

**WSR 09-05-098**  
**PROPOSED RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
(Aging and Disability Services Administration)  
[Filed February 18, 2009, 11:05 a.m.]

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February 13, 2009  
Stephanie E. Schiller  
Rules Coordinator

Original Notice.

Preproposal statement of inquiry was filed as WSR 09-01-140.

Title of Rule and Other Identifying Information: Amending and repealing sections in chapter 388-71 WAC, Home and community services and programs and chapter 388-106 WAC, Long-term care services.

Hearing Location(s): Blake Office Park East, Rose Room, 4500 10th Avenue S.E., Lacey, WA 98503 (one block north of the intersection of Pacific Avenue S.E. and Alhadeff Lane. A map or directions are available at <http://www.dshs.wa.gov/msa/rpau/docket.html> or by calling (360) 664-6094), on April 7, 2009, at 10:00 a.m.

Date of Intended Adoption: Not earlier than April 8, 2009.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504-5850, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail DSHS RPAURulesCoordinator@dshs.wa.gov, fax (360) 664-6185, by 5:00 p.m. on April 7, 2009.

Assistance for Persons with Disabilities: Contact Jenisha Johnson, DSHS rules consultant, by March 24, 2009, TTY (360) 664-6178 or (360) 664-6094 or by e-mail at johnsj14@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: DSHS is repealing and removing references to adult day health in chapters 388-71 and 388-106 WAC. The department is preparing for the elimination of adult day health, which will no longer be offered as a medicaid service due to budget restrictions.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 74.08.090, 74.09.520.

Statute Being Implemented: RCW 74.08.090, 74.09.-520.

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

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Anne Vanderbeek, P.O. Box 45600, Olympia, WA 98504-5600, (360) 725-2558; and Enforcement: Chris Imhoff, P.O. Box 45600, Olympia, WA 98504-5600, (360) 725-2272.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The preparation of a small business economic impact statement is not required, as no new costs will be imposed on small businesses or nonprofits.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Anne Vanderbeek, Home and Community Services, P.O. Box 45600, Olympia, WA 98504-

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0702 Purposes and definitions.** (1) WAC 388-71-0702 through 388-71-0776 contain the eligibility requirements for medicaid-funded adult day care (~~(and adult day health services)~~). These rules also contain the requirements that apply to adult day care (~~(or day health)~~) centers that contract with (~~(the department)~~), an area agency on aging, or other department designee to provide (~~(medicaid)~~) services to department clients. Nothing in these rules may be construed as requiring the department, area agency on aging, or other designee to contract with an adult day care (~~(or day health)~~) center.

(2) An adult day services program is a community-based program designed to meet the needs of adults with impairments through individual plans of care. This type of structured, comprehensive, nonresidential program provides a variety of health, social, and related support services in a protective setting. By supporting families and caregivers, an adult day services program enables the person to live in the community. An adult day services program assesses the needs of the persons served and offers services to meet those needs. The persons served attend on a planned basis. Nothing in this generic description of adult day services may be construed to modify the specific services or eligibility requirements referenced in the definition of adult day care (~~(and adult day health)~~).

(3) The following definitions apply under WAC 388-71-0702 through 388-71-0774:

(a) "**Adult day care**" means the services under WAC 388-71-0704 that are provided to clients who meet the eligibility requirement under WAC 388-71-0708.

(b) "**Adult day center**" means an adult day care (~~(or adult day health center. A day care or day health)~~) center. For purposes of these rules, an adult day center is a center operating in a specific location, whether or not the center's owner also operates adult day centers in other locations.

(c) (~~("Adult day health" means the services under WAC 388-71-0706 that are provided to clients who meet the eligibility requirements under WAC 388-71-0710.~~

~~(d))~~ "**Adult day services**" is a generic term referring to adult day care (~~(and adult day health services)~~).

~~((e))~~ (d) "**Client**" means an applicant for or recipient of medicaid-reimbursed adult day services.

