Chapter 173-700 WAC
WETLAND MITIGATION BANKS

WAC

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PART I
OVERVIEW

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 unavoidable 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-100, filed 9/3/09, effective 10/4/09.]

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 the effective date of this rule, must meet the requirements of this chapter.

(3) Instruments approved prior to the effective date of this rule, are grandfathered and may continue to operate under the terms of their existing instruments;

(4) Instruments modified on or after the effective date of this rule, 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).

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-101, filed 9/3/09, effective 10/4/09.]

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) 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 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-102, filed 9/3/09, effective 10/4/09.]

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).

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-103, filed 9/3/09, effective 10/4/09.]

WAC 173-700-104 Definitions. "Adaptive management activities" means actions taken by the bank sponsor on their own to correct any deficiencies on the site in order for the site to attain the required performance standards. The adaptive management activities shall be identified in the mitigation banking instrument.

"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. Long-term commercial significance includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.

"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 unavoidable 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 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.

"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. Creation may also be known as establishment.

"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.

"Cultural resources" means sites, structures, buildings, districts, lands, landscapes, and objects that have historical, archaeological, and traditional cultural significance. Cultural resources are the tangible and material evidence of the human past.

"Days" means calendar days.

"Debited credit"

(1) An available credit that has been withdrawn from the bank to meet regulatory requirements.

(2) A reserved credit that has been used to meet a regulatory requirement.

"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 the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

"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.

"Indian Country" means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

"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, 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.

"Prime farmland soils" means land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops and is also available for these uses. It has the soil quality, growing season, and moisture supply needed to produce economically sustained high yields of crops when treated and managed according to acceptable farming methods, including water management. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season, acceptable acid-

ity or alkalinity, acceptable salt and sodium content, and few or no rocks. They are permeable to water and air. Prime farmlands are not excessively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding.

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

"Reestablishment" means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Reestablishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions. Reestablishment falls under the broader term of restoration.

"Rehabilitation" means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

"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.

"Reserved credit" means an available credit that has been withdrawn from the bank but which is not associated with a specific regulatory requirement at the time of purchase. Purchase of reserved credits does not provide any guarantee that a project will be authorized under existing regulatory programs. Reserved credits are purchased at the buyer's sole risk.

"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.

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

"Urban areas" means areas located within a designated urban growth area.

"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 analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by authorized activities. The watershed approach may involve consideration of landscape scale, historic, and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements.

"Wetland(s)" means areas that are inundated or saturated by surface water or groundwater 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-104, filed 9/3/09, effective 10/4/09.]

PART II
CERTIFICATION PROCESS

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-200, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-201, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-210, filed 9/3/09, effective 10/4/09.]

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), basin, 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 groundwater 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-211, filed 9/3/09, effective 10/4/09.]

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, as specified in WAC 173-700-240 and 173-700-241.

(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, as specified in WAC 173-700-240 and 173-700-241.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-212, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-220, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-221, filed 9/3/09, effective 10/4/09.]

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, basin, 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 wetland delineations, soil types, vegetation, and water sources, including surface water features and groundwater 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, delineated boundaries, 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 Cowardin and HGM classes, wetland rating, and sizes of wetlands and other aquatic resources proposed;

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

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

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

(f) 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 adaptive management activities;

(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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-222, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-223, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-224, filed 9/3/09, effective 10/4/09.]

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 notify the sponsor of the nature of those concerns.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-225, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-230, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-231, filed 9/3/09, effective 10/4/09.]

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 decision of the program manager shall be the final decision of the department. The resolution shall be forwarded to the other IRT members.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-232, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-233, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-240, filed 9/3/09, effective 10/4/09.]

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) Affected tribes 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-241, filed 9/3/09, effective 10/4/09.]

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 during the comment periods for the prospectus or the proposed bank certification.

(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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-242, filed 9/3/09, effective 10/4/09.]

PART III
BANK ESTABLISHMENT

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-300, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-301, filed 9/3/09, effective 10/4/09.]

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 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-302, filed 9/3/09, effective 10/4/09.]

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, enhance, or negatively affect 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 farmland soils designated as 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 prime farmland soils both on-site and off-site shall be avoided to the maximum extent possible;

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

(iii) The bank must be designed and constructed to 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; and

(iv) The bank should be designed to support local and regional environmental 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.

(c) The department shall consult with the local conservation district and the conservation commission to determine whether the bank siting conflicts with local or statewide goals for agricultural land preservation.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-303, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-304, filed 9/3/09, effective 10/4/09.]

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) If different resource currencies are developed for a bank:

(a) The sponsor shall describe the credits and the method used to determine the credits;

(b) Those credits shall be quantified by the appropriate regulatory agency; and

(c) The accounting methods, including the relationship to wetland credits (e.g., the number of resource credits equivalent to a wetland credit), must be approved by the department and included in the instrument or an amendment to the instrument.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-310, filed 9/3/09, effective 10/4/09.]

