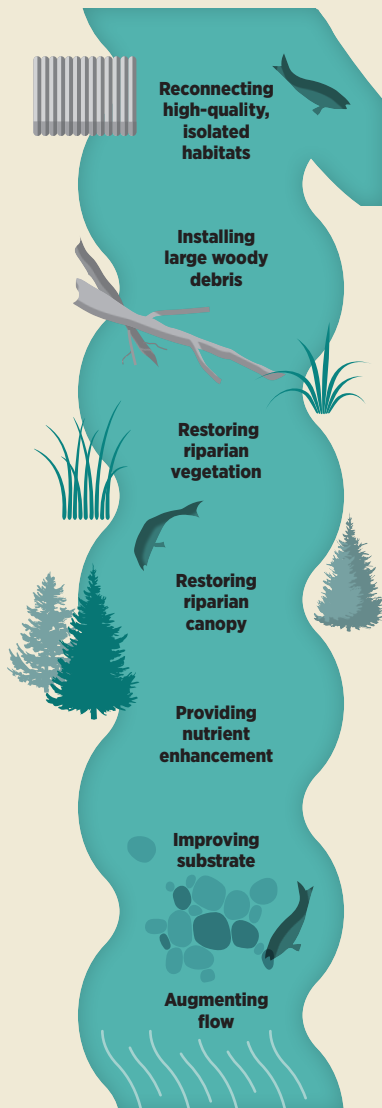




LEGAL AFFAIRS

Out-of-Kind Thinking

Here are some of the mitigation techniques that might be supported by a “Foster fix.”



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STREAMING SERVICE

LEGISLATIVE PROGRESS ON A POTENTIAL “FOSTER FIX”

THE 2013 WASHINGTON SUPREME COURT *Foster* decision effectively resulted in municipalities losing the ability to secure new water for growth in many parts of the state. Against somewhat steep odds, the Washington State Legislature took a small but important step during the 2018 legislative session to address that case by advancing a conversation on the potential future restoration of the Department of Ecology’s authority to allow out-of-kind/out-of-stream mitigation measures for municipal water supply projects. This move took form as a section in the so-called Hirst Fix (ESSB 6091), which was passed in order to restore the ability of rural parties to develop permit-exempt wells and thereby allow passage of the capital budget.

In brief, the Legislature approved the following in terms of out-of-kind mitigation:

- 1.) The establishment of a legislative task force to make recommendations to the Legislature regarding the authority the Department of Ecology should have to approve out-of-stream/out-of-kind mitigation to offset the impacts to instream flows of new ground and surface water appropriations; and

- 2.) The authorization of five pilot projects that will be eligible for water right approval employing a range of mitigation measures that are not limited to water-for-water, but may also include out-of-stream and out-of-place habitat improvement measures.

The above legislative action was driven by the Washington Supreme Court’s 2013 decision in the case of *Sara Foster, et al. v. Dept. of Ecology and City of Yelm*. As reported in a prior edition of *Cityvision*, the court found that:

- Ecology cannot use OCPI (overriding consideration of public interest) to justify the permanent, non-temporary, emergency allocation of water involving a closed or regulated stream;
- No level of impairment to instream flows is permissible, regardless of magnitude or ecological impact; and
- Ecology cannot use out-of-kind mitigation strategies, such as habitat improvement measures, to address impairment of instream flows.

As a consequence of the *Foster* decision, municipal systems, including Yelm, lost the ability to secure new water rights absent meeting the mitigation bar of same quantity, same duration, same place and time, and water for water. Meeting this bar is extremely difficult, if not simply unfeasible, for many jurisdictions. Why? Because few systems have access to water lines conveniently located to allow the simple “pump and dump” of mitigation water into affected streams at the exact location of a modeled stream impact. Other obstacles include an inability to acquire trust or private water rights that correspond to the area of impact.

With passage of the *Foster* pilot projects and task force, municipal systems now have at least a glimmer of an opportunity to

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restore Ecology’s authority, whether the agency wants it or not, to meet future needs through new appropriations that are not solely dependent on water-for-water mitigation. This opportunity will occur, however, only if the municipal systems undertaking the five authorized Pilot Projects can show, in a very credible and scientific fashion, that out-of-kind mitigation can not only offset flow impacts to salmonids and other important aquatic habitat species but also create a “net ecological benefit.”

Can the Legislature’s standard of net ecological benefits be achieved? Sure, it can, as demonstrated in habitat conservation plans and other innovative projects that have been implemented around the state. But achieving that standard will also depend on Ecology’s capacity to define it in a scientifically coherent and achievable manner—such as a water system being able to produce findings of net improvements in water quality, fish production, stream substrate, and other factors that are central to a healthy fishery.

A further challenge to restoring Ecology’s out-of-kind/out-of-stream approval authority exists in the fact that environmental groups (and tribes) have little incentive to encourage, much less allow, a true “Foster fix.” And for good reason: they won the Foster case with a solid court majority. Moreover, as

a result of their court victory, they effectively halted even the most minimal impacts to instream flows—clearly a big deal if you consider instream flows to be already overappropriated, overstressed, and now subject to the degrading impact of projected climate change.

Wherever one stands on the issue of out-of-kind mitigation, it can hardly be disputed that our water resources are facing unrelenting pressure as population growth, development, and other land use pressures continue to mount. Further, their protection is important to preserving the environmental values that have made our state special. What I hope for, however, is that solid science, rather than suspicion and distrust, will be allowed to prevail, thereby affording municipal systems a fair shot at showing that small flow impacts can be more than offset with true net ecological benefits to both salmonids and their aquatic habitat.

Given the political, economic, and legal stakes associated with out-of-kind mitigation, Ecology is likely to be subject to a myriad of internal and external scientific, political, and legal forces that seek to shape its definition of “net ecological benefits,” among other related standards. The legislative task force makes a recommendation by November 2019, hopefully leading the way for real progress. 

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