

WSR 24-16-038
EXPEDITED RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 24-09—Filed July 29, 2024, 3:31 p.m.]

Title of Rule and Other Identifying Information: This rule making is in response to 2SSB 5784 that was passed by the legislature in 2024 regarding deer and elk damage to commercial crops. This rule making amends chapter 220-440 WAC for these specific rules: WAC 220-440-140 Payment for commercial crop damage—Limitations, 220-440-150 Application for cash compensation for commercial crop damage—Procedure, 220-440-180 Application for cash compensation for livestock damage or domestic animal—Procedure, and 220-440-230 Commercial crop or livestock damage claim—Dispute resolution.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The law passed under 2SSB 5784 in the 2024 legislative session places limits on the amounts paid to eligible farmers for damage to their commercial crops caused by damage from deer and elk. The Washington department of fish and wildlife (WDFW) is now restricted to pay no more than \$300,000 per fiscal year from the general fund. In addition, the maximum payment amount for a crop or livestock loss claim is increased from \$10,000 to \$30,000. The limit of a claim is now \$30,000 and not appealable for a higher payment.

The bill also provides that any qualified claim for payment that is more than the available funds in the current fiscal year is eligible for payment in the next fiscal year. If additional funds are not provided by the legislature in the next fiscal year, then no further payment may be made on the claim unless the legislature specifically appropriates funds for that purpose. Under certain circumstances, the legislature may declare an emergency and may appropriate additional monies to pay WDFW for qualified crop damage claims. Furthermore, the bill requires that claims that are submitted to WDFW will be prioritized for payment based upon the highest percentage of loss, calculated by comparing agreed-upon or alternatively paid out commercial crop damages to the gross sales or harvested value of commercial crops for the previous tax year.

Reasons Supporting Proposal: WDFW has historically provided both mitigation services and compensation to crop farmers who suffer commercial crop damage caused by deer and elk activities on their property. The purpose of this program is to control or mitigate the crop damage caused by this wildlife without killing the animals and to increase the harvest of damage-causing animals in local hunting seasons. Under the previous law, there was no limitation on the amount of payment for a crop damage claim once it was appealed. The proposed amendments will align the rules with the statutory payment limitations on crop claims as well as implement the statutory mechanism for prioritizing commercial crop damage claims.

Statutory Authority for Adoption: RCW 77.04.012, 77.04.013, 77.04.020, 77.04.055, and 77.12.047.

Statute Being Implemented: RCW 77.36.080, 77.36.100, and 77.36.130.

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

Name of Proponent: WDFW, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Eric Gardner, 1111 Washington Street S.E., Olympia, WA 98501,

360-902-2515; Enforcement: Steve Bear, 1111 Washington Street S.E., Olympia, WA 98501, 360-902-2373.

This notice meets the following criteria to use the expedited adoption process for these rules:

Content is explicitly and specifically dictated by statute.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: Expedited rule making is appropriate because the proposed rule incorporates language that is specifically dictated by statute (2SSB 5784, codified in RCW 77.36.080, 77.36.100, and 77.36.130). The proposal also contains a clarification without changing the rule's effect.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Scott Bird, WDFW, P.O. Box 43200, Olympia, WA 98501-3200, phone 855-925-2801, code 7246, email cropdamageCR105@publicinput.com, www.publicinput.com/cropdamageCR105, AND RECEIVED BY October 8, 2024.

July 29, 2024

Scott Bird

Rules Coordinator

OTS-5513.2

AMENDATORY SECTION (Amending WSR 17-05-112, filed 2/15/17, effective 3/18/17)

WAC 220-440-140 Payment for commercial crop damage—Limitations.

Owners, who have worked with the department to prevent deer and elk damage, but continue to experience losses, may be eligible to file a damage claim and receive cash compensation from money appropriated by the legislature. Damages payable under this section are limited to the lost or diminished value of a commercial crop, whether growing or harvested, and will only be paid to the owner of the crop at the time of damage, without assignment. Cash compensation for claims from deer and elk damage does not include damage to other real or personal property, including other vegetation or animals, lost profits, consequential damages, or any other damages. The department is authorized to pay up to ~~((ten thousand dollars to the owner per claim))~~ the amount provided in RCW 77.36.080.