~~((f))~~ (e) "**Participant**" means clients and other persons receiving adult day services at an adult day center.

AMENDATORY SECTION (Amending WSR 06-05-022, filed 2/6/06, effective 3/9/06)

**WAC 388-71-0704 Adult day care—Services.** Adult day care is a supervised daytime program providing core services as defined in WAC 388-106-0800. Core services are

appropriate for adults with medical or disabling conditions that do not require the intervention or services of a registered nurse or licensed rehabilitative therapist acting under the supervision of the client's physician. The adult day care center must offer and provide on site the following core services. These core services must meet the level of care needed by the client as assessed by the department case manager for waiver funded clients and do not exceed the scope of services that the adult day care center is able to provide.

- (1) Assistance with activities of daily living:
  - (a) Locomotion outside of room, locomotion in room, walk in room;
  - (b) Body care;
  - (c) Eating;
  - (d) Repositioning;
  - (e) Medication management that does not require a licensed nurse;
  - (f) Transfer;
  - (g) Toileting;
  - (h) Personal hygiene at a level that ensures client safety while in attendance at the program; and
  - (i) Bathing at a level that ensures client safety and comfort while in attendance at the program.
- (2) Social services on a consultation basis, which may include:
  - (a) Referrals to other providers for services not within the scope of medicaid reimbursed adult day care services;
  - (b) Caregiver support and education; or
  - (c) Assistance with coping skills.
- (3) Routine health monitoring with consultation from a registered nurse that a consulting nurse acting within the scope of practice can provide with or without a physician's order. Examples include:
  - (a) Obtaining baseline and routine monitoring information on client health status, such as vital signs, weight, and dietary needs;
  - (b) General health education such as providing information about nutrition, illnesses, and preventative care;
  - (c) Communicating changes in client health status to the client's caregiver;
  - (d) Annual and as needed updating of the client's medical record; or
  - (e) Assistance as needed with coordination of health services provided outside of the adult day care program.
- (4) General therapeutic activities that an unlicensed person can provide or that a licensed person can provide with or without a physician's order. These services are planned for and provided based on the client's abilities, interests, and goals. Examples include:
  - (a) Recreational activities;
  - (b) Diversionary activities;
  - (c) Relaxation therapy;
  - (d) Cognitive stimulation; or
  - (e) Group range of motion or conditioning exercises.
- (5) General health education that an unlicensed person can provide or that a licensed person can provide with or without a physician's order, including but not limited to topics such as:
  - (a) Nutrition;
  - (b) Stress management;

(c) Disease management skills; or

(d) Preventative care.

(6) A nutritional meal and snacks every four hours, including a modified diet if needed and within the scope of the program, as provided under WAC 388-71-0768;

(7) Supervision and/or protection if needed for client safety;

(8) Assistance with arranging transportation to and from the program; and

(9) First aid and provisions for obtaining or providing care in an emergency. ~~((NOTE: If the client requires the intervention or services of a registered nurse or licensed rehabilitative therapist acting under the supervision of a physician, consider adult day health services.))~~

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0724 Adult day services—Contracting and rates.** (1) The department, or an area agency on aging (or other department designee) as authorized by the department, must determine that the adult day care ~~((or day health))~~ center meets the applicable adult day care ~~((or day health))~~ requirements and any additional requirements for contracting with the area agency on aging through a COPES contract ~~((or with the department through a medicaid provider contract. If a center is contracting for both day care and day health, requirements of both adult day services must be met))~~.

(a) A prospective provider desiring to provide adult day services shall be provided an application form from the department or the area agency on aging.

(b) The prospective provider will provide the area agency on aging with evidence of compliance with, or administrative procedures to comply with, the adult day service rules under this chapter.

(c) The area agency on aging will conduct a site inspection of the adult day center and review of the requirements for contracting.

(d) Within thirty days of completing the site visit, the area agency on aging will advise the prospective provider in writing of any deficiencies in meeting contracting requirements.

