Appendix C.

Public notices

- Copies of all public notices regarding rule (i.e., FOCUS sheets, news releases, legal notices and advertisements, handouts and flyers, WSR notices)

Wetland Mitigation Banks, Chapter 173-700 WAC

Rule Workshop and Hearing Agenda

- **2:00 pm / 6:00 pm**

  Welcome and Introductions

  Discuss Workshop and Hearing Proceedings

  Presentation

  Question and Answer Session

- **3:00 pm / 7:00 pm**

  Official Hearing Begins

  Public Testimonies

How to submit your comments

Ecology is currently taking public comments on the proposed rule. All comments must be received by 5:00 pm on April 23, 2009.

You can give us your official comments in the following ways:

- Testify at a public hearing.
- Visit our website and submit comments electronically at: http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/rule
- Email your comments to: yhol461@ecy.wa.gov
- Mail comments to:

  Department of Ecology
  Attn: Yolanda Holder
  Shorelands and Environmental Assistance Program
  PO Box 47600
  Olympia, WA 98504-7600

Summary of Changes to the State Draft Rule
Wetland Mitigation Banks, Chapter 173-700 WAC

The Department of Ecology (Ecology) made changes to the 2001 wetland mitigation banking (banking) draft rule. The changes are based on lessons learned from the pilot program, feedback received from the public and stakeholder groups, and to ensure consistency with the new federal rule: *Compensatory Mitigation for Losses of Aquatic Resources; Final Rule.*

To provide greater predictability and consistency within the banking program, we've changed the following:

1. Re-organized the certification process, including the addition of timelines.
2. Clarified the prospectus and mitigation banking instrument (instrument) submittal procedures.
3. Clearly defined roles and responsibilities of involved parties.
4. Additional guidance provided for locating and operating banks.

These changes will benefit both bank sponsors and regulatory agencies by streamlining the certification process while providing a successful and ecologically appropriate wetland mitigation option. The regulated community benefits by having a readily available option for mitigation requirements. The public benefits through the establishment of ecologically significant and successful wetland complexes.

General Changes by Section in the 2009 Draft Rule

Part I: OVERVIEW
173-700-100 to 173-700-104

- Includes text regarding the applicability of the draft rule for proposed tribal banks which are located exclusively on tribal lands as well as those located within state jurisdiction (173-700-102).

- Ensures consistency with the federal wetland mitigation rule by updating the definitions as needed (173-700-104).

Part II: CERTIFICATION PROCESS
173-700-200 to 173-700-242

- Part II of the rule is re-organized to accurately describe and clarify the current certification process.

- Part II of the rule incorporates agency review and decision timelines consistent with the new federal rule on wetland mitigation.

- Provides Ecology with the ability to accept or deny a bank proposal based on the ecological appropriateness and ability to provide appropriate compensatory mitigation (173-700-212).

- Allows review and decision timelines to stop or be extended due to insufficient information, government to government consultations, permit timelines, etc. (173-700-233).
- Incomplete submittals are not accepted by Ecology and review timelines are stopped until a complete proposal or draft instrument is submitted (173-700-212 and 173-700-224).

- Clearly outlines the prospectus, draft instrument, and final instrument contents, and submittal procedures (173-700-211 to 173-700-212, 173-700-222 to 173-700-225, and 173-700-230).

- Clarifies and strengthens the role of the local jurisdiction in the certification process. Ecology will notify the appropriate local jurisdiction of the department's intent to certify a wetland mitigation bank and request a certification decision from the local jurisdiction (173-700-230 and 173-700-231).

- Clarifies the public notice issuance at the prospectus and the final instrument stage (173-700-210, 173-700-212, 173-700-230, and 173-700-240).

Part III: BANK ESTABLISHMENT
173-700-300 to 173-700-354

- Changes the maximum extent of a proposed bank's service area to WRIA boundaries, except when ecologically appropriate to include areas outside of the WRIA (173-700-301).

- Changes the criteria listed in site selection to include steps an applicant must follow if a bank is proposed on agricultural lands of long-term commercial significance (173-700-303).

- Includes new categories or titles for mitigation activity, as defined in the joint wetland mitigation guidance (i.e., 'creation' is now 'establishment'). Ranges for credit conversion rates are changed to reflect these new terms and the type of compensation they provide (173-700-314).

- Conversion rates for uplands and other habitats are changed and clearly distinguish between enhancement and preservation (173-700-318).

- Clarifies the requirements for financial assurance for various phases of a bank project (173-700-351, 173-700-352, 173-700-353, and 173-700-354).

- Clarifies the credit release schedule for pre-construction and post-construction to provide consistency and predictability for the bank sponsor (173-700-331).

Part IV: BANK OPERATION
173-700-400 to 173-700-421

- Changes monitoring period for a bank site from 5 to generally 10 years (173-700-403).

- Clarifies the monitoring and reporting requirements for the bank site, including timelines (173-700-401).

- Specifies the bank sponsor shall notify Ecology within 90-days if adaptive management activities are implemented at the bank site to address unforeseen problems with site conditions (173-700-403).

- Clarifies that only credits debited from a bank to meet permit requirements (an impact project which requires a permit number and issuance date) should be recorded on the bank ledger and with the county auditor (173-700-411).

Part VII: ROLES AND RESPONSIBLITIES
173-700-700 to 173-700-701

- Duplicative text and processes previously stated in the rule text are removed from this section.

Wetland Mitigation Banking

Chapter 173-700 WAC

Q: What is a wetland mitigation bank?

A: A wetland mitigation bank is a site where wetlands are restored, created, enhanced or preserved. A wetland mitigation bank is established to generate increases in wetland function called credits that can be used or sold to provide compensation for unavoidable wetland losses.

Q: How is wetland mitigation banking different from other types of mitigation?

A: Concurrent or "permittee-responsible" mitigation: Generally, the wetlands are built after the permit is issued and the adverse impact occurs. Mitigation can occur on or off site.

Advance mitigation: Wetland sites are built in advance to compensate for project impacts already identified. Advanced mitigation can combine compensation for multiple wetland losses.

Wetland mitigation banking: Wetland areas are established before unavoidable permitted losses occur. These are typically used to offset unknown wetland losses associated with several permits, rather than a single project.

Q: What are the benefits of wetland mitigation banking?

A: Wetland mitigation banks provide many benefits, such as:

- Reducing the time lag between the lost or reduced wetland functions and values from a project and environmental compensation for those impacts.
- Sites can be planned consistent with local watershed planning efforts.
- Combining mitigation needs of small projects into one larger wetland complex.
- Providing mechanisms for long-term protection, management and maintenance.

DEFINITIONS

Credits: A unit of trade representing the increase in the ecological value of the bank site measured by acreage, functions, or other assessment method.

IRT: An interagency group of federal, state, tribal, and local regulatory and resource agency representatives who are invited to participate in negotiations with the sponsor on the terms and conditions of the instrument.

Mitigation Bank Instrument: The documentation of agency and sponsor concurrence on the objectives and administration of the bank. The mitigation banking instrument describes in detail the physical and legal characteristics of the bank, including the service area, and how the bank will be established and operated.

Performance standards: Measurable criteria for determining if project goals and objectives are being met. Performance standards document a desired state, threshold values, or amount of change necessary to indicate the bank is working successfully.

Service area: A specific geographic area in which a bank can reasonably be expected to provide appropriate compensation for unavoidable impacts to wetlands.

Contact information:
Yolanda Holder, 360-407-7186
yhol461@ecy.wa.gov

Special accommodations:
If you need this publication in an alternate format, call 360-407-6096. Persons with hearing loss, call 711 for Washington Relay Service. Persons with a speech disability, call 877-833-6341.

Q: What are the limits of wetland mitigation banking?

A: Wetland mitigation banking is one tool for compensating for unavoidable wetland impacts. Banking can't solve all mitigation-related problems. Banking also may not be suitable for all projects. Startup costs can be high and require a long-term commitment from the bank sponsor (sponsor).

Q: Are wetland mitigation banks regulated differently than other types of mitigation projects?

A: No. Existing regulatory requirements still apply to wetland mitigation banks. Parties seeking permits for activities that affect wetlands must first avoid and then minimize those adverse effects. After avoidance and minimization has been achieved, remaining unavoidable impacts must be compensated. Wetland mitigation banks are one option to compensate for unavoidable wetland impacts.

Q: What is the process for reviewing wetland mitigation bank proposals?

A: Wetland mitigation banks go through the following certification steps:

- **The review process starts when the sponsor submits a prospectus to Ecology.** The department provides feedback and determines if the prospectus is complete. Once the prospectus is complete, notice is issued seeking public input regarding the proposed bank.
- **The Interagency Review Team (IRT) is convened.** The IRT reviews and provides technical input on the sponsor's bank design, service area, performances measures, and decides the number of bank credits available. Public comments are considered during the technical review stage.
- **Sponsor submits a draft Mitigation Bank Instrument (MBI) for IRT review and comments.** The sponsor incorporates these comments and submits a Final MBI to the IRT.
- **Sponsor arranges for signing after all necessary comments are incorporated and approved by the IRT.** The certification process is complete once Ecology, the sponsor and the local jurisdictions' signatures are received.

Q: What is the local government's role in the certification process?

A: Ecology cannot certify a bank without local approval. After a sponsor submits a prospectus, the local government is contacted and invited to be part of the IRT bank review process. Each local jurisdiction where the bank would be located must sign the bank's mitigation banking instrument for the certification to be complete. The department's 2004 pilot program demonstrated the importance of involving local jurisdictions early and throughout the certification process. To encourage local involvement in the certification process, Ecology has clarified the role of local governments in the draft rule.

Q: How can the public get involved in the wetland mitigation bank certification process?

A: There are several opportunities during the certification process, where the public can review and comment on a proposed wetland mitigation bank (bank). An initial public notice is issued on the prospectus. A second public notice is issued on the mitigation banking instrument.

The public can also stay involved with the program by joining Ecology's wetland mitigation banking listserv at: http://listserv.wa.gov/cgi-bin/wa?A0=WETLAND-MITIGATION-BANKING.

Q: Will wetland mitigation banks result in more wetlands being lost?

A: Applicants proposing projects that will adversely impact wetlands must go through mitigation sequencing to avoid and minimize wetland losses, regardless of whether they propose to use wetland bank credits as compensation. Wetland bank credits can only be used when the permitting agency determines that the unavoidable wetland impacts are adequately offset by the bank.

Q: Will the creation of wetland mitigation banks result in larger wetland mitigation failures?

A: Ecology's proposed rule is designed to ensure banks do not result in large-scale failures. The proposed rule includes several mechanisms for ensuring successful banks. These include:

- Rigorous technical review.
- Site monitoring.
- Financial assurances.
- Permanent protection of the bank site.

Additionally, wetland mitigation bank credits are metered out over time to ensure that when bank credits are used they provide actual increases in wetland area and functions. Bank credits are only released when the bank meets specific, pre-identified benchmarks (performance standards). These benchmarks are tied to attaining certain levels of gain in wetland area and functions.

Q: Will wetland mitigation banks result in the loss of farmlands?

A: Ecology knows a vibrant agricultural industry is vital to the state's economy. We believe, if done correctly, wetland mitigation banks (banks) and a strong agricultural industry can go hand in hand. The draft rule includes language that discourages locating banks on prime soils and agricultural lands of long-term commercial significance. The rule also outlines criteria for evaluating whether a bank should be located on agricultural land and includes considerations for designing banks to ensure they do not adversely affect adjacent farms.

Q: Will banks result in my property being flooded?

A: As part of the banking certification process, the sponsor(s) is required to collect extensive data on water sources for the wetland and potential effects on adjacent properties. If there is the potential a bank will affect hydrologic conditions on adjacent properties, the sponsor(s) must monitor surface and groundwater levels to ensure flooding problems do not occur.

Q: How does Ecology ensure that banks are located in the right areas?

A: The 2004 Pilot Program showed us that while wetland mitigation banks (banks) may not be proposed in the most ecologically appropriate location, they may be proposed where land is less costly. Site selection criteria within the draft rule states banks must be consistent with watershed restoration priorities and designed to restore ecological processes.

Q: Can Ecology deny poor bank proposals?

A: Yes. The current draft rule includes criteria for when Ecology can deny an inappropriate or poor bank proposal. Bank proposals must be ecologically appropriate and able to provide appropriate mitigation for anticipated wetland losses – or face being denied. These criteria also meet federal mitigation rules. The original 2002 draft rule did not include a process for denying bank proposals.

Q: How does Ecology ensure that a bank won't fail?

A: Ecology can't guarantee a bank won't fail. However, Ecology uses several tools to minimize that risk including:

- Requirements for extensive technical information to support proposed designs.
- Intense review and evaluation by regulatory agencies.
- A credit release schedule that ties the ability to sell credits to the bank attaining certain performance standards.
- Suspending credit use if a bank fails to meet performance standards or if the bank is used inappropriately.
- Consistent and ongoing oversight to ensure that problems are identified early in the bank site development.

Finally, sponsors must post financial assurances for their project. If a sponsor defaults or fails to fulfill their obligations under the mitigation bank instrument, Ecology and the U.S. Army Corps of Engineers can access a bank's financial assurances to hire contractors to repair and maintain wetlands on the bank site.

Wetland Mitigation Banks

Overview

The Washington Department of Ecology (Ecology) is proposing to adopt a new rule related to wetland mitigation banks (banks). This rule will lay out criteria and a certification process to establish wetland mitigation banks across the state.

A wetland mitigation bank is a wetland restoration project designed to offset or "mitigate" environmental damages to wetlands from development, before harm occurs. These mitigation efforts can restore, create, enhance, and preserve critical wetland functions within a specific watershed or geographic area.

Why wetland mitigation banking is important

State and federal laws strongly discourage the loss of wetlands due to development. Wetlands are essential to maintaining and restoring Washington waters. They filter drinking water, hold flood waters, recharge groundwater, provide habitat for fish and wildlife, and offer recreation opportunities. Wetland mitigation banking is an innovative strategy to engage the private sector and the power of the marketplace to sustain Washington's remaining wetlands.

To ensure successful mitigation, bank proposals go through extensive review by an interagency team to gain state certification and federal approval. Besides Ecology, the team may also include representatives from the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, as well as affected local and tribal governments.

How wetland mitigation banks work

Wetland mitigation banks are designed to increase wetland functions within a defined area. Banks generate "credits" that are tracked on a ledger, similar to a regular bank account. Ecology and its partner regulatory agencies award credits to bank sponsors once a proposed bank meets specific performance standards – also called "benchmarks." Tying the release of bank credits to achieving benchmarks ensures the success of mitigation before unavoidable damage occurs at another site.

Once credits are added to the ledger, a bank sponsor can use or sell them to a developer who needs to compensate for unavoidable wetland impacts. When credits are used or sold, they are debited from the ledger. Once a credit has been debited, it cannot be used to compensate for any other impacts.