Claims for cash compensation will be denied when:

- (1) The claim is for a noncommercial crop;
- (2) The owner of the commercial crop does not meet the definition of "eligible farmer" in RCW 82.08.855 (4) (b) (i) through (iv);
- (3) The loss estimate is less than ~~((one thousand dollars))~~ \$1,000;
- (4) The owner does not have a valid damage prevention cooperative agreement signed by the owner and the department, or a waiver signed

by the director, or does not provide a department approved checklist of the preventative and nonlethal means that have been employed to prevent damage;

(5) The owner has not complied with the terms and conditions of his or her agreement(s) with the department;

(6) An owner or lessee has accepted noncash compensation to offset crop damage in lieu of cash consistent with conditions of the damage prevention cooperative agreement with the department. Acceptance of noncash compensation will constitute full and final payment for crop damages within the growing season of the damaged crop or for the time period specified by the department in writing to the owner;

(7) An owner or lessee has denied the department's offer of fencing as a long-term preventative measure;

(8) The owner or lessee has denied prevention measures offered by the department. The prevention measures offered shall be applicable, legal, practical, and industry recognized;

(9) Damages to the commercial crops claimed are covered by insurance or are eligible for payment from other entities. Any portion of the actual damage not covered by others that exceeds (~~one thousand dollars~~) \$1,000 is eligible for compensation from the department;

(10) The property where the damage occurred was not open to public hunting consistent with WAC 220-440-190 for the species causing the damage, unless, as determined by the department, the property is inconsistent with hunting or hunting would not address the damage problem. This includes all properties owned or leased by the owner adjacent to, contiguous to, or in the vicinity of the property where crop damage occurred;

(11) The crop is grown or stored on public property;

(12) The owner or lessee fails to provide on-site access to the department or designee for inspection and investigation of alleged damage or to verify eligibility for a claim;

(13) The owner has not provided a completed written claim form and all other required information, or met required timelines prescribed within WAC 220-440-150;

(14) The owner fails to sign a statement affirming that the facts and supporting documents are truthful to the best of the owner's knowledge;

(15) The owner or designee harvested commercial crops prior to providing a (~~seventy-two~~) 72 hour notice to the department;

(16) The department will prioritize payment for commercial crop damage (~~in the order the claims were received or upon final adjudication of an appeal. If the department is unable to make a payment for commercial crop damage during the current fiscal year, the claim will be held over until the following fiscal year when funds become available. As funding becomes available to the department under this section, RCW 77.36.170, or any other source, the department must pay claims in the chronologic order. Claims that are carried over will take first priority and receive payment before any new claims are paid. The payment of a claim included on the list maintained by the department under this section is conditional on the availability of specific funding for this purpose and is not a guarantee of reimbursement~~) as set forth in RCW 77.36.100. The claimant records in support of the prioritization method as proscribed therein. Before payment, claims in the current fiscal year will be prioritized after all crop damage claims have been received and approved, and any claim appeals have been resolved.

AMENDATORY SECTION (Amending WSR 17-05-112, filed 2/15/17, effective 3/18/17)

WAC 220-440-150 Application for cash compensation for commercial crop damage—Procedure. Pursuant to this section, the department may distribute funds appropriated by the legislature to pay commercial crop damage caused by wild deer or elk in the amount of up to ~~((ten thousand dollars))~~ the amount provided in RCW 77.36.080 per claim~~((7 unless following an appeal the department is ordered to pay more (see RCW 77.36.130(2))))~~. The department shall develop claim procedures and application forms consistent with this section for cash compensation of commercial crop damage. Partnerships with other public and private organizations to assist with completion of applications, assessment of damage, and to provide funding for compensation are encouraged.

Filing a claim:

(1) Claimants who have cooperated with the department and have a valid damage prevention cooperative agreement or a department approved checklist to prevent deer or elk damage and met the requirements of WAC 220-440-140, or a waiver from the director, yet still experience loss and meet eligibility requirements, may file a claim for cash compensation.

(2) The claimant must notify the department within ~~((seventy-two))~~ 72 hours of discovery of crop damage and at least ~~((seventy-two))~~ 72 hours prior to harvest of the claimed crop.

(3) A complete written claim and completed crop assessment must be submitted to the department within ~~((sixty))~~ 60 days of harvest.

(4) Claimants may only file one claim per year. Multiple partners in a farming operation are considered one claimant. Operations involving multiple partners must designate a "primary grower" to receive payment from the department.