(e) The area agency on aging will verify correction of any deficiencies within thirty days of receiving notice from the prospective provider that deficiencies have been corrected, before contracting can take place.

(f) The area agency on aging will provide the department with a written recommendation as to whether or not the center meets contracting requirements.

(2) Minimum application information required to apply for contract with the department, or an area agency on aging includes:

(a) Mission statement, articles of incorporation, and bylaws, as applicable;

(b) Names and addresses of the center's owners, officers, and directors as applicable;

(c) Organizational chart;

(d) Total program operating budget including all anticipated revenue sources and any fees generated;

(e) Program policies and operating procedure manual;

(f) Personnel policies and job descriptions of each paid staff position and volunteer position functioning as staff;

(g) Policies and procedures meeting the requirements of mandatory reporting procedures as described in chapter 74.34 RCW to adult protective services for vulnerable adults and local law enforcement for other participants;

(h) Audited financial statement;

(i) Floor plan of the facility;

(j) Local building inspection, fire department, and health department reports;

(k) Updated TB test for each staff member according to local public health requirements;

(l) Sample client case file including all forms that will be used; and

(m) Activities calendar for the month prior to application, or a sample calendar if the day service provider is new.

(3) The area agency on aging or other department designee monitors the adult day center at least annually to determine continued compliance with adult day care (~~and/or adult day health~~) requirements and the requirements for contracting with the department or the area agency on aging.

(a) The area agency on aging will send a written notice to the provider indicating either compliance with contracting requirements or any deficiencies based on the annual monitoring visit and request a corrective action plan. The area agency on aging will determine the date by which the corrective action must be completed

(b) The area agency on aging will notify the department of the adult day center's compliance with contracting requirements or corrected deficiencies and approval of the corrective action plan for continued contracting.

(4) Adult day care services are reimbursed on an hourly basis up to four hours per day. Service provided four or more hours per day will be reimbursed at the daily rate.

(5) Payment rates are established on an hourly and daily basis for adult day care centers as may be adopted in rule. Rate adjustments are determined by the state legislature. Providers seeking current reimbursement rates can refer to SSPS billing instructions.

(6) Rates as of July 1, 2002, are as follows:

Counties	COPES Adult Day Care	
	Daily Rate	Hourly Rate
King	\$36.48	\$9.10
Benton, Clark, Franklin, Island, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, & Yakima	\$32.45	\$8.11
All other counties	\$30.75	\$7.69

~~((7) Payment rates are established on a daily basis for adult day health centers as may be adopted in rule. Rate adjustments are determined by the state legislature. Providers seeking current reimbursement rates can refer to MAA billing instructions or <http://maa.dshs.wa.gov>.~~

~~(8) Rates as of July 1, 2002, are as follows:)~~

<del>((Counties))</del>	<del>((Day Health Daily))</del>
<del>((King))</del>	<del>(((\$47.48))</del>
<del>((Benton, Clark, Franklin, Island, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, &amp; Yakima))</del>	<del>(((\$43.06))</del>
<del>((All other counties))</del>	<del>(((\$40.68))</del>

~~((A one time only initial intake evaluation provided by an adult day health center, including development of a negotiated care plan, is reimbursed at an established rate as may be adopted in rule. The rate as of July 1, 2002 is eighty-nine dollars and thirty-eight cents. Rate adjustments are determined by the state legislature. Separate reimbursement is not available for subsequent evaluations.))~~

~~((9)) (7) Transportation to and from the program site is not reimbursed under the adult day care rate. Transportation arrangements are made with locally available transportation providers or informal resources.~~

~~((10) Transportation to and from the program site is not reimbursed under the adult day health rate. Transportation arrangements for eligible medicaid clients are made with local medicaid transportation brokers, informal providers, or other available resources per chapter 388-546 WAC.))~~