MORE INFORMATION ON WETLAND MITIGATION BANKING

General information

To learn more about wetland mitigation banking: www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking

173-700 Rule information

To learn more about the rule and the rule process: http://198.238.211.77:8004/programs/sea/wetlands/mitigation/rule/index.html

Sign up for e-mail updates

To stay informed about the wetland mitigation banking program, join the wetland banking listserv: http://listserv.wa.gov/cgi-bin/wa?A0=WETLAND-MITIGATION-BANKING

Contact information

Yolanda Holder
360-407-7186
yhol461@ecy.wa.gov

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How wetland mitigation banks relate to existing regulations

Wetlands are regulated under a number of different laws including the Federal Clean Water Act, the state Water Pollution Control Act, and local critical area ordinances. The U.S. Army Corps of Engineers currently regulates wetland mitigation banks and other forms of compensatory wetland mitigation. Under current law, parties seeking permits for development that affects wetlands must follow a mitigation sequence:

- **Avoid** damage to wetlands wherever possible.
- **Minimize** any damage that can't be avoided.
- **Compensate** for any remaining damage to wetlands.

The availability of wetland mitigation bank credits does not negate state and federal laws that require developers to **avoid** and **minimize** wetland damage. Wetland mitigation banks enable developers to **compensate** for unavoidable damages before harming a wetland at the development site.

In the past, developers have been responsible for designing, constructing, and maintaining wetland mitigation on-site. Since most developers have little expertise in wetland mitigation, the results have often been small, isolated "postage stamp" wetlands that failed to restore lost wetland functions.

Wetland mitigation banks, on the other hand, typically combine many small wetland mitigation projects into a single, larger project of more ecological value. Banks sponsors have both the resources and the incentive to work with wetland specialists and other technical professionals to ensure that the bank achieves its mitigation goals.

With proper implementation and guidelines, wetland mitigation banking has the potential to increase ecological benefits and improve efficiencies in wetland application and permitting processes. Applicants using bank credits will benefit from lower permitting costs, and the public will gain because the required compensation for authorized impacts to a natural wetland is already on the ground.

How the proposed rule will change existing practices

This proposed rule focuses on procedures for certifying wetland mitigation banks as well as the process for implementing banks. Essentially, this rule adds another tool to the regulatory toolbox for mitigating unavoidable wetland impacts.

Ecological benefits of wetland mitigation banking include:

- Greater likelihood of ecological success, since bank projects go through significant regulatory review of the site selection and design prior to the bank being authorized to generate and use credits. Bank projects must show on-the-ground benefits before credits are awarded and used for impacts.
- Larger, more diverse mitigation sites that are better connected to existing habitat areas. This supports a greater diversity of habitat and wetland functions and creates more sustainable systems.
- Reduction in temporal losses, since bank projects are generally constructed in advance of impacts. (Temporal loss is the loss of functions between the time an impact occurs and the time the functions are re-established.)
- A planning tool that meets wetland needs within a watershed, basin, or particular landscape, rather than being tied to piecemeal mitigation.
- Economic incentives to increase compliance. The bank sponsor shoulders the burden of demonstrating up-front that the mitigation effort is successful.
- More efficient permitting processes. Bank sponsors will have opportunities to certify banks through local, state, and federal permitting processes simultaneously. Developers proposing to purchase credits from a bank will experience a more-

streamlined permit process because the compensatory mitigation is already built and functioning.

- Reduced enforcement burden on regulatory agencies. Each bank sponsor must demonstrate that performance standards are met prior to the release of credits.

Key issues addressed through the proposed rule

The proposed rule identifies the criteria necessary for implementing an environmentally sound banking system and also describes the certification process. The rule also addresses the following topics:

- Designating the geographic service area in which a bank can reasonably be expected to provide appropriate compensation. The service area can vary, depending on the wetland functions being provided, type of impacts anticipated to be offset, local and regional conditions, and so on.
- Considerations for assigning bank credit values, based on variables such as acreage, wetland ratings, wetland type, and function.
- A schedule for releasing credits as part of the certification process. Credit release will be tied to attaining pre-determined performance standards.
- Streamlining the bank certification process. This will occur through an interagency review team that brings all pertinent players to the table. Ecology will serve as the chair of the review team. In cases where banks are also seeking federal approval, the U.S. Army Corps of Engineers will serve as co-chair.
- Agreements between the bank sponsor and the review team will be formalized in a contract called a mitigation banking instrument. To complete the certification, state law requires that the contract be signed by the bank sponsor, Ecology, and the local jurisdictions(s). Representatives from federal and tribal government are encouraged, but not required, to sign the contract as well.

Wetland mitigation banking and watershed planning

Wetland mitigation banking works best when implemented hand-in-hand with local watershed and land-use planning. Ideally, banks can be designed and located to address specific watershed needs such as enhancing or restoring wetland functions that are in short supply, critically important, or currently disrupted. Sound ecological assessment and characterization of watersheds—combined with sound transportation, infrastructure, and development planning—will ensure that banks are designed and located in areas where they will serve the greatest ecological good.

The proposed process for certifying and establishing wetland mitigation banks includes incentives to site and design banks that provide significant ecological benefits and restore watershed processes in areas identified as high priorities under a watershed-based approach to mitigation.

Reference page with web sites

Wetland Regulatory Personnel Contacts

Corps of Engineers Seattle District Regulatory Contacts
http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=staff_1

Environmental Protection Agency Personnel Contacts
http://yosemite.epa.gov/R10/ecocomm.nsf/Wetlands/Wetlands

Interagency Review Team Personnel Contacts
http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking/irt.html

Washington Department of Ecology Wetlands and Mitigation Banking Contacts
http://www.ecy.wa.gov/programs/sea/wetlands/contacts.htm

Wetlands and Wetland Mitigation Documents

Best Available Science
http://www.ecy.wa.gov/programs/sea/wetlands/bas/index.html

Compensatory Mitigation for Losses of Aquatic Resources; Final Rule
http://www.usace.army.mil/CECW/Documents/cecwo/reg/news/final_mitig_rule.pdf

Delineation Manual
http://www.ecy.wa.gov/biblio/9694.html

Mitigation Guidance
http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/guidance/index.html

Protecting Aquatic Ecosystems
http://www.ecy.wa.gov/biblio/0506027.html

Using Credits from Wetland Mitigation Banks: Guidance to Applicants on Submittal Contents for Bank Use Plans
http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking/pdf/mitig_plan_guidance.pdf

Wetland Rating Systems
http://www.ecy.wa.gov/programs/sea/wetlands/index.html#rating_systems

Wetlands Stewardship
http://www.ecy.wa.gov/programs/sea/wetlands/index.html#Stewardship

General Wetland Mitigation and Mitigation Banking Information

Corps of Engineers Seattle District Mitigation, Mitigation Banking, and In-lieu Fee
http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=mainpage_mitigation

Department of Ecology Wetland Mitigation Banking
http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking/index.html

General Wetlands Listserv (Sign up to receive updates from Ecology on Wetlands)
http://www.ecy.wa.gov/programs/sea/wetlands/maillist.html

Wetlands Banking Listserv (Sign up to receive updates on Wetland Mitigation Banking)
http://listserv.wa.gov/archives/wetland-mitigation-banking.html

Rule Proposal Notice

DEPARTMENT OF ECOLOGY State of Washington

Shorelands and Environmental Assistance Program **March 2009**

Wetland Mitigation Banks, chapter 173-700 WAC

Rule language is now available for public comment

Ecology is proposing to adopt a new rule for wetland mitigation banks. The purpose of the proposed rule is to provide an efficient, predictable framework to certify, operate and monitor wetland mitigation banks across the state.

The proposal notice will be published in the Washington State Register on March 18, 2009. **Ecology is taking public comments on the proposed rule until 5:00 pm on April 23, 2009.**

Ecology has issued a Draft Environmental Impact Statement under the State Environmental Policy Act, a Small Business Economic Impact Statement, and a preliminary cost-benefit analysis. Ecology is also taking public comments on these documents.

A copy of all rule documents including rule text can be viewed at: http://www.ecy.wa.gov/laws-rules/activity/wac173700.html.

Public workshop and hearing schedule

April 8, 2009 - Spokane, WA
Workshops: 2:00 pm and 6:00 pm. Hearings: 3:00 pm and 7:00 pm
Department of Ecology, Eastern Regional Office
N. 4601 Monroe, 1st floor large conference room

April 9, 2009 - Lacey, WA
Workshop: 6:00 pm. Hearing: 7:00 pm
Department of Ecology, Headquarters
300 Desmond Dr SE, R0A-32 and R0A-34

April 15, 2009 - Mt. Vernon, WA
Workshops: 2:00 pm and 6:00 pm. Hearings: 3:00 pm and 7:00 pm
Skagit Station
105 E. Kincaid, Community Room

April 16, 2009 - Seattle, WA (Must bring photo ID for check-in)
Workshops: 2:00 pm and 6:00 pm. Hearings: 3:00 pm and 7:00 pm
US Army Corps of Engineers, Seattle District
4735 E Marginal Way S, Galaxy Room

WHY IT MATTERS

The goals of the proposed rule:

- Provide timely review of wetland mitigation bank proposals,
- Establish coordination among state, local, tribal, and federal agencies involved in certifying wetland mitigation banks,
- Ensure consistency with existing federal mitigation rules, and
- Encourage bank sponsors to locate and design wetland mitigation banks to provide the greatest ecological benefits.

MORE INFORMATION

www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking

Contact information:
Yolanda Holder
360-407-7186
yhol461@ecy.wa.gov

Special accommodations:
If you need this publication in an alternate format, call Tim Schlender at 360-407-6096. Persons with hearing loss, call 711 for Washington Relay Service. Persons with a speech disability, call 877-833-6341.

How to submit your comments

Comment period ends April 23, 2009. Comments on all documents must be received by 5:00pm on April 23, 2009.

You can give us your official comments in any of the following ways:

- Testify at a public hearing.
- Visit our website and submit comments electronically at:

  http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/rule
- Email your comments to: yhol461@ecy.wa.gov
- Mail comments to:

  Department of Ecology
  Attn: Yolanda Holder
  Shorelands and Environmental Assistance Program
  PO Box 47600
  Olympia, WA 98504-7600

Ecology's response to your comments

All of the comments we receive will become part of the official record (Concise Explanatory Statement). The Concise Explanatory Statement is required by the Administrative Procedure Act (RCW 34.05) and is published after the rule is adopted. You will be able to find your name listed in the document with a reference to where, in the document, Ecology responded to your comments.

Expected adoption date

Ecology expects to adopt this rule by July 31, 2009.

Public Workshops

The Department of Ecology will conduct a public workshop one hour prior to each hearing. The workshop will begin with a short presentation on the banking rule and finish with an opportunity for the public to ask questions. Informational materials will be available to read or take home.

Sign-up for E-mail Updates on Wetland Mitigation Banking

To stay informed about the banking program, join the wetland banking listserv: http://listserv.wa.gov/cgi-bin/wa?A0=WETLAND-MITIGATION-BANKING.

WSR 09-06-086

PROPOSED RULES

DEPARTMENT OF ECOLOGY

[Order 04-13 -- Filed March 3, 2009, 2:44 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 04-15-045.

Title of Rule and Other Identifying Information: Wetland mitigation banks, chapter 173-700 WAC, the purpose of the rule is to provide a predictable, efficient, regulatory framework for the review of bank proposals and the certification of environmentally responsible wetland mitigation banks consistent with existing federal guidance on compensatory wetland mitigation banks.

The rule includes procedures for the certification, operation, monitoring and implementation of wetland mitigation banks. The rule contains procedures for certification and technical requirements for the implementation of wetland mitigation banks. The rule includes compliance procedures and the appeals process for wetland mitigation bank certifications.

Other Identifying Information: The proposed rule applies to both public and private wetland mitigation banks. Credits from certified wetland mitigation banks may be used to compensate for unavoidable wetland impacts authorized under state or local permits.

Hearing Location(s): Ecology Eastern Regional Office, North 4601 Monroe, 1st Floor, Large Conference Room, Spokane, WA 99205-1295, on April 8, 2009, workshop times 2:00 p.m. and 6:00 p.m., hearing times 3:00 p.m. and 7:00 p.m.; at the Ecology Headquarters, 300 Desmond Drive S.E., R0A-32 and R0A-34, Lacey, WA 98503, on April 9, 2009, workshop time 6:00 p.m., hearing time 7:00 p.m.; at the Skagit Station, 105 East Kincaid, Community Room, Mt. Vernon, WA 98273-4326, on April 15, 2009, workshop times 2:00 p.m. and 6:00 p.m., hearing times 3:00 p.m. and 7:00 p.m.; and at the U.S. Army Corps of Engineers, Seattle District, 4735 East Marginal Way South, Galaxy Room, Seattle, WA 98124-2255, on April 16, 2009, workshop times 2:00 p.m. and 6:00 p.m., hearing times 3:00 p.m. and 7:00 p.m.

Date of Intended Adoption: July 31, 2009.

Submit Written Comments to: Yolanda Holder, Department of Ecology, Shorelands and Environmental Assistance Program, P.O. Box 47600, Olympia, WA 98504-7600, e-mail yhol461@ecy.wa.gov, fax (360) 407-6902, received by 5 p.m. on April 23, 2009.

Assistance for Persons with Disabilities: Contact Max Willis at (360) 407-6908, by April 1, 2009. Persons with hearing loss, call 711 for Washington relay service. Persons with a speech disability, call 877-833-6341.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this rule is to encourage wetland mitigation banking (WMB) by providing an efficient, predictable statewide framework for the certification and operation of environmentally sound banks.

This rule sets out to accomplish the following:

1. Provide timely review of bank proposals;

2. Establish coordination among state, local, tribal, and federal agencies involved in the certification of banks;

3. Ensure consistency with existing federal mitigation rules;

4. Provide incentives to encourage bank sponsors to locate and design banks that provide the greatest ecological benefits.

Reasons Supporting Proposal: The legislature required the department, in chapter 90.84 RCW, to adopt rules for the "certification, operation and monitoring of wetland mitigation banks." The statute also directed that the rule provide a "predictable, efficient, regulatory framework" for the certification of wetland mitigation banks.

Statutory Authority for Adoption: Chapter 90.84 RCW, Wetlands mitigation banking.

Statute Being Implemented: Chapter 90.84 RCW, Wetlands mitigation banking.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington state department of ecology, governmental.

Name of Agency Personnel Responsible for Drafting: Yolanda Holder and Lauren Driscoll, Ecology Headquarters, SEA Program, Lacey, Washington, (360) 407-7186, (360) 407-7045; Implementation: Kate Thompson and Christina Merten, Ecology Headquarters, SEA Program, Lacey, Washington, (360) 407-6749, (425) 649-7007; and Enforcement: Lauren Driscoll, Ecology Headquarters, SEA Program, Lacey, Washington, (360) 407-7045.