(5) The claim form declaration must be signed, affirming that the information provided is factual and truthful per the certification set out in RCW 9A.72.085, before the department will process the claim.

(6) In addition to a completed claim form, a claimant must provide:

(a) A copy of claimant's Schedule F of Form 1040, Form 1120, or other applicable forms filed with the Internal Revenue Service or other documentation indicating the claimant's gross sales or harvested value of commercial crops for the previous tax year.

(b) The assessment method used is consistent with WAC 220-440-160, valuation of property damage.

(c) Proof of ownership of claimed commercial crops or contractual lease of claimed commercial crops consistent with department procedural requirements for submission of documents.

(d) Written documentation of approved methodology used to assess and determine final crop loss and value.

(e) Records documenting average yield on claimed crop and parcel, certified yield reports, production reports and weight certificates completed at the time weighed for claimed year, and other applicable documents that support yield loss and current market price. Current market price will be determined less transportation and cleaning costs when applicable.

(f) A declaration signed under penalty of perjury as provided in RCW 9A.72.085, indicating that the claimant is eligible for the claim, meets eligibility requirements listed under this section, and that all

claim evaluation and assessment information in the claim application is true and accurate to the best knowledge of the claimant.

(g) A copy of the insurance policy and payment on the commercial crop where loss is claimed.

(h) Copies of any applications for other sources of loss compensation and any payment or denial documentation.

Damage claim assessment:

(7) Completion of a damage claim assessment for the amount and value of commercial crop loss is the responsibility of the claimant. A crop damage evaluation and assessment must be conducted by a licensed crop insurance adjustor in cooperation with the claimant:

(a) The claimant must submit a damage claim assessment prepared by a crop insurance adjustor licensed by the state of Washington and certified by the federal crop insurance service.

(b) The department will provide the claimant with a list of approved adjustors. The claimant may select an adjustor from the approved list and work with the department and the adjustor to arrange for the completion of a crop damage assessment or select a state licensed adjustor of their own choosing.

(i) If the claimant selects an adjustor from the approved list, the department will provide the adjustor written authorization to proceed with an assessment and adjustor fees will be the shared responsibility of the owner and the department. The claimant portion of the assessment fees may not exceed one half or a maximum of (~~six hundred dollars~~) \$600, whichever is smaller, and will be deducted from the final payment.

(ii) If the claimant selects a state licensed adjustor of their own choosing then the claimant accepts full responsibility for the assessment fees.

(c) The department or the claimant may accept the damage claim assessment provided by the licensed adjustor or may hire a state licensed adjustor of their choosing and conduct a separate assessment or evaluation of the crop loss amount and value. The party hiring an adjustor to conduct a separate assessment or evaluation is responsible for payment of all fees.

(8) Disagreement between the claimant and the department over the crop loss value may be settled through an adjudicative proceeding pursuant to chapter 34.05 RCW, subject to the limit provided in RCW 77.36.130.

Settlement of claims:

(9) Compensation paid by the department, in addition to any other compensation received by the claimant, may not exceed the total value of the assessed crop loss.

(10) The claimant will be notified by the department upon completion of the evaluation and has (~~sixty~~) 60 days to accept or appeal the department's offer for settlement of the claim, or the claim is considered accepted and not subject to appeal.

(11) The department will prioritize payment for commercial crop damage (~~in the order the claims were received or upon final adjudication of an appeal. If the department is unable to make a payment for commercial crop damage during the current fiscal year, the claim will be held over until the following fiscal year when funds become available. As funding becomes available to the department under this section, RCW 77.36.170, or any other source, the department must pay claims in the chronologic order. Claims that are carried over will take first priority and receive payment before any new claims are paid. The payment of a claim included on the list maintained by the~~

~~department under this section is conditional on the availability of specific funding for this purpose and is not a guarantee of reimbursement) as set forth in RCW 77.36.100.~~

AMENDATORY SECTION (Amending WSR 18-04-049, filed 1/31/18, effective 3/3/18)

WAC 220-440-180 Application for cash compensation for livestock damage or domestic animal—Procedure. Pursuant to this section, the department may distribute money specifically appropriated by the legislature or other funding entity to pay commercial livestock or guard dog losses caused by wild bear, cougar, or wolves (~~(in the amount of)~~) up to (~~(ten thousand dollars per claim unless, following an appeal, the department is ordered to pay more (see RCW 77.36.130(2))~~) the amount set forth in RCW 77.36.130. The department will develop claim procedures and application forms consistent with this section for cash compensation of commercial livestock or guard dog losses. Partnerships with other public and private organizations to assist with completion of applications, assessment of losses, and to provide funding for compensation are encouraged.