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0728 Coordination of services.** (1) ~~((A COPES-eligible client may receive adult day care services on some days and adult day health services on different days if the service plan documents which level of service is to be provided on which days. However, core services must be provided on all days that adult day health skilled services are provided, and reimbursement is limited to the day health rate on days that day health services are provided.~~

~~((2)) Clients receiving services from the department in an adult family home, boarding home, or other licensed community residential facility may not receive COPES-funded adult day care (~~, but may receive medicaid adult day health services when the skilled nursing or rehabilitative services are approved by the client's case manager as part of the client's service plan~~).~~

~~((3)) (2) A licensed boarding home providing department-approved day care under chapter 388-78A WAC is subject to any applicable provisions of that chapter and is also subject to the rules under this chapter if the facility contracts with an area agency on aging or the department to provide COPES or other medicaid-funded adult day services.~~

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0730 Senior Citizens Services Act/ Respite care.** (1) Except as provided under this section, the adult day services rules under this chapter do not apply to adult day care (~~or day health~~) services funded under chapters 74.38 and 74.41 RCW.

(2) An area agency on aging that elects to provide adult day services using Senior Citizens Services Act funding

under chapter 74.38 RCW or respite care funding under chapter 74.41 RCW must contract with an adult day center that meets all administrative and facility requirements under WAC 388-71-0736 through 388-71-0774.

(3) The adult day care (~~(or day health)~~) services funded under chapters 74.38 or 74.41 RCW must be the same as the day care services required under WAC 388-71-0704 (~~(or the day health services required under WAC 388-71-0706)~~). The area agency on aging may require additional services by contract.

(4) The area agency on aging may, by contract, establish eligibility and assessment requirements for day care (~~(or day health services)~~) in accordance with locally identified needs. However, funding provided under chapters 74.38 or 74.41 RCW may only be used to meet the needs of individuals who are not eligible for adult day care under WAC 388-71-0708 (~~(or for adult day health under WAC 388-71-0710)~~), or who are eligible for those services and are not receiving them because of funding limitations.

(5) Nothing in this section or chapter may be construed as requiring an area agency on aging to contract with an adult day center, whether or not the center has a COPEs or other medicaid contract. Nor may anything in this section or chapter be construed as creating an entitlement to state-funded adult day services authorized under chapters 74.38 and 74.41 RCW.

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0732 Hearing rights.** (1) If the department or area agency on aging denies, terminates, or reduces an individual client's adult day care (~~(or day health)~~) services, the client has the right to a fair hearing as provided under chapter 388-02 WAC.

(2) An adult day care (~~(or day health)~~) center has those hearing or dispute resolution rights that are afforded under RCW 43.20B.675 and the center's contract with the area agency on aging or the department. (~~An adult day health center has any other applicable hearing or dispute resolution rights under chapter 388-502 WAC.~~)

(3) ~~Adult day health centers are subject to all applicable provisions of chapter 388-502 WAC, and the department's aging and adult services administration may exercise the department's authority under that chapter to the same extent as the medical assistance administration.~~

AMENDATORY SECTION (Amending WSR 05-02-064, filed 1/4/05, effective 2/4/05)

**WAC 388-71-0734 Limiting expenditures.** (1) In order to provide adult day services within the limits of available funding, the department may limit services when program expenditures exceed the budget appropriation or when limiting services is required to prevent expenditures from exceeding the appropriation.

(2) (~~When adult day health program expenditures exceed available funding, the department may limit adult day health services based on the four care level system as determined through the established department assessment and described in chapter 388-105 WAC.~~)

(a) ~~Using the care level determined by the department assessment tool, the department will limit adult day services on a statewide basis to clients whose total scores exceed the assessed need level identified by the department as necessary to provide adult day health services to the extent of available funding.~~

(b) ~~At least thirty days before implementing the limitation on services under this subsection, the department will notify the area agencies on aging, adult day health centers, and the affected adult day health clients that services are being limited and for what period of time the limitation is estimated to remain in effect.~~

(c) ~~For purposes of RCW 74.08.080, the reduction in services shall be deemed an assistance adjustment for an entire class of recipients that is required by state laws prohibiting the department from expending funds in excess of appropriations.~~

(3)) The department may adopt additional or alternative rules to control costs, such as, but not limited to, imposing a moratorium on contracting with new adult day centers, limiting services to clients based on level of care need, or reducing the numbers of days per week that clients may receive services.