A small business economic impact statement has been prepared under chapter 19.85 RCW.

Small Business Economic Impact Statement

Executive Summary: Based on research and analysis required by the Regulatory Fairness Act, RCW 19.85.070, ecology has determined that the proposed rule (chapter 173-700 WAC) has a disproportionate impact on small business. Therefore, ecology included cost-minimizing features in the rule where it is legal and feasible to do so.

Ecology estimated total (present value) compliance costs of $13.9 million associated with compliance with the standards, monitoring, recordkeeping, and financial assurance set in the proposed rule.

For WMB businesses that may be impacted by the proposed rule, this resulted in cost-to-employment ratios of between $151 thousand per employee for the largest businesses, to the full amount of $13.9 million per employee for the smallest investor-only firms. As based on this measure, the proposed rule does impose disproportionate costs on small businesses.

To reduce prospective compliance costs for small businesses, ecology included cost-reduction and flexibility provisions in the proposed rule. These provisions include:

- Streamlining wetland mitigation bank certification to simplify application and compliance decisions.
- Optional financial assurance for construction (when bank credits are not released prior to construction).
- Optional financial assurance for monitoring (when bank credits are not released prior to achievement of performance standards).

The impact of the proposed rule on jobs, accounting for the flow of money through the state economy as based on a model developed by the state office of financial management, is expected to be a loss of between twenty-one and twenty-seven jobs. This range depends on assumptions regarding the industry in which wetland banking businesses have primary focus.

Ecology expects the highest job losses if wetland bankers are primarily land developers or in related fields. If, however, wetland bankers are primarily individual investors or investment groups, ecology expects jobs created in construction and wetland creation to mitigate job losses in investment fields, and lower overall job loss.

Note: Due to size limitations relating to the filing of documents with the code reviser, the small business economic impact statement (SBEIS) does not contain a fully detailed explanation of ecology's analysis. The cost-benefit analysis (ecology publication #09-06-002) contains full details of the analysis, including additional contextual information and methodology.

Section 1: Introduction and Background: Based on research and analysis required by the Regulatory Fairness Act, RCW 19.85.070, ecology has determined that the proposed rule (chapter 173-700 WAC) has a disproportionate impact on small business. Therefore, ecology included cost-minimizing features in the rule where it is legal and feasible to do so.

This document presents the background for the analysis of impacts on small business relative to other businesses, the results of the analysis, and cost-mitigating action taken by ecology. It is intended to be read with the associated cost-benefit analysis (ecology publication #09-06-002), which contains more in-depth discussion of the analyses.

Mitigation Banking: The concept of mitigation banking has been around since the 1970s. In 1995, federal agencies released guidance on establishing, using, and operating mitigation banks. Recently there has been a renewed interest in mitigation banks as a regulatory tool, because mitigation banking creates economic incentives for restoring, creating, enhancing and/or preserving wetlands. These economic incentives provide opportunities to change developer behavior in ways that benefit the developer seeking mitigation, and the public and environment that receive wetland services.

Mitigation banks typically involve the consolidation of many small wetland mitigation projects into a larger, potentially more ecologically valuable site. Further, mitigation banks require upfront compensation prior to affecting a wetland at another site. This ensures the success of the mitigation before unavoidable damage occurs at another site. With proper implementation and guidelines, mitigation banking has the potential to:

- Increase ecological benefits.
- Save money for project applicants.
- Improve efficiencies in application and permitting processes.

The proposed rule identifies the criteria necessary for implementing an environmentally sound banking system in Washington state.

Regulatory Baseline: Wetlands are regulated under many statutory authorities. Regulatory agencies from the federal, state, and local governments all have an interest in overseeing wetland protection.

Under current regulatory programs, parties seeking permits for activities that affect wetlands must first avoid and then minimize those effects. Any remaining damage must be compensated for. Historically, the regulatory preference for compensation has been on-site creation, restoration, or enhancement of a wetland. These mitigation efforts have resulted in several smaller, "postage stamp" wetlands that have had limited success in reaching full functional potential.

Under the proposed rule, the sequencing of avoidance, minimization, and compensation still applies prior to using credits from any mitigation bank. However, in contrast to traditional mitigation activities, mitigation banking requires that compensation - restoration, creation, enhancement, and/or preservation - occurs before a site is affected by a project. Bank projects are put in place prior to allowing unavoidable impacts by a project.

Wetland credits are generated by this upfront activity. Those credits can then be used by the bank sponsor (to mitigate his own wetland impacts at other sites), or sold to another party to offset impacts to wetlands that occur in other locations. Again, only impacts that cannot be avoided or minimized are available for compensation through credits from a mitigation bank.

Changes under the Proposed Rule Amendments: The law, chapter 90.84 RCW, Wetlands mitigation banking, provides no new authority for regulating wetlands, other than wetland bank projects. Current sequencing practices of avoidance, minimization, and compensation still apply. However, the proposed rule (chapter 173-700 WAC) focuses on procedures for certifying banks, and the process for implementing banks. Essentially, the proposed rule adds another tool to the regulatory toolbox for protecting wetlands.

To the extent entrepreneurs participate in the creation and functioning of wetland mitigation banks, the rule effectively establishes standards for certifying businesses in the WMB industry. While ecology analyzed compliance costs in the cost-benefit analysis (ecology publication #09-06-002) as represented by mitigation bank credit prices (irrespective of whether the bank is run by a developer, entrepreneur, or agency), ecology analyzed individual costs in this SBEIS, to better present the situation faced by the regulated industry of entrepreneurial wetland bank owners and sponsors.

Section 2: Compliance costs for Washington businesses: The proposed rule creates a certification process for WMB. To the extent that banks are owned or sponsored by entrepreneurs (rather than developers who use the credits themselves; or government agencies), the authorizing statute, chapter 90.84 RCW, creates an industry of WMB. The proposed rule implements the statute, and regulates that industry.

The certification process for WMB creates a number of costs. While ecology took WMB credit prices as representative of the present value of all costs per acre in its cost-benefit analysis (ecology publication #09-06-002), the SBEIS breaks down costs as described below. Costs are quantified to the degree possible in Chapter 3.

Mitigation Bank Prospectus: Prior to the certification of a bank, the proposed rule requires the bank sponsor to create and submit a bank prospectus. The prospectus includes site descriptions of the site, legal context, and planning.

Ecology expects bank sponsors to incur costs for creating a banking prospectus, as based on the time

commitment and level of expertise necessary to evaluate each element of the prospectus. Ecology expects that the size of the bank will be an important factor in the level of difficulty and expertise necessary to create the prospectus.

Banking Instrument: The banking instrument describes how the site conditions, management, and credit sales will function in the wetland mitigation bank. This document describes in detail the short-run and long-run qualities and management of the bank, as well as how bank credits will be created and used.

The proposed rule requires the banking instrument to contain some similar or identical information to what is in the mitigation bank prospectus. The banking instrument must also include specific descriptions of how the bank will develop, be monitored and maintained, and how credit banking will function.

Construction and Financial Assurance: Depending on the current state of a bank's land, construction may be required to create wetlands that generate credits for use or sale. This can range from protection of existing, functional wetlands, to wetland restoration, to creation of entirely new wetlands.

Normally, ecology would not consider full construction costs in its analysis, as they are generally the costs of doing business (creating a product to be sold – credits), rather than costs imposed directly by ecology. However, because ecology sets the standards for wetland banks, and defines and evaluates the types of wetland that can be used as mitigation credits, ecology has included construction costs in its analysis. The proposed rule's standards may impact the size of construction costs, or how construction is performed.

Moreover, ecology requires financial assurance of construction costs for banks that release credits prior to completing construction. In light of this additional compliance cost, ecology considered construction costs an important component of evaluating the possible decisions of bankers regarding when to release credits, and whether to incur financial assurance requirements.

Monitoring, Long-Run Management, and Financial Assurance: The proposed rule requires planning and implementation of performance standards, and scheduled monitoring and reporting of compliance. If bank credits are released before attaining performance standards, the proposed rule requires financial assurance for monitoring and maintenance expenses. Financial assurance is based on the future monitoring and maintenance costs for the operational life of the bank.

The proposed rule requires financial assurance for long-run management of the bank. Financial assurance is based on future costs of annual maintenance, and on expected inflation. It can be funded through contract mechanisms such as endowments or trusts, and must ensure an ownership transfer mechanism for the bank.

Monitoring and Reporting: The proposed rule requires wetland bankers to monitor and report on conditions at the bank. The bank instrument describes, in part, what variables will be monitored, and how they will be monitored and evaluated. The plans and protocols for monitoring the wetland bank, and the schedule for reporting site conditions are described in the banking instrument submitted by the banking certification applicant.

Monitoring and reporting includes, but is not limited to:

- Document baseline conditions after construction.

- Document development of the site.
- Document attainment of performance standards.
- Identify possible problems at the site.

These items document data and methodologies for bank quality evaluation over time, as based on data gathered at the site.

Section 3: Quantification of Costs and Ratios: Ecology quantified all costs for which reliable data and analytic methods were available. The costs associated with creating and certifying a bank are correlated with the size of the bank. Ecology estimated that the cost per acre of a wetland bank diminishes as the size of the bank increases.

The determination that the proposed rule may impose disproportionate costs on small business was a more complicated task, because the size of the bank is **not** correlated with the bank sponsor's number of employees. Wetland banking is a capital-intensive venture, able to run primarily off of finances, without large contributions of labor over time, unlike an industry that produces goods, or provides ongoing human services. This means a bank of any size can be owned or sponsored by a few investors, who contract construction and monitoring activities to other firms, and do not have many employees.

Data on other measures of business size (sales, labor hours) was not available or reliable for the WMB industry in Washington state. While these may have been more representative of the size of businesses, and of their ability to bear the burden of compliance costs, ecology decided to use the most consistently available data in this analysis. This was done to have the most representative sample of businesses possible, and to generate confident results and conclusions.

Ecology also evaluated costs-per-employee based on the attributes of banks that are currently planned. These banks are the minimum set of banks that will need to comply with the proposed rule for certification. They are primarily small businesses (individuals or small groups of investors). Here, also, ecology concluded that the proposed rule may impose disproportionate costs on small businesses.

This chapter describes the methodology and results of ecology's estimation of compliance costs for wetland banks, and possible cost-to-employment ratios for small and large firms.

Mitigation Bank Prospectus: To develop a prospectus for a proposed wetland mitigation bank, a bank sponsor must directly, or though [through] consultants, expend time and expertise. Ecology assumed that creating a prospectus will take approximately 1,000 hours (approximately six months of full-time work). The level of analytic work required involves a high degree of expertise. Ecology estimated the per-hour cost of this labor as $44.25 per hour, the expected 2009 wage rate for management and administrative positions in the Pacific Census Division of the United States. Ecology expanded the scope of the wage estimate beyond Washington state because some existing bank sponsors or consultants are located in nearby states. Ecology also allowed for hiring consultants from states with similar mitigation banking procedures, and with a similar geographic area. Ecology expects, however, that bank sponsors will seek to minimize costs while maintaining the necessary level of expertise.

Multiplying wage by the number of hours required to create a prospectus for a wetland mitigation bank, ecology estimated that a bank will incur a prospectus cost of $44 thousand. Ecology assumed conservatively that this entire cost is incurred up front, and did not discount it over time, as it could not make confident assumptions about the distribution of time spent on a prospectus.

Banking Instrument: To develop a WMB instrument, a bank sponsor must add to information provided in the banking prospectus. This involves additional information about bank design,

construction, sponsor responsibilities, monitoring and maintenance, and how the bank will function and sell credits over time.

Ecology assumed that developing a banking instrument will take approximately 4,000 hours (approximately two years of full-time work). This level of analytic work requires a high degree of expertise from both the document's creator, and from engineering or landscape consultants contributing to the work. Ecology could not determine the degree to which a sponsor's effort in creating the banking instrument could be exchanged for consultant effort. This depends highly on the sponsor's area of expertise. To maintain conservative estimates, ecology assumed that a consulting landscape expert will be involved in the creation of the banking instrument the entire time the document is being created.

Ecology estimated the per-hour cost of sponsor labor as $44.25 (see above), the expected 2009 wage for management and administrative positions in the Pacific Census Division of the United States. Ecology estimated the per-hour cost of engineer or landscape architect labor as $48.44, the expected 2009 wage for engineering and architectural positions in the Pacific Census Division of the United States. Ecology expanded the scope of the wage estimates beyond Washington state because some existing bank sponsors or consultants are located in nearby states. Ecology also allowed for hiring consultants from states with similar mitigation banking procedures, and with similar geographic area. Ecology expects, however, that bank sponsors will seek to minimize costs while maintaining the necessary level of expertise.

Multiplying the wage by the number of hours required to create a banking instrument for a wetland mitigation bank, ecology estimated that a bank will incur a banking instrument cost of $177 thousand for creation of the instrument, plus $194 thousand for engineering or design expertise. The total expected cost is $371 thousand. Ecology assumed conservatively that this entire cost is incurred up front, and did not discount it over time.

About Financial Assurance: Ecology estimated costs over time and present value financial assurance for construction, monitoring, and long-run management. Present value is the current dollar equivalent of a flow of costs over time, accounting for inflation, and for the opportunity cost of not being able to invest those dollars in the future if they are spent up front. In other words, the present value is how much money a wetland banker would need to invest now to be able to pay a series of future (say, annual) costs.

In the typical present value (PV) calculation, ecology calculates PV costs based on an expected annual inflation rate, and expected return to invested capital for the industry in question. This accounts for both the return on investing that money before the costs occur, and for the value of each dollar lost to inflation over time.

In this standard ecology calculation, the expected costs of future construction and the money necessary upfront to cover those costs (PV) are identical. If financial assurance is calculated in this fashion, there is no difference over time between paying construction (or maintenance; or long-run management) costs as they occur, and having enough funds for upfront as with financial assurance.

Construction and Financial Assurance: Ecology surveyed available wetland construction costs in Washington state. Ecology calculated a median cost of nearly $70 thousand per acre.[1] At the median size of one hundred sixty acres, for mitigation banks that may be impacted by the proposed rule, this totals $11.2 million. This value is nominal (does not account for inflation), as reported in available data. Ecology could not determine the distribution of costs over construction time for this value, and so made the conservative assumption that the entire (undiscounted) amount was required prior to construction.

This is likely to be a conservative overestimate of a financial assurance of construction costs.

Rather than attempt to disentangle the imposed requirements from the basic costs of doing business, ecology chose to estimate entire wetland construction costs, and treat them as though they were wholly composed of requirements set by the proposed rule. The construction cost estimated here is an overestimate of the actual incremental costs imposed by the proposed rule.