WAC 173-700-311 Types of credits. There are four types of credits associated with a bank: Potential, available, reserved 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 and reserved 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) Reserved credit is an available credit that has been withdrawn from the bank but which is not associated with a specific regulatory requirement at the time of purchase. Purchase of reserved credits does not provide any guarantee that a project will be authorized under existing regulatory programs. Reserved credits are purchased at the buyer's sole risk.

(4) A debited credit is:

(a) An available credit that has been withdrawn from the bank to meet regulatory requirements.

(b) A reserved credit that has been used to meet a regulatory requirement.

(c) Removed from the ledger and cannot be used again.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-311, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-312, filed 9/3/09, effective 10/4/09.]

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

If the mitigation activity is:	The conversion rate can range from: 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 of wetlands	5:1 to 10:1
Preservation: Alone	Case-by-case

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-313, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-314, filed 9/3/09, effective 10/4/09.]

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 wetland 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-315, filed 9/3/09, effective 10/4/09.]

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).

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-316, filed 9/3/09, effective 10/4/09.]

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 more favorable rates 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-317, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-318, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-319, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-320, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-321, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-330, filed 9/3/09, effective 10/4/09.]

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 or other approved financial assurance for such activity is established; and

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

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-331, filed 9/3/09, effective 10/4/09.]

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 requires approval from the department and signatories prior to work occurring.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-332, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-333, filed 9/3/09, effective 10/4/09.]

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, or in the case of banks developed solely by public agencies a suitable long-term funding mechanism that has been approved by the department; 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-334, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-335, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-340, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-350, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-351, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-352, filed 9/3/09, effective 10/4/09.]

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 adaptive management activities identified in the instrument;

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

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-353, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-354, filed 9/3/09, effective 10/4/09.]

PART IV
BANK OPERATION

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 adaptive management activities.

(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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-400, filed 9/3/09, effective 10/4/09.]

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) Discussion of any adaptive management activities performed on the site;

(j) 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-401, filed 9/3/09, effective 10/4/09.]

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 adaptive management activities 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 adaptive management activities or remedial actions, if required.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-402, filed 9/3/09, effective 10/4/09.]

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) Goals and objectives of the bank;

(b) Identification of potential causes for site failure;

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

(d) The sponsor's responsibilities and process for reporting and implementing adaptive management activities.

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

(4) If the adaptive management activities are not effective in correcting deficiencies at the site, the department may require remedial actions as specified in WAC 173-700-601.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-403, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-410, filed 9/3/09, effective 10/4/09.]

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, sold, or debited. 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-411, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-412, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-413, filed 9/3/09, effective 10/4/09.]

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 as specified in the instrument.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-420, filed 9/3/09, effective 10/4/09.]

WAC 173-700-421 Permanent protection. (1) Bank sites must be permanently protected and preserved as specified in the instrument. 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-421, filed 9/3/09, effective 10/4/09.]

PART V
USE OF BANK CREDITS

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 unavoidable 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-500, filed 9/3/09, effective 10/4/09.]

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 because of the reduced risk of failure and reduction in temporal losses.

(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.

(4) Recommended replacement ratios are generally included in the instrument.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-501, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-502, filed 9/3/09, effective 10/4/09.]

PART VI
COMPLIANCE WITH CERTIFICATION

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 instru-

ment. 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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-600, filed 9/3/09, effective 10/4/09.]

WAC 173-700-601 Remedial actions. (1) If a bank does not attain the required performance standards or meet other requirements specified in the instrument or this chapter, the sponsor shall implement adaptive management activities. If such activities do not achieve compliance within a reasonable time, the department may require remedial actions, which may include additional adaptive management activities or other activities necessary to achieve compliance.

(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) If the department determines that remedial actions are necessary:

(a) The department shall consult with the signatories to determine appropriate remedial actions;

(b) During consultation, the signatories may recommend remedial actions to the department and may comment on remedial actions proposed by the department; and

(c) The department shall consider the recommendations and comments of the signatories, if any, and shall make the final decision regarding appropriate remedial actions.

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

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-601, filed 9/3/09, effective 10/4/09.]

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 (5) of this section thirty days after the date of mailing of the department's notice to the sponsor.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-602, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-603, filed 9/3/09, effective 10/4/09.]

PART VII
RESPONSIBILITIES AND ROLES

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-700, filed 9/3/09, effective 10/4/09.]

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-701, filed 9/3/09, effective 10/4/09.]

PART VIII
APPEALS

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.

[Statutory Authority: Chapter 90.84 RCW. WSR 09-19-013 (Order 04-13), § 173-700-800, filed 9/3/09, effective 10/4/09.]