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0746 Adult day center—Documentation.** (1) Entries in the client's record must be typewritten or legibly written in ink, dated, and signed by the recording person with his/her title. Identification of the author may be a signature, initials, or other unique identifier within the requirements of applicable licensing standards and center policy.

(2) Progress notes must be chronological, timely, and recorded (~~(at least weekly by adult day health centers and)~~) at least monthly by adult day care centers. Client dates of attendance are to be kept daily.

(3) (~~Consultation and/or care plan reviews must be dated and initialed by the physician or other authorizing practitioner who reviewed them. If the reports are presented electronically, there must be representation of review by the ordering practitioner.~~)

(4)) Documentation of medication use must include the name of the medication, dosage, route of administration, site of injection if applicable, and signature or initials of the person administering the medication, title, and date.

(5)) (4) The record must be legible to someone other than the writer.

(6) ~~Department contracted adult day health centers must comply with all other applicable documentation requirements under WAC 388-502-0020.)~~

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

**WAC 388-71-0752 Adult day center—Staffing requirements.** (1) Staff selection is dependent on participant needs, program design, and contracting requirements. The center must have the proper balance of professionals and paraprofessionals or nonprofessionals to adequately meet the

needs of participants. Services must be delivered by those with adequate professional training. A staff person can have multiple functions, such as an administrator who is also responsible for providing nursing services or social services.

(2) To ensure continuity of direction and supervision, there must be a clear division of responsibility between the governing body and the adult day center administrator.

(3) The administrator must be given full authority and responsibility to plan, staff, direct, and implement the program. The administrator must also have the responsibility for establishing collaborative relations with other community organizations to ensure necessary support services to participants and their families/caregivers.

(4) The administrator must be on site to manage the center's day-to-day operations during hours of operation. If the administrator is responsible for more than one site, or has duties not related to adult day center administration or provision of services, a program director must be designated for each additional site and must report to the administrator.

(5) The administrator must be responsible for the development of a written plan of operation with approval of the governing body and the development, coordination, supervision, fiscal control, and evaluation of services provided through the adult day center.

(6) A nurse or personnel trained in first aid and CPR must be on hand whenever participants are present.

(7) Background checks pursuant to RCW 43.43.830 and 43.43.832 must be performed for all applicants hired, existing employees, and volunteers. Unsupervised access to participants is prohibited until a background check has been completed and the employee's suitability for employment has been determined.

(8) Required credentials must be verified to ensure that they are current and in good standing for licensed and certified staff.

(9) Adult day centers may utilize a range of staff under contract or consulting from a larger parent organization or from a private entity to provide services.

(10) Staff commonly utilized by ~~((both))~~ adult day care ~~((and adult day health))~~ centers must meet the following requirements:

(a) An activity coordinator must have a bachelor's degree in recreational therapy or a related field and one year of experience (full-time equivalent) in social or health services; or an associate degree in recreational therapy or a related field plus two years of appropriate experience; or three years of paid experience in an activity program and expertise with the population served at the center.

(b) The nurse must be a registered nurse (RN) with valid state credentials and have at least one-year applicable experience (full-time equivalent). In addition to a registered nurse, an adult day center can utilize a licensed practical nurse (LPN), but the LPN must be supervised in compliance with all applicable nurse practice acts and standards. The LPN must have valid state credentials and at least one-year applicable experience (full-time equivalent).

(c) The social services professional must have a master's degree in social work, gerontology, or other human services field, or counseling and at least one year of professional work experience (full-time equivalent), or a bachelor's degree in

social work, counseling, or a related field and two years of experience in a human services field.