Monitoring, Long-Run Management and Financial Assurance: Ecology was unable to gather specific data on the long-run costs of monitoring and management of wetland banks, independent of overall costs, or as distinct from construction costs. Ecology, therefore, used existing wetland bank credit prices to estimate, first, annualized costs and, second, the portion of upfront financial assurance costs that reflects long-run monitoring and management costs. Ecology could do this, based on likely interest and discount rates, because standard economic theory indicates that the cost per acre of wetland bank credits should reflect the discounted present value of long-run construction, monitoring, and maintenance costs, divided by the number of acres in a bank.

Based on an Army Corps of Engineers survey (see the associated cost-benefit analysis, ecology publication #09-06-002, for details), ecology calculated that the median price of wetland bank credits is $84 thousand per acre, in the Northwestern Corps Division. Using an annual discount rate of 1.88%,[2] ecology calculated an annualized cost of construction, monitoring, and maintenance of approximately $5 thousand per acre, per year. Subtracting the annualized cost of construction over the life of the bank (see above section; divided by the median acreage of wetland banks in the state) of approximately $4 thousand per acre, ecology calculated an annualized cost of long-run monitoring and maintenance of $802 per acre. When accounting for inflation and discounting over time, this is equivalent to a payment of $2.3 million upfront for the median size of wetland bank in the state.

Total Compliance Costs: Ecology estimated total compliance costs to be $13.9 million for a median wetland mitigation bank. These costs account for future inflation and opportunity costs of money where possible, and are assumed to be upfront costs, where distribution of costs over time was not available, and present value discounting was not possible.

Total Cost-to-Employment Ratios: Ecology calculated cost-to-employment ratios to examine the relative impacts of the proposed rule on small versus large businesses. Other measures of business ability to cope with compliance costs (sales, hours of labor) were not available, due to the composition of bank-sponsoring businesses – largely investment or development companies, or individual and small groups of investors. Typically, these firms' revenues are returns to investment, rather than sales, and they do not have explicit labor hours as inputs to production, as would be seen with traditional manufacturing of goods.

Ratios of total cost to employment ranged from $150,596 per employee for large businesses, to the full cost of $13,854,850 for the smallest business involving a single investor. The median-sized business would incur a ratio of cost-to-employment of $3,463,713 per employee. It is clear from these ratios that the proposed rule creates a disproportionate impact on small business, as based on employment rolls. This means ecology must make reasonable effort to mitigate these disproportionate impacts.

Section 4: Action Taken to Reduce Small Business Impacts: Ecology took a variety of actions in the proposed rule to reduce both the disproportionate impact of compliance costs on small businesses, and to reduce compliance costs by allowing flexibility for internal business decisions made by wetland mitigation banks.

Efficiency in Certification: The proposed rule creates a streamlined certification, improving efficiency and reducing transaction costs for all businesses. It allows certification of banks through local, state, and federal permitting authorities concurrently. In particular, this reduction, primarily in time costs, is likely to be relatively large for small businesses operating smaller, less complicated banks, and to reduce the disproportionality of costs.

Optional Financial Assurance for Construction: The proposed rule only requires financial assurance for construction if credits are released prior to completion of construction. This gives all businesses greater flexibility in their internal decisions regarding cost reductions and profit maximization. It allows small businesses, in particular, to address their unique needs, as they are more likely to find funding financial assurances difficult.

Optional Financial Assurance for Monitoring: The proposed rule only requires financial assurance for monitoring if credits are released prior to attainment of a wetland bank's performance standards. This gives all businesses greater flexibility in their internal decisions regarding cost reductions and profit maximization. It allows small businesses, in particular, to address their unique needs, as they are more likely to find funding financial assurances difficult.

Section 5: Small Business Involvement: Ecology extensively involved businesses in the development of the proposed rule, including small businesses. Ecology involved the business community, and especially those businesses that might be disproportionately impacted by regulation, because they provide unique input into the views of the regulated community.

A large part of business involvement began during the pilot phase of the rule making, through the Pilot Program Advisors Group. The advisors group assisted ecology in implementation of the wetland banking pilot program. In addition, the advisors group assisted in revisions to the proposed rule language. The advisors group consists of:

- Local, state, and federal agencies.
- Conservation and environmental interests.
- Mitigation bankers, including small businesses prospectively impacted by the proposed rule.
- Agriculture and business communities, including small businesses as represented by professional organizations.

Section 6: NAICS Codes of Impacted Industries: This section lists NAICS codes for industries ecology expects to be impacted by the proposed rule.[3] The list does not include public entities such as state and local agencies that may also be impacted by the proposed rule, as these are not private businesses.

Wetland mitigation bank sponsors are largely investment based in Washington state. This ranges from individuals or small groups of individuals contracting with management firms to bank on their own land under a limited liability corporation business, to interstate investment and land development firms.

Ecology faced difficulty in researching and assigning NAICS codes to wetland mitigation banks in Washington state, as this industry is not yet thoroughly defined in the codes' structure. The investors and firms themselves, however, generally fall into three categories:

523910: Individuals investing in financial contracts on own account.

237210: Land subdivision.

5222: Nondepository credit intermediation.

The existing NAICS system has difficulty suiting industries such as WMB. This is, in part, because the industry is relatively new, and consists of a variety of investor and firm types. Moreover, it is because, unlike typical real estate sales, a wetland bank provides the entire set of long-run quality and maintenance services in the package of a credit. In this sense, the wetland bank does not create goods in the traditional physical sense (for which the standard industrial classification systems were designed), so much as it provides a long-run service.

In response to the need for classification of service sector industries (as well as international firms), the United States Census Bureau has been developing the North American Product Classification System (NAPCS) since 1999, but the system is not yet complete. The census bureau writes of the NAPCS:

Whereas NAICS focuses on the input and production processes of industries, NAPCS will classify all the outputs of the industries defined in NAICS. The long-term objective of NAPCS is to develop a market-oriented, or demand-based classification system for products that (a) is not industry-of-origin based but can be linked to the NAICS industry structure, (b) is consistent across the three NAICS countries, and (c) promotes improvements in the identification and classification of service products across international classification systems, such as the Central Product Classification System of the United Nations.

In light of the limitations on available NAICS classifications, ecology listed classifications that are likely to be impacted by the proposed rule, to the best of its ability. In future, ecology hopes to use the NAICS and NAPCS in conjunction to describe affected industries.

Section 7: Impact on Jobs: Ecology used the Washington state office of financial management's 2002 Washington input-output model (OFM-IO) to estimate the proposed rule's first-round impact on jobs across the state. This methodology estimates the impact as reductions or increases in spending in certain sectors of the state economy flow through to purchases, suppliers, and demand for other goods.

Ecology assumed that compliance expenditures on skilled consultants in engineering or landscape fields would result in increased revenues to that industry. Ecology assumed that construction financial assurance would go to the construction industry, and that compliance costs were lost to at least one of the industries listed in Section 6.

Ecology estimated based on the OFM-IO model that the proposed rule may result in economy-wide job losses between twenty-one and twenty-seven jobs overall. If businesses sponsoring wetland banks in Washington state fall primarily into the land development industry, overall job losses will be the highest, with primary losses in construction field. If businesses sponsoring wetland banks fall primarily into finance and related investment fields, net employment gains may occur, with increased employment in the construction field mitigating losses in the credit intermediation and other investment industries.

[1] Ecology chose the most conservatively large estimate of wetland creation costs, namely, complete construction of a wetland. This option was deemed more expensive than preservation or restoration of existing wetlands.

[2] Ecology uses a twenty-year timeframe for analyzing long-run and ongoing present values, as it typically encompasses the meaningful time period before discounted future values diminish below significant levels. Ecology used a discount rate of 1.88%, which equals the expected rate of return on invested capital (the risk-free rate of United States Treasury I-Bonds,

adjusted for inflation). When possible, ecology uses an industry-specific rate of return, but could not determine this rate for the diverse set of sponsors – investor groups, individual owners, and development groups - involved in WMB.

[3] NAICS codes have largely taken the place of Standard Industry Classification (SIC) codes in the categorization of industries.

A copy of the statement may be obtained by contacting Yolanda Holder, Department of Ecology, Shorelands and Environmental Assistance Program, P.O. Box 47600, Olympia, WA 98504-7600, phone (360) 407-7186, fax (360) 407-6902, e-mail yhol461@ecy.wa.gov.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Yolanda Holder, Department of Ecology, Shorelands and Environmental Assistance Program, P.O. Box 47600, Olympia, WA 98504-7600, phone (360) 407-7186, fax (360) 407-6902, e-mail yhol461@ecy.wa.gov.

March 2, 2009

Polly Zehm

Deputy Director

OTS-2175.3

Chapter 173-700 WAC

WETLAND MITIGATION BANKS

PART I

OVERVIEW
NEW SECTION
WAC 173-700-100 Background and purpose. (1) The Wetlands Mitigation Banking Act, chapter 90.84 RCW, identifies wetland mitigation banking (banks) as an important regulatory tool for providing compensatory mitigation for unavoidable impacts to wetlands and declares it the policy of the state to support banking. The act directs the department of ecology (department) to adopt rules establishing a statewide process for certifying banks.

(2) The department anticipates that banks will provide compensatory mitigation in advance of impacts to wetlands and will consolidate compensatory mitigation into larger contiguous areas for regionally significant ecological benefits.

(3) Banks prioritize restoration of wetland functions and as such should be complementary to the restoration of ecosystems and ecosystem processes as identified in state or locally adopted science-based watershed management plans.

(4) The purpose of this chapter is to encourage banking by providing an efficient, predictable statewide framework for the certification and operation of environmentally sound banks. This chapter sets out to accomplish the following:

(a) Provide timely review of bank proposals;

(b) Establish coordination among state, local, tribal, and federal agencies involved in the certification of banks;

(c) Ensure consistency with existing federal mitigation rules; and

(d) Provide incentives to encourage bank sponsors (sponsors) to locate and design banks that provide the greatest ecological benefits.

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NEW SECTION
WAC 173-700-101 Applicability. (1) This chapter applies to private and public banks established under chapter 90.84 RCW.

(2) All mitigation banking instruments (instruments) approved on or after July 31, 2009, must meet the requirements of this chapter.

(3) Instruments approved prior to July 31, 2009, are grandfathered and may continue to operate under the terms of their existing instruments;

(4) Instruments modified on or after July 31, 2009, must be consistent with the terms of this chapter. Modifications include but are not limited to:

(a) Addition of sites under an umbrella instrument;

(b) Expansion of an existing site; or

(c) Addition of a different resource currency (e.g., flood storage credits).

[]

NEW SECTION
WAC 173-700-102 Applicability to tribal banks. (1) For proposed tribal banks which are located exclusively in Indian Country, the following section applies:

(a) If the tribal bank has been approved by the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) under existing federal rules, the bank will be deemed state certified, solely to allow the use of credits for projects under state jurisdiction, provided that:

(i) The department was a member of the IRT for the proposed bank;

(ii) Any concerns raised by the department, through the IRT process, have been resolved to the department's satisfaction; and

(iii) The department has notified the Corps and EPA in writing that it concurs with their approval of the bank.

(b) The department shall determine whether to allow the use of bank credits for projects under state

jurisdiction on a case-by-case basis.

(c) Certification under this section does not imply any extension of state jurisdiction or authority by the state on tribal land use activities.

(2) Proposed tribal banks which are located outside of Indian Country and partially or wholly on lands under state jurisdiction are not covered under this section and are subject to the requirements of this chapter.

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NEW SECTION
WAC 173-700-103 Public records. The department must make available for public inspection:

(1) The prospectus;

(2) The final instrument;

(3) Other supporting materials; and

(4) The comments received by the department during the public notice period(s).

[]

NEW SECTION
WAC 173-700-104 Definitions. "Agricultural lands of long-term commercial significance" or **"ALLCS"** means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.

"Aquatic resources" means those areas where the presence and movement of water is a dominant process affecting their development, structure, and functioning. Aquatic resources may include, but are not limited to, vegetated and nonvegetated wetlands or aquatic sites (e.g., mudflats, deepwater habitats, lakes, and streams).

"As-built plans" means a document which describes the physical, biological, and, if required, the chemical condition of a bank site after complete construction of each phase of an approved construction plan. As-built plans serve as a baseline from which to manage and monitor the site.

"Available credits" means a potential credit that has been released by the department after a bank attains the performance standards specified in the instrument.

"Bank" or **"wetland mitigation bank"** means a site where wetlands are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of development impacts to wetlands or other aquatic resources that typically are unknown at the time of certification.

"Bank sponsor" or **"sponsor"** means any public or private entity responsible for establishing and, in most circumstances, operating a bank.

"Buffer" means those areas on the perimeter of a bank site that enhance and protect a wetland's functions and values by maintaining adjacent habitat and reducing adverse impacts from adjacent land uses. These areas are vegetated and can reduce impacts through various physical, chemical, and/or biological processes.

"Compensatory mitigation" means the restoration, creation, enhancement, or in exceptional circumstances, the preservation of wetlands or other aquatic resources for the purpose of compensating for unavoidable adverse impacts to wetlands or other aquatic resources which remain after all appropriate and practicable avoidance and minimization have been achieved.

"Consensus" means a process by which a group synthesizes its ideas and concerns to form a common collaborative agreement acceptable to all members. While the primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible.

"Contingency actions" means actions taken during the operational life of a bank site to correct any deficiencies on the site in order for the site to attain the required performance standards.

"Cowardin class" means the classification of a wetland area as described in *Classification of Wetlands and Deepwater Habitats of the United States* USFWS publication FWS/OBS 79/31.

"Creation" means the establishment of wetland area, functions, and values in an area where none previously existed.

"Credit" means a unit of trade representing the increase in the ecological value of the bank site, as measured by acreage, functions, or by some other assessment method.

"Days" means calendar days.

"Debited credit" means an available credit which has been withdrawn from the bank to meet regulatory requirements.

"Debit project" means those projects that use credits from a bank to fulfill regulatory requirements for compensation of impacts. These projects may require more than one regulatory approval under federal, state, and local rules.

"Department" means the department of ecology.

"Enhancement" means actions taken within an existing degraded wetland or other aquatic resource to increase or augment one or more functions or values. Enhancement can also include actions taken to improve the functions provided by a buffer or upland area. Enhancement actions typically focus on structural improvements to a site and generally do not address environmental processes, either at the site scale or at a larger scale.

"Financial assurance" means the money or other form of financial instrument (e.g., surety bonds, trust funds, escrow accounts, proof of stable revenue sources for public agencies) required of the sponsor to ensure that the functions of the bank are achieved and maintained over the long term.

"Function assessment" means an evaluation of the degree to which a wetland is performing, or is capable of performing, specific wetland functions and processes. Function assessments include the use of scientifically based quantitative and qualitative methods developed for assessing functions, as well as the use of best professional judgment.