Filing a claim:

(1) Claimant must notify the department within (~~(twenty-four)~~) 24 hours of discovery of livestock or other domestic animal attack or as soon as feasible.

(2) Damage claim assessment of amount and value of eligible livestock or guard dog loss is the primary responsibility of the claimant.

(3) Investigation of the loss and review and approval of the assessment will be conducted by the department:

(a) The claimant must provide access to department staff or designees to investigate the cause of death or injury to eligible livestock or guard dogs and use reasonable measures to protect evidence at the depredation site.

(b) Federal officials may be responsible for the investigation when it is suspected that the attack was by a federally listed species.

(4) To be eligible a claimant must submit a written statement, electronic or hard copy, within (~~(thirty)~~) 30 days of discovery of a loss to indicate his or her intent to file a claim.

(5) A complete claim package must be submitted to the department within (~~(ninety)~~) 90 days of a discovery of an attack on livestock or guard dogs to be eligible for compensation.

(6) A claim form declaration must be signed, affirming that the information provided is factual and truthful, per the certification set out in RCW 9A.72.085 before the department will process the claim.

(7) In addition to a completed claim form, a claimant must provide:

(a) Proof of legal ownership or contractual lease of claimed livestock.

(b) Records documenting the value of the livestock or guard dog depending upon the determination for cause of loss.

(c) Declaration signed under penalty of perjury indicating that the claimant is eligible for the claim, meets eligibility requirements listed under this chapter and in RCW 77.36.100, 77.36.110, and 77.36.120, and all claim evaluation and assessment information in the

claim application is to the best knowledge of the claimant true and accurate.

(d) A copy of any insurance policy covering loss claimed.

(e) Copies of applications for other sources of loss compensation and any payment or denial documentation.

(f) The department approved checklist of preventative measures that have been deployed, or documented compliance with the terms and conditions of the claimant's agreement with the department, or the director approved waiver.

Settlement of claims:

(8) Subject to funds appropriated to pay for livestock or guard dog losses, undisputed claims will be paid up to ten thousand dollars.

(9) Valuation of the lost livestock;

(a) The department may utilize the services of an independent certified appraiser to assist in the evaluation of livestock or guard dog claims.

(b) For losses caused by wolves, the compensation value for livestock or guard dogs will be based on the value at the time the animal would normally be sold at market or the cost to replace the animal, and based on comparable types and/or weight of livestock or guard dogs, such as comparable calves, steers, cows, ewes, and lambs; except bulls will be replaced based on the actual purchase price prorated on a four-year depreciation cycle minus salvage value if applicable. The market or replacement value will be determined by an independent certified appraiser, the sales receipts from the most recent sale of comparable animals by the owner, or the sales receipts from the next sale of comparable animals by the owner.

(c) The payment amount for wolf depredations to livestock will be based on the following criteria:

(i) Where the livestock grazing site was greater than or equal to (~~one hundred~~) 100 acres, there is a rebuttable presumption that the number of commercial livestock wolf depredations that are eligible for compensation is twice the number of wolf livestock depredations documented by the department, unless all remaining livestock are accounted for. On these grazing sites, the payment for each confirmed wolf depredation will be the full market value for two commercial livestock. The payment for each probable wolf depredation will be half the full market value for two commercial livestock. Payments will be reduced by half if all the remaining livestock are accounted for.

(ii) Where the livestock grazing site was less than (~~one hundred~~) 100 acres, there is a rebuttable presumption that all the commercial livestock wolf depredations are discovered by the livestock owner. On these grazing sites, the payment for each confirmed wolf depredation will be the full market value for one commercial livestock. The payment for each probable wolf depredation will be half the full market value for one commercial livestock.

(d) For losses caused by bear or cougar, livestock value will be determined by the market value for an animal of the same breed, sex, and average weight at the time the animal is lost.