(d) Program assistant/aides or personal care aides must have one or more years of experience (full-time equivalent) in working with adults in a health care or social service setting.

(e) Consultants from a larger parent organization without formal contracts may be utilized whenever the center is part of a larger organization that has the ability to provide professional services within the larger framework.

(f) Consultants, with appropriate, valid state credentials may be utilized as needed to meet the requirements outlined in this chapter.

(g) Secretary/bookkeepers must have at least a high school diploma or equivalent and skills and training to carry out the duties of the position.

(h) If the adult day center provides transportation drivers must have a valid and appropriate state driver's license, a safe driving record, and training in first aid and CPR. The driver must meet all state requirements for licensure or certification.

(i) Volunteers may be individuals or groups who desire to work with adult day center clients and must take part in program orientation and training. Volunteers and staff must mutually determine the duties of volunteers. Duties to be performed under the supervision of a staff member must either supplement staff in established activities or provide additional services for which the volunteer has special talents. Volunteers will be included in the staff ratio only when they conform to the same standards and requirements as paid staff, meet the job qualification standards of the organization, and have designated responsibilities.

(j) Dietitians must be certified with valid state credentials and have a minimum of one year applicable experience (full-time equivalent).

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-71-0706	Adult day health—Services.
WAC 388-71-0710	Adult day health—Eligibility.
WAC 388-71-0712	Adult day health—Skilled nursing.
WAC 388-71-0714	Adult day health—Rehabilitative therapy.
WAC 388-71-0720	Adult day health—Assessment and service plan.
WAC 388-71-0722	Adult day health—Negotiated care plan.
WAC 388-71-0726	Adult day health transportation.
WAC 388-71-0758	Adult day health—Staffing requirements.

AMENDATORY SECTION (Amending WSR 08-12-023, filed 5/29/08, effective 7/1/08)

**WAC 388-106-0015 What long-term care services does the department provide?** The department provides long-term care services through programs that are designed to help you remain in the community. These programs offer an alternative to nursing home care (which is described in WAC 388-106-0350 through 388-106-0360). You may receive services from any of the following:

(1) **Medicaid personal care (MPC)** is a medicaid state plan program authorized under RCW 74.09.520. Clients eligible for this program may receive personal care in their own home or in a residential facility.

(2) **Community options program entry system (COPEs)** is a medicaid waiver program authorized under RCW 74.39A.030. Clients eligible for this program may receive personal care in their own home or in a residential facility.

(3) **Medically needy residential waiver (MNRW)** is a medicaid waiver program authorized under RCW 74.39.041. Clients eligible for this program may receive personal care in a residential facility.

(4) **Medically needy in-home waiver (MNIW)** is a medicaid waiver program authorized under RCW 74.09.700. Clients eligible for this program may receive personal care in their own home.

(5) **Chore** is a state-only funded program authorized under RCW 74.39A.110. Grandfathered clients may receive assistance with personal care in their own home.

(6) **Volunteer chore** is a state-funded program that provides volunteer assistance with household tasks to eligible clients.

(7) **Program of all-inclusive care for the elderly (PACE)** is a medicaid/medicare managed care program authorized under 42 CFR 460.2. Clients eligible for this program may receive personal care and medical services in their own home, in residential facilities, and in adult day (~~health~~) centers.

(8) ~~((Adult day health is a supervised daytime program providing skilled nursing and rehabilitative therapy services in addition to core services outlined in WAC 388-106-0800.~~

~~((9))~~ **Adult day care** is a supervised daytime program providing core services, as defined under WAC 388-106-0800.

~~((10))~~ **(9) GAU-funded residential care** is a state-funded program authorized under WAC 388-400-0025. Clients eligible for this program may receive personal care services in an adult family home or an adult residential care facility.

~~((11))~~ **(10) Residential care discharge allowance** is a service that helps eligible clients to establish or resume living in their own home.