"Hydrogeomorphic classification" or **"HGM class"** means a wetland classification scheme that groups wetlands based on their location in the landscape and water regime.

"Instrument" or **"mitigation banking instrument"** means the documentation of agency and sponsor concurrence on the objectives and administration of the bank. The mitigation banking instrument describes in detail the physical and legal characteristics of the bank, including the service area, and how the bank will be established and operated.

"Interagency review team" or **"IRT"** means an interagency group of federal, state, tribal, and local regulatory and resource agency representatives who are invited to participate in negotiations with the sponsor on the terms and conditions of the instrument.

"Local jurisdiction" means any local government such as a town, city, or county in which the bank site is located.

"Maintenance" includes all activities and actions necessary to ensure the successful development of a bank.

"Mitigation sequencing" means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to wetlands or other aquatic resources.

"Operational life" or **"operational life of a bank"** means the period during which the terms and conditions of the instrument are in effect. With the exception of arrangements for the long-term management, permanent protection, and financial assurances, the operational life of a mitigation bank terminates at the point when:

(1) Available credits have been exhausted and the bank is determined to be functionally mature and self-sustaining to the degree specified in the instrument; or

(2) The sponsor voluntarily terminates the banking activity with written notice to the department.

"Performance standards" are measurable criteria for determining if the project goals and objectives are being achieved. Performance standards document a desired state, threshold value, or amount of change necessary to indicate that a particular function is being performed or structure has been established as specified in the design.

"Potential credit" means a credit anticipated to be generated by the bank, but is not currently available for use.

"Practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

"Preservation" means the permanent protection of ecologically important wetlands or other aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection or

enhancement of the aquatic systems, or both. Preservation does not result in a gain of aquatic resource area or functions.

"Prospectus" is the conceptual proposal for a bank project.

"Reestablishment" means actions taken to return wetland area, function, and values to a site where wetlands previously existed, but are no longer present because of the lack of water or hydric soils. Reestablishment falls under the broader term of restoration.

"Rehabilitation" means actions taken in an existing wetland or at a larger landscape scale to reinstate environmental processes that have been disturbed or altered by human activities, thereby improving the functions of an existing wetland. Rehabilitation typically involves restoring the original HGM class or subclass to a wetland whose current HGM class or subclass is a result of alterations caused by human activities. Rehabilitation falls under the broader term of restoration.

"Remedial actions" means actions required by the department to correct any deficiencies on the site in order for the site to attain the required performance standards. Remedial actions may be required by the department to gain compliance by the sponsor with this chapter.

"Restoration" is a broad term referring to both reestablishment and rehabilitation.

"Service area" means the designated geographic area in which a bank can reasonably be expected to provide appropriate compensation for unavoidable impacts.

"Signatories" means those entities that have documented their concurrence with the terms and conditions of the instrument through their signature on the document.

"Sustainability" means the ability of a bank to persist in the landscape and maintain its functions in anticipation of future development needs within the watershed. Sustainable bank sites must have sufficient buffer areas to protect the site from degradations due to activities on adjacent lands.

"Umbrella banks" means a single instrument may provide for future authorization of additional bank sites. As additional sites are selected, they must be included in the instrument as modifications, using the procedures outlined in WAC 173-700-212 through 173-700-231; unless the department determines that a streamlined review process is warranted.

"Unavoidable" means adverse impacts that remain after all appropriate and practicable avoidance and minimization have been achieved.

"Water resource inventory areas" or **"WRIA"** refers to Washington state's sixty-two major watershed basins as described in chapter 173-500 WAC, water resources management program established pursuant to the Water Resources Act of 1971, as amended.

"Watershed characterization" means an approach to identify and map areas within a watershed that are most important to support a watershed process. It identifies the degree of impairment to these areas, and identifies areas most important for protection and restoration.

"Watershed processes" means the dynamic physical and chemical interactions that form and maintain the landscape and ecosystems on a geographic scale of watersheds to basins (hundreds to thousands of square miles). The most important factors include the movement of water, sediment,

nutrients, pathogens, toxic compounds, and wood.

"Watershed-based approach to mitigation" means an approach to place mitigation in the right place in the landscape. The watershed-based approach to mitigation means that decisions about where to place mitigation are based on an understanding of ecosystem processes and their effects on ecosystem functions.

"Wetland(s)" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

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PART II

CERTIFICATION PROCESS
NEW SECTION
WAC 173-700-200 How do other laws and rules relate to banks? (1) Banks certified under this chapter must be consistent with existing federal, state, and local laws and rules and treaty rights which relate to the establishment of a bank.

(2) Certification of a bank does not serve as authorization for other federal, state, or local permits or approvals.

(3) Interagency review team (IRT) members shall advise the sponsor of pertinent federal, state, or local rules that may apply to a specific bank proposal and that may delay the certification process.

(4) The sponsor is responsible for obtaining all required federal, state, and local permits and approvals for the construction and establishment of the bank.

(5) The sponsor is strongly encouraged to coordinate with the local jurisdiction(s) early in the development of their proposal. Each local jurisdiction has its own local permitting process and there is not a standard sequence for integrating with the bank certification process.

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NEW SECTION
WAC 173-700-201 Decision-making procedure. (1) All decisions made by the department must fully consider IRT, tribal, and public comments submitted to the department as part of the certification evaluation process.

(2) The department shall strive to achieve consensus with the IRT on the terms and conditions of the instrument.

(3) If the department determines that consensus cannot otherwise be reached on any term, condition, or procedural element of the instrument within a reasonable time frame, the department shall be responsible for making the final decisions.

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NEW SECTION
WAC 173-700-210 Purpose of the prospectus. (1) The purpose of the prospectus is to provide a conceptual plan for a bank project.

(2) The department uses the prospectus to notify the public, tribes, and the local government of the proposed bank project.

(3) The prospectus initiates dialogue between the department, sponsor, and IRT members on a proposed bank project.

(4) The department uses the prospectus and comments received during the public notice period to make an initial determination on whether there are critical issues that may affect the ability of the bank to be certified.

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NEW SECTION
WAC 173-700-211 Content of the prospectus. At a minimum, the prospectus must contain information on the following elements:

(1) The goals and objectives of the project;

(2) Location including city or county, proximity to existing roads and other landmarks, and a vicinity map showing location of the proposed site(s);

(3) A statement of how the bank meets any watershed restoration needs and how its design and location are ecologically appropriate;

(4) The rationale for site selection addressing the considerations listed in WAC 173-700-303;

(5) The general need for the proposed bank project;

(6) General site map(s) that includes, but is not limited to:

(a) Total area of site;

(b) Location, size, and number of existing wetlands;

(c) Location of all streams, ponds, and other water features on or adjacent to the site;

(d) Location and type of all known water control features on or adjacent to the site; and

(e) Presence of rights of way, easements, or other encumbrances.

(7) A description of existing conditions of the proposed site(s) including, but not limited to:

(a) Land ownership;

(b) Local land use or zoning designation;

(c) Current use;

(d) Presence of liens, rights of way, easements, or other encumbrances;

(e) The landscape position of the site including water resource inventory area (WRIA) and subbasin location;

(f) Wetland types present on the site including Cowardin classification and hydrogeomorphic (HGM) class of each wetland;

(g) Other habitat types present;

(h) Available information on water sources including surface water features, preliminary ground water information, soil types, and vegetation;

(i) A preliminary analysis of functions provided by on-site wetlands;

(j) Adjacent land uses that might affect the bank's function;

(k) Site constraints, conflicts, or known risks that could affect bank development or function;

(l) Identification of all buildings, structures, and other built features that would remain on the site after construction; and

(m) Identification of existing mitigation sites and whether they will remain on-site after construction.

(8) Description of conceptual site design, including but not limited to:

(a) Proposed types and approximate sizes of wetlands;

(b) Other proposed habitat types to be provided;

(c) Proposed functions that the bank is anticipated to provide;

(d) Description of alterations to hydrology;

(e) Location of grading, if applicable; and

(f) Proposed structures (e.g., perch poles, weirs, trails, etc.).

(9) Figures illustrating the conceptual bank design;

(10) Proposed service area and accompanying rationale that demonstrates the service area is ecologically appropriate;

(11) Discussion of whether water rights have been applied for or secured for the site, if needed;

(12) Identification of proposed permanent protection mechanism, such as a conservation easement;

(13) The proposed ownership arrangements and long-term management strategy for the bank;

(14) Description of how the proposed bank project meets federal, state, and local laws and rules;

(15) Identification of whether the bank site is fully or partially located on agricultural lands of long-term commercial significance;

(16) The qualifications of the sponsor to successfully complete the proposed bank project(s), including information describing any past such activities by the sponsor; and

(17) The qualifications of the main design team and their areas of expertise.

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NEW SECTION

WAC 173-700-212 Submittal of the prospectus. (1) The sponsor must submit a complete electronic and a hard copy of the prospectus to the department.

(2) A prospectus must contain all of the information identified in WAC 173-700-211 to be complete.

(3) When the department receives a prospectus, it will notify affected tribes and the local jurisdiction's planning department where the bank site is located.

(4) The department will notify the sponsor in writing within thirty days of receipt of a prospectus whether or not the document is complete.

(5) If the department determines that the prospectus is not complete, the department shall identify any additional information necessary to complete the prospectus.

(6) Within thirty days after the department notifies the sponsor that the prospectus is complete, it shall provide public notice of the prospectus.

(7) At the beginning of the comment period, the department will ask appropriate agencies and affected tribes to provide written comments on the prospectus. The comments should address, but are not limited to:

(a) Any technical and ecological concerns regarding the prospectus;

(b) Potential conflicts with existing rules and ordinances; and

(c) Any critical issues that the sponsor needs to address prior to moving forward to developing the draft instrument.

(8) The department will review the comments received in response to the public notice and make a written initial evaluation. The department makes an initial evaluation on the ecological appropriateness

of the proposed bank and its ability to provide appropriate compensatory mitigation for activities authorized by state or local permits. This initial evaluation letter must be provided to the sponsor within thirty days of the end of the public notice comment period.

(a) If the department determines that the proposed bank is ecologically appropriate and has potential for providing appropriate compensatory mitigation, the initial evaluation letter will inform the sponsor they may proceed with preparation of the draft instrument consistent with WAC 173-700-222.

(b) If the department determines that the proposed bank is not ecologically appropriate or does not have potential for providing appropriate compensatory mitigation, the initial evaluation letter will provide the reasons for that determination.

(i) The sponsor may revise the prospectus to address the department's concerns and submit a revised prospectus to the department.

(ii) If the sponsor submits a revised prospectus, the department may provide a revised public notice.

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NEW SECTION
WAC 173-700-220 Convening the interagency review team. (1) If the department determines that the proposed bank may proceed with preparation of the draft instrument, the department shall invite representatives from the appropriate federal and state regulatory and resource agencies, the local jurisdiction(s) where the bank site is located, and affected tribes to participate on the IRT.

(2) The department shall serve as chair of the IRT. For bank proposals seeking federal approvals in addition to state certification, the U.S. Army Corps of Engineers may cochair the IRT.

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NEW SECTION
WAC 173-700-221 Purpose of the instrument. (1) An instrument details all of the physical characteristics, legal obligations, operational procedures, monitoring, and maintenance requirements for a bank.

(2) Requirements for instruments may vary based on the specific conditions of the bank site.

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NEW SECTION
WAC 173-700-222 Content of the instrument. The minimum technical elements required in the instrument are:

(1) The goals and objectives of the project;

(2) Site location including city or county, proximity to existing roads and other landmarks, and a vicinity map showing location of the proposed site(s);

(3) A description of existing conditions of the proposed site(s) including, but not limited to:

(a) Local land use or zoning designation;

(b) Current uses;

(c) Presence of liens, rights of way, easements, or other encumbrances;

(d) The landscape position of the site including WRIA and subbasin location;

(e) Wetland types present on the site including Cowardin classification and HGM class of each wetland;

(f) Other habitat types present;

(g) Technical information on soil types, vegetation, and water sources, including surface water features and ground water information;

(h) An analysis of functions provided by on-site wetlands;

(i) Adjacent land uses that might affect the bank's function;

(j) Site constraints, conflicts, or known risks that could affect bank development or function;

(k) Identification of all buildings, structures, and other built features that would remain on the site after construction;

(l) Identification of existing mitigation sites and whether they will remain on-site after construction; and

(m) Detailed site map(s) that includes, but is not limited to:

(i) Total area of site;

(ii) Location, size, and number of existing wetlands;

(iii) Location of all streams, ponds, and other water features on and adjacent to the site;

(iv) Location and type of all known water control features on and adjacent to the site; and

(v) Presence of rights of way, easements, or other encumbrances.

(4) A statement of how the bank meets any watershed restoration needs and how its design and location are ecologically appropriate;

(5) The rationale for site selection addressing the considerations listed in WAC 173-700-303;

(6) A detailed description of the proposed bank site including, but not limited to:

(a) The bank size;

(b) The landscape position of the site;

(c) The Cowardin and HGM classes, wetland rating, and sizes of wetlands and other aquatic resources proposed;

(d) A description of the buffers for the site and any other habitats provided on the site;

(e) The functions to be provided by the bank and level of increase over existing conditions;

(f) Detailed site design plans and specifications to include grading plans, planting plans, and specifications for any structures; and

(g) Construction timing and schedules.

(7) Documentation of the ownership of bank lands and a legal description of the bank site;

(8) A detailed description of sponsor responsibilities for construction implementation, monitoring and reporting, and maintenance;

(9) A description and map of the service area and accompanying rationale that demonstrates the service area is ecologically appropriate;

(10) The potential number of credits to be generated by the bank and a credit description consistent with WAC 173-700-310;

(11) A description of any restrictions on use of credits;

(12) Documentation of water rights for the proposed bank, if required;

(13) An evaluation of historic, cultural, and archaeological resources on the bank site;

(14) Credit tracking and accounting procedures including reporting requirements;

(15) Performance standards for determining bank success and credit release including a schedule for the phased release of credits, if necessary;

(16) Monitoring plan and reporting protocols including a clear statement of responsibility for conducting the monitoring and reporting;

(17) An adaptive management plan and statement of responsibility for contingency actions;

(18) Financial assurances;

(19) The ownership arrangements and long-term management plan for the bank;

(20) Provisions for permanent protection of the bank site;

(21) Force majeure clause (identification of sponsor responsibilities in the event of catastrophic events that are beyond the sponsor's control);

(22) Any supporting documentation requested by the department;

(23) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor; and

(24) Default and closure provisions.

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NEW SECTION

WAC 173-700-223 Preliminary review of the technical elements of the draft instrument. Prior to submitting the draft instrument, the sponsor may elect to have meetings with the IRT to discuss technical elements of their proposal. This preliminary review is optional, but is strongly recommended. It is intended to identify potential issues early, so the sponsor may attempt to address those issues prior to the start of the formal draft instrument review process.