(10) Claims for higher than normal livestock losses, reduced weight gains, or reduced pregnancy rates due to harassment of livestock caused by wolves must include:

(a) At least three consecutive years of records preceding the year of the claim. Claims will be assessed for losses in excess of the preceding three-year running average;

(b) The losses must occur on large pastures or range land used for grazing, lambing, or calving where regular monitoring of livestock

is impractical (and therefore discovery of carcasses infeasible) as determined by the department;

(c) Verification by the department that wolves are occupying the area;

(d) The losses cannot be reasonably explained by other causes;

(e) Compliance with the department's preventative measures checklist, or damage prevention cooperative agreement, or a waiver signed by the director.

(11) Compensation paid by the department combined with any other compensation may not exceed the total assessed value of the loss.

(12) Upon completion of an evaluation, the department will notify the claimant of its decision to either deny the claim or make a settlement offer (order). The claimant has (~~sixty~~) 60 days from the date received to accept, sign, and mail to the department the original offer for settlement of the claim. If the claimant wishes to appeal the offer, they must request an informal resolution or adjudicative proceeding as described in WAC 220-440-230. The appeal must be in writing and may be mailed or submitted by email. If no written acceptance or request for appeal is received within (~~sixty~~) 60 days of receipt of the settlement offer, the offer is considered rejected and not subject to appeal.

(13) If the claimant accepts the department's offer, the department will provide payment to the claimant within (~~thirty~~) 30 days from receipt of the written acceptance document(s).

(14) The department will prioritize payment for livestock losses (~~(in the order the claims were received or upon final adjudication of an appeal. If the department is unable to make a payment for livestock losses during the current fiscal year, the claim shall be held over until the following fiscal year when funds become available. As funding becomes available to the department under this section, RCW 77.36.170, or any other source, the department must pay claims in chronological order. Claims that are carried over will take first priority and receive payment before any new claims are paid. The payment of a claim included on the list maintained by the department under this section is conditional on the availability of specific funding for this purpose and is not a guarantee of reimbursement)~~) as set forth in RCW 77.36.100.

AMENDATORY SECTION (Amending WSR 17-05-112, filed 2/15/17, effective 3/18/17)

WAC 220-440-230 Commercial crop or livestock damage claim—Dispute resolution. For claims where the owner has met all claim eligibility criteria and procedures, but ultimately rejects the written settlement offer (order) for crop or livestock loss and/or value assessment, the provisions of this section shall apply:

Informal resolution:

(1) If the owner rejects the property loss or value assessment and would like to discuss a negotiated settlement, he or she can request a meeting by notifying the department in writing within (~~ten~~) 10 days of receiving the settlement offer or claim denial (order).

(2) A department representative and the owner or designee(s) will meet and attempt to come to mutual resolution.

(3) A livestock appeals committee may be established with a minimum of six citizen members appointed by the director, and a representative from the department of fish and wildlife to review and recommend a settlement if requested by the claimant or the department. The citizen members must represent a variety of interests including at least: Three statewide organizations representing the interests of livestock owners; two representing wildlife advocates; and one at large.

(4) Monetary compensation or noncash compensation, mutually agreed upon by both the department and owner, shall be binding and constitute full and final payment for claim.

(5) If parties cannot agree upon damages, or the owner wishes to appeal the claim denial or the department's settlement offer (order), the owner may request an adjudicative proceeding consistent with chapter 34.05 RCW within (~~sixty~~) 60 days of receiving a copy of the department's decision.

(6) The request must comply with the following:

(a) The request must be in writing, and the signed document may be mailed or submitted by fax or email;

(b) It must clearly identify the order being contested (or attach a copy of the order);

(c) It must state the grounds on which the order is being contested and include the specific facts of the order that are relevant to the appeal; and

(d) The request must identify the relief being requested from the proceeding (e.g., modifying specific provisions of the order).

(7) The proceeding may only result in the reversal or modification of an order when the preponderance of evidence shows:

(a) The order was not authorized by law or rule;

(b) A fact stated in the order is not supported by substantial evidence;

(c) The award amount offered is inconsistent with applicable procedures; or

(d) Material evidence was made available by the owner at the time of the damage assessment, but was not considered in the order.

(8) The burden of proof is on the appellant (owner) to show that he or she is eligible for a claim and that the damage assessment is reliable (see RCW 77.36.130(~~(+4)~~)) (3).

(9) Findings of the hearings officer are subject to the annual funding (~~(limits)~~) appropriated by the legislature and to the limit found in RCW 77.36.130 and payment rules (WAC 220-440-150 and 220-440-180(9)) of the commission.