~~((12))~~ **(11) Private duty nursing** is a medicaid service that provides an alternative to institutionalization in a hospital or nursing facility setting. Clients eligible for this program may receive at least four continuous hours of skilled nursing care on a day to day basis in their own home.

~~((13))~~ **(12) Senior Citizens Services Act (SCSA)** is a program authorized under chapter 74.38 RCW. Clients eligi-

ble for this program may receive community-based services as defined in RCW 74.38.040.

~~((14))~~ **(13) Respite program** is a program authorized under RCW 74.41.040 and WAC 388-106-1200. This program provides relief care for unpaid family or other caregivers of adults with a functional disability.

~~((15))~~ **(14) Programs for persons with developmental disabilities** are discussed in chapter 388-823 through 388-853 WAC.

~~((16))~~ **(15) Nursing facility.**

~~((17))~~ **(16) New Freedom consumer directed services (NFCDS)** is a medicaid waiver program authorized under RCW 74.39A.030.

AMENDATORY SECTION (Amending WSR 08-12-023, filed 5/29/08, effective 7/1/08)

**WAC 388-106-0070 Will I be assessed in CARE?** You will be assessed in CARE if you are applying for or receiving DDD services, COPEs, MNIW, MNRW, MPC, chore, respite, ~~((adult day health,))~~ GAU-funded residential care, PACE, private duty nursing, New Freedom or long-term care services within the WMIP program.

If you are under the age of eighteen and within thirty calendar days of your next birthday, CARE determines your assessment age to be that of your next birthday.

AMENDATORY SECTION (Amending WSR 05-11-082, filed 5/17/05, effective 6/17/05)

**WAC 388-106-0800 What adult day care services may I receive?** You may receive the following services in an adult day care:

- (1) Core services, which include assistance with:
  - (a) Locomotion outside of room, locomotion in room, walk in room;
  - (b) Body care;
  - (c) Eating;
  - (d) Repositioning;
  - (e) Medication management that does not require a licensed nurse;
  - (f) Transfer;
  - (g) Toileting;
  - (h) Personal hygiene at a level that ensures your safety and comfort while in attendance at the program; and
  - (i) Bathing at a level that ensures your safety and comfort while in attendance at the program.

(2) Social services on a consultation basis, which may include:

- (a) Referrals to other providers for services not within the scope of medicaid reimbursed adult day care services;
  - (b) Caregiver support and education; or
  - (c) Assistance with coping skills.
- (3) Routine health monitoring with consultation from a registered nurse that a consulting nurse acting within the scope of practice can provide with or without a physician's order. Examples include:

- (a) Obtaining baseline and routine monitoring information on your health status, such as vital signs, weight, and dietary needs;

(b) General health education such as providing information about nutrition, illnesses, and preventative care;

(c) Communicating changes in your health status to your caregiver;

(d) Annual and as needed updating of your medical record; or

(e) Assistance as needed with coordination of health services provided outside of the adult day care program.

(4) General therapeutic activities that an unlicensed person can provide or that a licensed person can provide with or without a physician's order. These services are planned for and provided based on your abilities, interests, and goals. Examples include:

(a) Recreational activities;

(b) Diversionary activities;

(c) Relaxation therapy;

(d) Cognitive stimulation; or

(e) Group range of motion or conditioning exercises.

(5) General health education that an unlicensed person can provide or that a licensed person can provide with or without a physician's order, including but not limited to topics such as:

(a) Nutrition;

(b) Stress management;

(c) Disease management skills; or

(d) Preventative care.

(6) A nutritional meal and snacks are provided every four hours, including a modified diet if needed and within the scope of the program, as provided under WAC 388-71-0768;

(7) Supervision and/or protection if needed for your safety;

(8) Assistance with arranging transportation to and from the program; and

(9) First aid and provisions for obtaining or providing care in an emergency. ~~((NOTE: If you require the intervention or services of a registered nurse or licensed rehabilitative therapist acting under the supervision of your physician, consider adult day health services.))~~

AMENDATORY SECTION (Amending WSR 05-11-082, filed 5/17/05, effective 6/17/05)

**WAC 388-106-1215 Who may provide respite care services?** Respite care providers include, but are not limited to the following:

(1) Nursing homes (chapter 388-97 WAC).