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NEW SECTION

WAC 173-700-224 Submittal of the draft instrument. (1) If the sponsor chooses to proceed with the certification process, they must prepare a draft instrument and submit an electronic and hard copy to the department.

(2) The sponsor must develop the instrument using feedback from the department, the IRT, and comments received during the prospectus phase.

(3) The draft instrument must contain all of the information identified in WAC 173-700-222 to be complete.

(4) After receiving the draft instrument, the department shall determine whether the instrument is complete and notify the sponsor within thirty days. If the draft instrument is not complete, the department shall notify the sponsor in writing of its determination and identify any additional information that is necessary to complete the instrument. Once a modified draft instrument is submitted, the department must notify the sponsor as soon as it determines that the draft instrument is complete.

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NEW SECTION

WAC 173-700-225 Review of the draft instrument. (1) Upon receipt of notification by the department that the draft instrument is complete, the sponsor must provide an electronic and a hard copy of the complete draft instrument to each member of the IRT.

(2) The IRT will have thirty days to comment on the draft instrument to the department. The thirty-day comment period begins five days after the department receives its copy of the complete draft instrument as described in subsection (1) of this section.

(3) Following the comment period, the department will discuss any comments with the appropriate agencies and the sponsor. The department will:

(a) Notify the sponsor of the recommendations and comments received from the IRT;

(b) Identify any additional information that the sponsor must submit; and

(c) Identify additional terms and conditions required as part of the certification.

(4) If the department requests additional information, the certification process shall stop until the requested information is received.

(5) Within ninety days of receipt of the complete draft instrument by the IRT members, the department must notify the sponsor of the status of the review. Specifically, the department must indicate to the sponsor if the draft instrument is generally acceptable and what changes, if any, are needed.

(6) The department will seek to resolve concerns using a consensus-based approach, to the extent practicable.

(7) If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final instrument, the department will indicate the nature of those concerns.

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NEW SECTION

WAC 173-700-230 Submittal of the final instrument. (1) The sponsor shall submit a final instrument to all members of the IRT in electronic and hard copy format for approval by the department.

(2) The final instrument must contain the items listed in WAC 173-700-222, in addition to other supporting information as required by the department. This supporting information may include, but is not limited to:

(a) An explanation of how the final instrument addresses the comments provided by the department and the IRT;

(b) Financial assurance documents;

(c) Legal mechanisms for the permanent protection of the bank site; and

(d) Hydrologic and other ecological studies.

(3) Within thirty days of receipt of the final instrument, the department shall provide public notice on the proposed certification.

(4) At the end of the public comment period, the department shall direct the sponsor to incorporate changes as needed based on the comments received. After incorporating the required changes, the sponsor shall submit the revised instrument to the department.

(5) Within thirty days of receipt of the revised instrument, the department notifies the local jurisdiction(s) of its intent to approve or deny the certification. If the department intends to certify the bank, it will request a decision on certification from the local jurisdiction(s).

(6) The local jurisdiction(s) reviews the intent to certify, determines whether it concurs with the certification, and notifies the department in writing.

(a) If the local jurisdiction(s) does not concur with the intent to certify, the notice shall state the reasons for the local jurisdiction's decision.

(b) The department shall not certify the bank if the local jurisdiction(s) does not concur with the certification.

(c) If the local jurisdiction(s) concurs with the intent to certify, the notice shall state the local jurisdiction's intent to sign the instrument.

(7) After receipt of the local jurisdiction's decision, the department must send a notice on its certification decision to the IRT.

(8) Within fifteen days of receipt of the certification decision, if no IRT member objects by initiating the dispute resolution process, the department will notify the sponsor of the final decision. If the instrument is approved, the sponsor will arrange for it to be signed by the appropriate parties.

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NEW SECTION

WAC 173-700-231 Signatories of the instrument. An instrument must contain signatures from the department, the local jurisdiction(s), and the sponsor for certification to be complete.

(1) Signature on the instrument shall indicate that entity's concurrence with the terms and conditions of the instrument.

(2) No agency, except for the department and the local jurisdiction(s), is required to sign an instrument in order for certification to be complete.

(3) IRT member agencies and tribes are encouraged to sign the instrument.

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NEW SECTION

WAC 173-700-232 Dispute resolution process. An IRT member(s) who has concerns with a particular decision or element of an instrument shall submit the concern and accompanying rationale in writing to the chair(s) of the IRT within fifteen days of the decision. The following dispute resolution process for resolving concerns shall be used:

(1) The chair(s) of the IRT shall outline the majority position on the area of concern and shall work with the IRT member(s) to develop potential solutions to those concerns.

(2) The department shall make every effort to resolve concerns within the IRT before the conflict is elevated to the program manager of the department's shorelands and environmental assistance program.

(3) In the event that the IRT is still unable to reach consensus, within thirty days of receipt of the concern by the department, the IRT member with the concern may request, through written notification, that the department's program management review the issue. The written notification must be directed to the program manager of the shorelands and environmental assistance program or the program manager's designee. Such a notification must include:

(a) A detailed description of the issue; and

(b) Recommendations for resolution.

(4) Within thirty days of receipt of a notification, the program manager or designee shall contact the IRT member with a final decision on the resolution. The resolution shall be forwarded to the other IRT members.

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NEW SECTION

WAC 173-700-233 Review timelines. (1) When additional information or changes to documents are requested by the department, the review timelines shall stop until the requested information is received. If the requested information is not received by the department within one hundred eighty days, the department has the option of canceling the certification process. If the certification process is canceled, the sponsor may apply to restart the certification process.

(2) The timelines in WAC 173-700-212, 173-700-225, and 173-700-230 may be extended by the department at its sole discretion in cases where:

(a) It is necessary to conduct government-to-government consultation with affected tribes;

(b) Timely submittal of information necessary for the review of the proposed bank is not accomplished by the sponsor;

(c) Information that is essential to the department's decision cannot be reasonably obtained within the specified time frame; or

(d) Other permits or authorizations needed for certification cannot be completed within the specified time frame.

(3) In such cases, the department must promptly notify the sponsor in writing that the review timelines have stopped or have been extended, with an explanation of the reason. Such extensions shall be for the minimum time necessary to resolve the issue.

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NEW SECTION

WAC 173-700-240 Public notices. (1) It is the department's goal to ensure that accurate information

on the prospectus and the proposed bank certification is made available to the public, and to avoid duplicative processes for public comment.

(a) When an existing public notice process is available to solicit public comment, the department shall strive to provide a joint public notice.

(b) When an existing public notice process is not available, the department shall issue a public notice.

(2) A public notice comment period must be at least thirty days.

(3) If the department holds a public hearing, the comment period may be extended to one week after the hearing date.

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NEW SECTION

WAC 173-700-241 Notification on the prospectus and proposed certification. At a minimum, the department shall notify the following entities:

(1) The local jurisdiction(s) where the bank site is located;

(2) Tribal governments located within the proposed service area;

(3) The latest recorded real property owners, as shown by the records of the county treasurer, located within:

(a) Three hundred feet of the contiguous boundaries of the proposed bank property; or

(b) The distance from the property boundary as specified in local regulations.

(4) The general public within a bank's proposed service area through:

(a) A published notice in a newspaper of general circulation in the service area of the proposed bank and in other counties as deemed appropriate;

(b) A notice posted by the sponsor in a conspicuous manner on the proposed bank property which is consistent with local regulatory requirements and adjacent to a public right of way; and

(c) A notice posted on the department's web site.

(5) Other interested persons and organizations that have requested information on bank certifications, and all others deemed appropriate by the department.

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NEW SECTION

WAC 173-700-242 Public hearings. (1) The sponsor, any interested government entity, any group, or any person may request a public hearing on the bank certification.

(2) The written request must be received by the department before the end of the comment period.

(3) Any request for a public hearing shall indicate the interest of the party filing it and why a hearing is warranted.

(4) The department shall determine, in its sole discretion, if significant public interest exists to hold a public hearing.

(5) The department shall provide at least fourteen days' notice prior to any hearing.

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PART III

BANK ESTABLISHMENT
NEW SECTION
WAC 173-700-300 Ecological design incentives. (1) One goal of this chapter is to encourage the development of banks that provide significant ecological benefits and are sustainable. In order to achieve this, incentives have been built into the certification and bank establishment process to encourage the siting and designing of banks that provide significant ecological benefits and restore watershed processes in areas identified as high priorities under a watershed-based approach to mitigation.

(2) The incentives may include, but are not limited to, more favorable credit conversion rates and larger service areas.

(3) The department shall make decisions regarding the application of specific incentives on a case-by-case basis.

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NEW SECTION
WAC 173-700-301 Service area. (1) The department must determine the appropriate service area for proposed banks.

(2) The sponsor must provide a detailed text description and a map of the bank's proposed service area in the instrument.

(3) The maximum extent of a service area shall be the WRIA in which the bank is located, except when inclusion of portions of adjacent WRIAs is ecologically appropriate and defensible.

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NEW SECTION
WAC 173-700-302 Considerations for determining service area size. The department considers the following elements when determining the size of the service area:

(1) The functions provided by the bank and the distance from the bank that the ecological functions

can reasonably be expected to compensate for impacts;

(2) Whether the bank addresses existing watershed-based mitigation planning efforts;

(3) How far the ecological and hydrological benefits of the bank extend beyond the bank site location;

(4) The landscape position of the bank within the watershed;

(5) The degree to which the bank restores processes within the watershed;

(6) The size and characteristics of the WRIA in which the bank is located;

(7) The quality, diversity, and regional significance of the habitats provided;

(8) Local needs and requirements, such as consistency with land use or watershed management plans;

(9) Types of impacts that may be compensated through the use of credits from the bank; and

(10) The degree to which the bank supports priorities found in, but not limited to, watershed management plans, watershed characterizations, wetland mapping or inventories, storm water management plans, shoreline master programs, salmon recovery plans and comprehensive land use plans.

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NEW SECTION

WAC 173-700-303 Site selection. (1) Banks must be sited, planned, and designed to be self-sustaining over time. The department shall carefully consider ecological suitability, ecological sustainability, and land use compatibility when determining if a site is an appropriate location for a bank.

(a) The department shall consider the following factors when determining if a proposed bank site is ecologically suitable for providing the desired aquatic resource functions, to the extent practicable:

(i) Whether the proposed location and design are consistent with watershed-based restoration priorities;

(ii) Whether the proposed location and design allow for the protection and restoration of ecological processes within the basin or the watershed;

(iii) Whether the proposed location and design protect or enhance wetland functions that can be sustained over time;

(iv) Whether the proposed location will possess the physical, chemical, and biological characteristics to support a sustainable wetland ecosystem;

(v) Whether the size and location of the bank are appropriate relative to the ecological features found at the site, such as sources of water;

(vi) Whether the proposed location has a high potential to connect or complement existing wetlands;

(vii) Whether the process of establishing the bank at the site will protect or enhance ecologically significant aquatic or upland resources or habitat for threatened, endangered, or candidate species; and

(viii) The types of unavoidable impacts that are anticipated to use bank credits for mitigation.

(b) The department shall consider the following factors when determining if a proposed bank site is ecologically sustainable:

(i) Whether the bank site can be protected over time from direct, indirect, and cumulative impacts based on development trends and anticipated land use changes;

(ii) Whether the sponsor has obtained water rights for the site, if necessary; and

(iii) Other factors deemed appropriate.

(c) The department shall consider various factors when determining if a proposed bank site is compatible with the surrounding land. These factors shall include, but are not limited to:

(i) Whether the proposed location contains cultural resources;

(ii) Whether the proposed location and bank objectives are compatible with surrounding land uses located both up and down gradient;

(iii) Whether the proposed location contributes to the improvement of identified management problems within the drainage basin or watershed (e.g., sedimentation, water quality degradation, or flood control); and

(iv) What the historical land uses were at the proposed location (e.g., agricultural, chemical, industrial, and archaeological).

(2) Compatibility of banks and agricultural lands of long-term commercial significance (ALLCS).

(a) The department discourages the location of banks on prime soils within ALLCS due to the important resource and societal values of those resource lands.

(b) If a bank is proposed to be located within an area designated as ALLCS:

(i) Impacts to ALLCS both on-site and off-site shall be avoided to the maximum extent possible;

(ii) The bank must be compatible with the purpose of designated ALLCS, to conserve and maintain agricultural production, food sources, and prime agricultural soils;

(iii) Placement of banks on ALLCS must be consistent with the local agricultural strategy;

(iv) The bank shall be located on nonprime soils to the greatest extent possible; and

(v) The bank must be compatible with and not adversely affect adjacent and nearby agricultural operations. This includes, but is not limited to: Adverse effects on water flows to neighboring farms, and

minimizing shading effects on adjacent farms.

(c) The department shall consult with the local conservation district and the conservation commission to ensure that bank siting is consistent with both local and statewide goals for agricultural land preservation and advances local priorities and goals.

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NEW SECTION
WAC 173-700-304 Buffers. (1) The department determines the buffer necessary for each bank. The buffer for a bank must be sufficient to protect the functions at the bank.

(2) The department considers the following elements to determine the buffer necessary for a bank:

(a) The level of sensitivity of the wetlands to off-site activities;

(b) The functions and quality of the buffer (existing conditions and proposed conditions); and

(c) The intensity of adjacent land uses.

(3) Required buffers shall generally range between fifty and three hundred feet in width.

(4) The quality and functions of the buffer are included in determining the credit conversion rates for wetlands and aquatic resources on the bank site. Buffers generally do not directly generate credit on an area basis.

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NEW SECTION
WAC 173-700-310 Credit description. The sponsor must provide a description of what the credits represent in the instrument.

(1) For credits determined using a conversion rate under WAC 173-700-313, the sponsor shall describe the credits in terms of wetland rating, HGM class, and Cowardin class. The credit description must list the ecological functions provided by the bank.

(2) For credits determined using an alternative method under WAC 173-700-321, the sponsor shall describe the credits and the method used to determine the credits.

(3) For different resource currencies generated by a bank, the sponsor shall describe the credits and the method used to determine the credits. Those credits shall be quantified by the appropriate regulatory agency.

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NEW SECTION
WAC 173-700-311 Types of credits. There are three types of credits associated with a bank:

Potential, available, and debited.

(1) A potential credit is a credit anticipated to be generated by the bank, but is not currently available for use. Potential credits have not been released by the department.

(2) An available credit is a potential credit that has been released by the department after a bank attains the performance standards specified in the instrument. Only available credits may be used to compensate for unavoidable wetland impacts authorized under a federal, state, or local permit or other authorizations in accordance with the conditions of the instrument.

(3) A debited credit is an available credit which has been withdrawn from the bank to meet regulatory requirements. Debited credits must be removed from the ledger and cannot be used again.

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NEW SECTION

WAC 173-700-312 Default method for determining credits. (1) The department shall use area of wetland as the default credit unit for calculating credits at a bank site.

(2) The department shall determine the number of potential credits at a bank using a credit conversion rate.

(3) The credit conversion rate uses a ratio of area of activity such as reestablishment, creation, rehabilitation, enhancement, or preservation to credits generated at the bank site (area of activity: Credit).

(4) Except as provided in WAC 173-700-320, the department must determine the credit conversion rates for individual banks from within the ranges specified in WAC 173-700-313 and 173-700-318.

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NEW SECTION

WAC 173-700-313 Wetland credit conversion rates. The ranges for establishing conversion rates for wetland areas are as follows:

	The conversion rate can range from:
If the mitigation activity is:	**Area of activity: Credit**
Reestablishment	1:1 to 2:1
Creation (establishment)	1:1 to 2:1
Rehabilitation of altered processes	2:1 to 3:1
Enhancement of wetland structure	3:1 to 5:1
Preservation: In combination with reestablishment, creation, rehabilitation, or enhancement	5:1 to 10:1

of wetlands
Preservation: Alone Case-by-case

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NEW SECTION
WAC 173-700-314 Considerations for determining credit conversion rates for wetland reestablishment, creation, rehabilitation, and enhancement. Unless an alternative credit determination method is used under WAC 173-700-321, the department shall use the following considerations to determine specific conversion rates for wetlands on a bank site:

(1) The anticipated net gains in wetland functions at the site;

(2) The degree to which the bank restores ecological processes previously altered by human activity in a watershed, based on predicted success and sustainability of process restoration;

(3) The degree to which the bank is expected to successfully restore or maintain the appropriate HGM class of wetland for the landscape setting;

(4) The degree to which the bank incorporates a watershed-based approach for site location and design;

(5) The rarity of the predicted wetlands and habitats at the site, based on rarity at state and/or local level;

(6) The site's contribution to the protection, recovery, or both, of state or federally listed threatened or endangered species, protection of state priority species and habitats, and locally significant habitats;

(7) The degree of connectivity to other habitats and open space areas, based on existing connectivity and level of protection for connected areas; and

(8) Public access and education opportunities, where appropriate, as determined by the department.

[]

NEW SECTION
WAC 173-700-315 Considerations for determining credit conversion rates for wetland preservation. (1) Preserving wetlands may generate credit when the preservation occurs in conjunction with the reestablishment, creation, rehabilitation, or enhancement of a wetland or, in exceptional circumstances, as the sole means of generating credits.

(2) Unless an alternative credit determination method is used under WAC 173-700-321, the department shall use the following considerations to determine specific conversion rates for preserved wetlands on a bank site:

(a) The degree to which the preservation area contributes to the ecological functioning of the overall bank site and the protection of watershed processes;

(b) The site is located in an area identified as a high priority for preservation and restoration in a watershed plan or characterization;

(c) The area proposed for preservation is a high quality system, as determined using the considerations under WAC 173-700-316; and

(d) The area proposed for preservation is at risk because the wetland is under demonstrable threat of loss or substantial degradation, due to human activities that might not otherwise be expected to be restricted based on local zoning codes, critical areas ordinances, Forest Practices Act, and foreseeable future land uses in the watershed.

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NEW SECTION

WAC 173-700-316 Considerations for determining high quality wetland systems. The department shall determine whether a site is a high quality wetland system including, but not limited to:

(1) Wetlands with special characteristics including:

(a) Estuarine wetlands;

(b) Natural Heritage wetlands;

(c) Bogs;

(d) Old-growth and mature forested wetlands;

(e) Interdunal wetlands;

(f) Vernal pools; and

(g) Alkali wetlands.

(2) Bog-like wetlands, aspen-dominated wetlands, camas prairie wetlands, and marine water with eelgrass beds.

(3) Category I wetlands (Washington state wetland rating system, 2004 or as amended).

(4) Category II wetlands with a habitat score > 29 points (Washington state wetland rating system, 2004 or as amended).

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NEW SECTION

WAC 173-700-317 Considerations for determining credit conversion rates for banks in urban areas. In urban areas wetlands and uplands may generate credits at the lower ratios within WAC 173-700-313 and 173-700-318. The department will take into consideration the following when determining how much credit is generated:

(1) WAC 173-700-314, 173-700-315, and 173-700-319;

(2) Local land use zoning, anticipated future build-out, width of the buffer and its ability to protect the wetland or other aquatic resource from further degradation;

(3) Integrated public education and directed access for passive recreation opportunities, where appropriate as determined by the department;

(4) Whether the bank provides multiple functions; and

(5) The degree to which the bank helps to implement local restoration priorities, shoreline master programs, local land use management plans, and watershed plans.

[]

NEW SECTION

WAC 173-700-318 Credit conversion rates for uplands and other habitats. (1) Uplands and other habitat areas may generate credits to the extent that those areas contribute to the overall ecological functioning and sustainability of the bank.

(2) Enhancement of upland and other habitats may generate credits at a conversion rate from 3:1 to 10:1. Preservation of high quality uplands and other habitats may generate credits at a conversion rate from 8:1 to 15:1.

[]

NEW SECTION

WAC 173-700-319 Considerations for determining credit conversion rates for uplands and other habitats. Unless an alternative credit determination method is used under WAC 173-700-321, the department shall use the following considerations to determine specific conversion rates for uplands and other habitats on a bank site:

(1) Degree of contribution to the ecological functioning of the bank;

(2) The existing or proposed enhanced condition of the uplands and other habitats; and

(3) Connectivity to other habitats and open space areas, based on existing connectivity and level of protection for those adjacent areas.

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NEW SECTION

WAC 173-700-320 Exceptions to credit conversion rates. (1) The department may allow a conversion rate for wetlands, uplands, and other habitat areas that are outside of the ranges specified in WAC 173-700-313 and 173-700-318.

(2) All exceptions for credit conversion rates authorized by the department must be:

(a) Made on a case-by-case basis, considering the specific circumstances of a bank; and

(b) Based on ecological considerations.

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NEW SECTION
WAC 173-700-321 Using an alternative method to determine credits. The department may allow the use of an alternative method to determine credits so long as:

(1) The department approves of the method;

(2) The method is applicable and appropriate for the Pacific Northwest;

(3) The method is applicable for use on projects debiting from the bank; and

(4) The method is documented in the instrument.

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NEW SECTION
WAC 173-700-330 Schedule for the release of credits. (1) The instrument shall include the amount and schedule for release of credits. Releases of credits must be tied to the attainment of performance standards.

(2) The department shall determine a schedule for the release of credits.

(3) The department shall base the number of credits to be released on the following considerations, but not limited to:

(a) The amount of ecological gain at the time of the release;

(b) The sponsor's experience and success with similar types of projects;

(c) The expected length of time necessary to achieve project goals and performance standards; and

(d) The potential for design failure.

(4) The credit release schedule and amount of credits eligible for release may not exceed the maximum amounts under WAC 173-700-332 through 173-700-335. The credit releases in these sections are cumulative in the sense that the percentage of credits available for release under any particular section is the amount stated in that section, minus the percentage of credits released under all prior sections.

(5) The maximum percentages of credits able to be released under WAC 173-700-331 through 173-700-333 do not include credits generated by preservation of wetlands.

(6) The department may release credits generated by the preservation of existing wetlands or aquatic

resources after the minimum requirements specified in WAC 173-700-331 have been met.

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NEW SECTION
WAC 173-700-331 Credit release -- Preconstruction. (1) Up to fourteen percent of the total potential credits for the bank, or for the phase, may be released preconstruction. Initial physical and biological improvements must begin within one year following the release of credits.

(2) The following criteria must be met prior to any release of credits:

(a) The instrument is signed and approved;

(b) The permanent protection mechanism for the site is established;

(c) The proof of financial assurances has been received by the department;

(d) The long-term management and maintenance endowment fund escrow account is established; and

(e) All necessary permits and authorizations for site construction have been obtained.

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NEW SECTION
WAC 173-700-332 Credit release -- Postconstruction. (1) Up to thirty percent of the total potential credits for the bank, or for the phase that has been constructed, may be released when the department, in consultation with signatories, approves:

(a) The complete implementation of construction plans; and

(b) The as-built condition of the bank or phase.

(2) Approval of the as-built condition of a bank or phase includes the following:

(a) The sponsor must submit as-built plans that reflect the final grading and planting of the site to the department and signatories; and

(b) The department must inspect the as-built condition of the bank.

(3) If the department approves the as-built plans and the constructed condition of the site, then the department must release the credit(s) specified in the instrument.

(4) If the bank cannot be constructed in accordance with the approved instrument, the sponsor must notify the department and signatories. Any changes to the bank design will be handled as a remedial action under WAC 173-700-600 through 173-700-605. A significant modification of the bank project requires approval from the department and signatories.

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NEW SECTION
WAC 173-700-333 Credit release -- Attainment of hydrologic performance standards. (1) Up to fifty percent of total potential credits for the bank, or for the phase of the bank that has been constructed, may be released when the department, in consultation with signatories, determines that the hydrologic performance standard(s), at a minimum, has been attained.

(2) The department may require that additional performance standards be met prior to releasing up to fifty percent of the total potential credits.

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NEW SECTION
WAC 173-700-334 Credit release -- Final release. (1) The department, in consultation with the signatories, may adjust the final number of potential credits available at a bank based on actual conditions of the bank site at the time of the final release of credits. The number of potential credits may be adjusted in the following ways:

(a) The total number of potential credits may be reduced if all of the required performance standards cannot be attained; or

(b) The total number of potential credits may be increased if:

(i) All of the required performance standards are met; and

(ii) The department determines that the site provides higher levels of function than originally projected.

(2) The department may not release all of the potential credits until the following requirements are met and approved:

(a) The bank site has attained the required performance standards;

(b) An approved long-term management plan has been submitted;

(c) The long-term management account is fully funded; and

(d) The long-term steward has been identified.

(3) If the department concurs that all the above requirements have been met, then the department must release all remaining potential credits specified in the instrument.

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NEW SECTION
WAC 173-700-335 Additional credit releases. (1) Earlier releases of credits may be awarded by the department, in consultation with the signatories, as long as the maximum percentages for the release of potential credits specified in WAC 173-700-331 through 173-700-334 are not exceeded.

(2) Earlier releases of credits may be awarded by the department, in consultation with the signatories, if the sponsor performs approved actions beyond those identified in the instrument in order to increase the projected functions of the site. Earlier releases of credits will not be awarded for implementation of management activities that are necessary to attain the performance standards required in the instrument.

(3) Any deviation from the credit release schedule shall be documented in an amendment to the instrument.

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NEW SECTION
WAC 173-700-340 Performance standards. (1) Performance standards must be based on the bank's objectives and goals as identified in the instrument.

(2) Performance standards must be measurable.

(3) The department may require multiple years of monitoring data to document the sustainable attainment of specific performance standards, particularly hydrologic performance standards.

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NEW SECTION
WAC 173-700-350 Financial viability. (1) Certification of a bank under this chapter does not imply or guarantee the financial viability of the bank.

(2) Sponsors are responsible for conducting any financial studies prior to implementation of an instrument to determine the financial risks and potential economic viability of the bank.

(3) The department may not consider the economic standing of a bank when implementing mitigation sequencing, determining unavoidable impacts, or evaluating compensation alternatives for debit projects.

(4) The sponsor is responsible for all costs associated with the construction, operation, maintenance, long-term management, permanent protection, financial assurances, and remedial actions, if required.

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NEW SECTION
WAC 173-700-351 Financial assurances. (1) The department must require financial assurances to ensure that the potential risks to the environment from unsuccessful banks are minimized. This may include financial assurances specifically for:

(a) The construction phase (see WAC 173-700-352);

(b) The monitoring and maintenance phase (see WAC 173-700-353); and

(c) The long-term management phase (see WAC 173-700-354).

(2) The amount of financial assurances required by the department must be determined on a bank-specific basis and be commensurate with the degree of risk of bank failure and the nature and extent of site alteration and development.

(3) The department will consider the timing of release of bank credits in determining the amount of financial assurances required.

(4) The department may reduce the amount of financial assurances over the operational life of the bank as the bank matures and the risk of failure is reduced.

(5) The instrument and the financial assurance mechanisms must specify the financial requirements and conditions, and the entity responsible for the release or cashing of the financial assurances.

(6) The department must determine the adequacy of the proposed financial assurances prior to certification.

(7) The department shall require financial assurances for construction, monitoring and maintenance, and long-term management of the site as specified in WAC 173-700-352 through 173-700-354.

(8) The financial assurances shall include department costs for contract administration and overhead, as necessary.

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NEW SECTION

WAC 173-700-352 Financial assurances for construction. (1) If credits are released prior to the construction of a bank, the department must require a financial assurance for construction.

(2) The amount of the financial assurance must be sufficient to cover the estimated costs for construction of a portion of the bank site that the department determines is equivalent to the credits released prior to construction.

(3) Construction cost estimates must be based on the costs of having an independent contractor perform the construction of the bank. The sponsor must provide the department with a written estimate from a qualified contractor.

(4) The department shall authorize the release of the financial assurance mechanism for bank construction after the department has approved the as-built condition of the bank.

(5) If the first release of credits will occur after construction is completed and the department has approved the as-built plans, the department may require a financial assurance that would be adequate to stabilize the bank site in the event of default by the sponsor.

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NEW SECTION

WAC 173-700-353 Financial assurances for monitoring and maintenance. (1) The department must require a financial assurance for monitoring and maintenance for all banks that have credit releases

prior to full attainment of all performance standards.

(2) The sponsor must provide the department a written cost estimate, including an adjustment for inflation, from a qualified contractor. The cost estimates for monitoring and maintenance must be based on the costs to have the work specified below performed by an independent contractor.

(3) The amount of the financial assurance must be sufficient to cover all monitoring and maintenance activities listed under WAC 173-700-402 for the operational life of the bank and the below activities, but not limited to:

(a) Estimated costs for a contractor to implement the contingency actions identified in the instrument;

(b) Estimated costs of all monitoring activities required in the monitoring plan.

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NEW SECTION
WAC 173-700-354 Financial assurances for long-term management. (1) The department must require financial assurances for the long-term management of a bank site.

(2) The sponsor must provide the department a written estimate for the costs of annual maintenance of the bank, including an adjustment for inflation, from a qualified contractor.

(3) The sponsor must secure sufficient funds for the anticipated long-term management costs. Appropriate long-term financing mechanisms include, but are not limited to, nonwasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the bank site.

(4) Any provisions necessary for long-term financing must be addressed in the instrument.

(5) If the ownership of the site is transferred in the future, the financial mechanism for long-term management must remain with the entity responsible for the long-term management of the bank site.

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PART IV

BANK OPERATION
NEW SECTION
WAC 173-700-400 Monitoring plan. (1) The goals of monitoring bank sites are to:

(a) Document the postconstruction baseline conditions at the site;

(b) Document the condition of the site as it develops over time;

(c) Document the attainment of performance standards; and

(d) Provide early identification of problems in the site's development that would trigger potential

contingency actions.

(2) The sponsor must develop a monitoring plan for each bank site and include it in the instrument. The monitoring plan must include, but is not limited to:

(a) A description of the variables that will be monitored, a description of the methods or protocols used to monitor those variables, and how they will be evaluated;

(b) The monitoring protocols must be sufficient to provide an accurate representation of site conditions;

(c) A schedule of monitoring including the time of year, frequency, and duration; and

(d) A description of proposed photo documentation of the site.

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NEW SECTION

WAC 173-700-401 Monitoring and as-built reporting. (1) The sponsor must submit to the signatories an electronic and a hard copy of the monitoring reports. The monitoring reports must accurately document the conditions and progress of the bank's development. The reports must be submitted according to the schedule specified in the instrument.

(2) The monitoring report must include, but is not limited to:

(a) A list of the bank's performance standards;

(b) A narrative summary of the results of the monitoring;

(c) Discussion of whether applicable performance standards were attained;

(d) Data collected during the monitoring;

(e) Location of transects, plots, and monitoring wells;

(f) Photo points or referenced locations where photographs of the site are taken periodically to document site progress;

(g) Identification of any probable causes for failure of the bank to attain any performance standards;

(h) Discussion of recommended adaptive management activities to improve attainment of performance standards or performance of functions at the site;

(i) Name and qualification of the persons and organizations conducting the monitoring.

(3) The sponsor must submit to the department an as-built report that accurately documents the postconstruction conditions of the site within ninety days after the completion of grading, planting, or both.

(4) The sponsor must identify in the as-built report any variations from the approved site design plan.

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NEW SECTION
WAC 173-700-402 Monitoring and maintenance. (1) The department shall determine a monitoring schedule for the bank.

(a) The schedule shall be of sufficient duration to show that the bank is progressing toward ecological success and a sustainable condition. Generally, the department shall require a ten-year monitoring schedule.

(b) Longer monitoring periods may be required for banks that contain wetland or other aquatic systems that require more time to reach a stable condition or where contingency or remedial actions have been undertaken.

(2) Monitoring and maintenance includes the following activities, but is not limited to:

(a) Regular monitoring of the site;

(b) Ongoing maintenance activities required during the operational life of the bank as specified in the instrument. These activities may include, but are not limited to, control of invasive species, irrigation, or maintenance of a water control structure; and

(c) Implementation of contingency or remedial actions, if required.

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NEW SECTION
WAC 173-700-403 Adaptive management plan. (1) Each instrument must include an adaptive management plan.

(2) The adaptive management plan for a bank site must include the following elements, but is not limited to:

(a) Identification of potential causes for site failure;

(b) A management strategy to address unforeseen changes in site conditions or if the monitoring indicates that the site will not achieve specific performance standards; and

(c) The sponsor's responsibilities in reporting and implementing contingency actions.

(3) The sponsor shall notify the department within ninety days if adaptive management activities are implemented to address unforeseen problems with site conditions.

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NEW SECTION
WAC 173-700-410 Obtaining credit releases. (1) Once the bank has met the required performance standards, the sponsor must petition the department in writing in order to obtain a release of credits.

(2) For preconstruction credit releases, the sponsor must include documentation that the minimum requirements in WAC 173-700-331 have been met.

(3) For postconstruction credit releases, the sponsor must send the department supporting monitoring data demonstrating that the required performance standards have been met.

(a) The department shall conduct an on-site inspection, as needed, to verify that performance standards have been met.

(b) The sponsor must allow the department access to the site and to all documentation relevant to the requested credit release.

(4) The department must grant the release of credits upon its approval that the bank met the required performance standards. The department must respond to the petition in writing.

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NEW SECTION
WAC 173-700-411 Ledger tracking and reporting. (1) The sponsor must maintain a separate ledger for each bank.

(2) The ledger must be formatted to be consistent with the department's ledger template.

(3) The sponsor must submit a complete copy of the ledger at the following times:

(a) An annual ledger for the previous calendar year must be submitted by February 1st.

(b) An updated ledger must be submitted within thirty days after any credits are received, or within thirty days after credits are debited for permit requirements. This requirement also applies to other resource credits available at the bank.

(4) When a credit is debited from a bank to meet a permit requirement, and the credit sale is completed, the bank sponsor must record the permitted transaction at the auditor's office of the county in which the bank is located.

(a) Any recording fees or other costs are the responsibility of the sponsor.

(b) The sponsor must submit a copy of the recorded transaction to the department within thirty days of recording it at the auditor's office.

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NEW SECTION
WAC 173-700-412 Master ledger. (1) The department shall maintain a master ledger for each bank

and must cross check the sponsor's annual ledger against the master ledger.

(2) The department must notify the sponsor within sixty days of receipt of the sponsor's annual ledger if the ledger conflicts with the master ledger.

(3) The sponsor is responsible for reconciling any discrepancies between the sponsor's ledger and the department's master ledger. If the sponsor fails to resolve any discrepancies, the department may suspend the further use of available credits under WAC 173-700-603.

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NEW SECTION
WAC 173-700-413 Random audits. (1) The department may conduct random audits during the operational life of a bank.

(2) The audit may include the department contacting the local jurisdiction(s) and the county auditor's office to verify all transactions listed in a bank's ledger.

(3) In the event of an audit, the sponsor must provide all supporting documentation requested by the department in order to verify transactions listed in the bank's ledger.

(4) Unexplainable discrepancies between the public records and the bank's ledger may result in the department initiating compliance actions under WAC 173-700-600 through 173-700-603.

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NEW SECTION
WAC 173-700-420 Long-term management plan. (1) The instrument must identify the party responsible for the ownership and long-term management of the bank.

(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.

(3) The instrument may contain provisions allowing the sponsor to transfer the long-term management responsibilities of the bank site to a land stewardship entity, such as a public agency, nongovernmental organization, or private land manager, after review and approval by the department. This land stewardship entity need not be identified in the instrument, as long as the future transfer of long-term management responsibility is approved by the department.

(4) The owner of a bank may not complete any conveyance of title, easement, lease, or other interest directly related to the bank without adequate and complete provision for the continued management of the bank in a natural state.

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NEW SECTION

WAC 173-700-421 Permanent protection. (1) Bank sites must be permanently protected and preserved in their natural state. The department requires that the sponsor use a legal mechanism to ensure the permanent protection and preservation of the site. Generally, the department shall require a conservation easement.

(2) The department may approve other legal and administrative mechanisms, in lieu of a conservation easement, if it determines they are adequate to protect the site.

(3) The legal mechanisms must:

(a) Be approved by the department and secured prior to any release of credits;

(b) Limit site activities that are incompatible or interfere with the goals, purposes, and ecological functioning of the site;

(c) Transfer with the property;

(d) Contain a provision requiring a sixty-day advance notification to the department before any action is taken to void or modify the mechanism, including transfer of title, or establishment of any other legal claims over the bank site;

(e) Require the easement holder of the bank to notify and receive approval from the department for any proposal to use the bank in a manner that is inconsistent with the conservation easement or other approved legal mechanism; and

(f) Grant the department and its designated representatives the right to enter the bank at reasonable times for the purpose of evaluating compliance with the terms of the instrument and the conservation easement or other approved legal mechanism.

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PART V

USE OF BANK CREDITS
NEW SECTION
WAC 173-700-500 Use of bank credits. Banks can be a preferable option for compensating for authorized impacts. Use of a bank can help reduce risk and uncertainty as well as temporal loss of resource functions and services when used to compensate for authorized impacts. Local and state agencies are encouraged to use banks as a tool for implementing various management and restoration plans. These plans may include, but are not limited to, watershed management plans, watershed characterizations, storm water management plans, shoreline master programs, salmon recovery plans, and comprehensive land use plans. Banks can restore processes, habitats, and functions identified as priorities within the watershed.

(1) The department requires an approved instrument that includes a mitigation plan, appropriate real estate protections, and financial assurances for a bank. The department requires that the bank attain performance standards before credits can be used.

(2) Projects located within the bank's service area are eligible to apply to use credits from that bank to compensate for authorized impacts.

(3) Permitting agencies for debit projects should ensure that mitigation sequencing has occurred before approving the use of credits.

(4) The permitting agencies determine whether the use of credits from a bank provides appropriate compensation for a debit project's unavoidable impacts.

(5) Under no circumstances may the same credits be debited as compensation for a different impact authorized under another regulatory program.

(6) Some debit projects may require authorization under more than one regulatory program (e.g., section 404 authorization, local grading permit, and a hydraulic project approval). Where appropriate, banks may be designed to holistically address requirements under multiple programs and authorities for the same activity.

(7) The sponsor is responsible for obtaining all approvals from the signatories when proposing to use credits in a manner that is inconsistent with the terms and conditions of the instrument.

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NEW SECTION

WAC 173-700-501 Replacement ratios for debit projects. (1) Replacement ratios used to determine compensation requirements for debit projects should generally be lower than those required for permittee-responsible mitigation.

(2) The replacement ratios for debit projects should take into consideration that credit conversion rates for banks include adjustments for the site's overall ecological benefit. One credit at a bank is not necessarily equal to one acre on the ground. In many cases, one credit from a bank represents more than one acre at the bank site.

(3) Replacement ratios for debit projects should reflect the extent to which the bank site adequately compensates for lost wetland functions at the impact site.

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NEW SECTION

WAC 173-700-502 Use of bank credits outside of the service area. (1) The department, in consultation with the signatories, may authorize the use of credits to compensate for impacts outside of the bank's designated service area if the department deems that use to be reasonable and environmentally desirable.

(2) Linear projects that contain at least one impact within the bank's service area, such as roadways, transmission lines, distribution lines, pipelines, or railways, may be eligible to use a bank even though not all of the projects' impacts are located within the bank's service area. However, the following conditions must be met:

(a) The bank must provide appropriate compensation for the impacts; and

(b) The determination to allow use of credits for impacts lying outside of a bank's service area must

take into consideration the elements used in determining the bank's service area.

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PART VI

COMPLIANCE WITH CERTIFICATION
NEW SECTION
WAC 173-700-600 Compliance with the terms of certification. It is the department's goal to ensure that the establishment and operation of a bank is consistent with the terms and conditions of the certification as specified in the instrument. The department may use one or more of the methods in WAC 173-700-601 through 173-700-603 to gain compliance of certified banks.

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NEW SECTION
WAC 173-700-601 Remedial actions. (1) If a bank is unable to attain the required performance standards or meet other requirements specified in the instrument or this chapter, the department may require that the sponsor implement remedial actions necessary to correct any deficiencies.

(2) If the sponsor determines that the bank will not attain performance standards, the sponsor shall notify the department and the signatories.

(3) Any agency, entity, or person may also notify the department if it has supporting documentation that a bank site is not successfully meeting the required performance standards. The notification must include:

(a) A clear statement of the issue;

(b) Supporting documentation of the problem, such as photographic evidence, documentation from field reviews, the submitted monitoring report, or the credit release petition; and

(c) Recommendations for remedial actions or other alternatives to address the problem.

(4) The department, with recommendations from the signatories, shall evaluate and determine the appropriate remedial actions required for the site. The department will consider whether the bank provides ecological benefits comparable to the original objectives of the bank.

(5) The department must submit, in writing, its determination for required remedial actions to the sponsor and the signatories.

(6) Interested signatories of the bank shall notify the department if they have comments on the proposed remedial actions within thirty days of receipt of the determination.

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NEW SECTION
WAC 173-700-602 Compliance with required remedial actions. (1) If the sponsor does not

complete the required remedial actions within the schedule specified by the department, the department must send a notice of noncompliance to the sponsor and to the signatories.

(2) The sponsor must respond in writing to the department within fifteen days of receipt of the notice. The response shall include an explanation of why the sponsor has not implemented the required remedial actions and a proposed schedule for completion.

(3) The department, in consultation with interested signatories of the bank, shall determine whether the reasons provided by the sponsor constitute extenuating circumstances and shall determine whether to extend the schedule for implementing remedial actions.

(4) If the department determines that the schedule should be extended, the department must notify the sponsor in writing.

(5) If the department determines that the schedule should not be extended, the department must notify the sponsor by certified mail with return receipt requested that it intends to proceed with one of the following actions:

(a) Use the posted financial assurances to have the required remedial actions completed;

(b) Adjust the total number of potential credits at the bank under WAC 173-700-334; or

(c) Suspend the use and sale of available credits at the bank under WAC 173-700-603.

(6) The department may initiate the actions specified in subsection (4) of this section thirty days after the date of the sponsor's receipt of the department's notice.

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NEW SECTION

WAC 173-700-603 Suspension of credit use. (1) The department may suspend the sale of credits to bring a bank into compliance. If the department suspends the sale of credits, credits may not be debited until the department lifts the suspension and notifies the sponsor in writing that credit use may be resumed.

(2) The suspension shall include all available credits at a bank.

(3) Use of available credits may be suspended if the department determines that:

(a) A bank is out of compliance with the terms of its certification and the sponsor has not implemented the remedial actions required by the department;

(b) The sponsor has not made reasonable efforts to bring the bank into compliance;

(c) There is documented fraudulent use of the bank; or

(d) Initial physical and biological improvements have not been initiated within one year following the initial release of credits, unless the sponsor and signatories agree to a longer construction timeline.

(4) If credit use is suspended by the department, the department must notify the sponsor by certified mail with return receipt requested that further sale of credits has been suspended.

(5) The department shall maintain the suspension until compliance is achieved.

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PART VII

RESPONSIBILITIES AND ROLES
NEW SECTION
WAC 173-700-700 Role of the interagency review team. (1) The IRT assists in the development of the terms and conditions of the instrument by participating in negotiations with the sponsor.

(2) The IRT reviews proposed bank certifications and makes recommendations to the department.

(3) The IRT assists the sponsor in identifying any permits or approvals that may be required from their agency.

(4) The IRT ensures that certified banks are technically feasible and ecologically appropriate.

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NEW SECTION
WAC 173-700-701 Role of the signatories. (1) Signatories provide assistance to the department in overseeing the establishment and operation of that bank.

(2) Signatories provide input to the department on whether a credit release petition should be granted.

(3) Signatories review and provide comments to the department on any proposed uses of bank credits that are not consistent with the terms of the certification.

(4) Signatories notify the department if they determine that the bank is out of compliance with the terms of its certification and recommend whether remedial actions are warranted to bring the bank into compliance.

(5) Signatories must notify the department if they have any comments regarding the department's proposed remedial actions required under WAC 173-700-601.

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PART VIII

APPEALS
NEW SECTION
WAC 173-700-800 Appeals process. A decision to issue or deny a final certification may be appealed to the pollution control hearings board under chapter 43.21B RCW.

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