(2) Adult day ~~((services, which includes adult day care and adult day health))~~ centers.

(3) Home health/care agencies.

(4) Hospitals.

(5) Licensed residential care facilities such as boarding homes, adult family homes, and assisted living facilities.

(6) Providers such as volunteer chore workers, senior companions, and individual providers.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-106-0810 What adult day health services may I receive?

WAC 388-106-0815 Am I eligible for adult day health?

**WSR 09-06-022**

**PROPOSED RULES**

**GAMBLING COMMISSION**

[Filed February 23, 2009, 1:59 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 09-02-004.

Title of Rule and Other Identifying Information: Amending WAC 230-15-475 Tips from players and patrons to card room employees.

Hearing Location(s): Red Lion Hotel, 2300 Evergreen Park Drive, Olympia, WA 98502, (360) 943-4000, on April 10, 2009, at 9:00 a.m.

Date of Intended Adoption: April 10, 2009.

Submit Written Comments to: Susan Arland, P.O. Box 42400, Olympia, WA 98504-2400, e-mail SusanA@wsgc.wa.gov, fax (360) 486-3625, by April 1, 2009.

Assistance for Persons with Disabilities: Contact Gail Grate, executive assistant, by April 1, 2009, TTY (360) 486-3637 or (360) 486-3453.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The petitioner requests that poker managers at house-banked card rooms be prohibited from accepting tips from players or patrons.

Gambling commission staff note: In the past, there were no rules that addressed whether or not poker supervisors or managers were allowed to accept tips from players or patrons. A rule interpretation was created approximately five years ago to clarify that poker supervisors were allowed to accept tips from players or patrons. During the gambling commission's rules simplification project (RSP), this rule interpretation was inadvertently left out of the new rules. The proposed change would be consistent with current practice.

WAC 230-15-475 prohibits employees at house-banked card rooms directly concerned with management, supervision, accounting, security or surveillance to ask for, accept, or share any tips originating from players or patrons. The way this rule is written, "house-banked card game licensees," it also applies to poker games at house-banked card rooms. This was an inadvertent change made during the RSP. This rule needs to be changed so poker supervisors at house-banked card rooms are allowed to receive tips.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 9.46.070.

Statute Being Implemented: Not applicable.

Name of Proponent: Erin Louis, petitioner, private.

Name of Agency Personnel Responsible for Drafting: Susan Arland, Rules Coordinator, Lacey, (360) 486-3466;

Implementation: Rick Day, Director, Lacey, (360) 486-3446; and Enforcement: Mark Harris, Assistant Director, Lacey, (360) 486-3579.

No small business economic impact statement has been prepared under chapter 19.85 RCW. A small business economic impact statement has not been prepared pursuant to RCW 19.85.025 because the change would not impose additional costs on businesses.

A cost-benefit analysis is not required under RCW 34.05.328. The Washington state gambling commission is not an agency that is statutorily required to prepare a cost-benefit analysis under RCW 34.05.328.

February 23, 2009  
Susan Arland  
Rules Coordinator

AMENDATORY SECTION (Amending Order 617, filed 10/22/07, effective 1/1/08)

**WAC 230-15-475 Tips from players and patrons on card room employees.** (1) House-banked card game licensees may allow selected employees to accept tips from players or patrons.

(2) If licensees allow house-banked card game dealers to accept tips, licensees must ensure that tips are controlled so that only authorized employees receive tips, that tips are properly accounted for, and that tips are maintained separately from all other gambling funds.

(3) Cage cashiers may accept tips. They must locate their tip containers outside the cage enclosure. Players or patrons must deposit the tips directly into the container. A shift or floor supervisor, security, or an accounting manager who does not work as a cashier must verify the tips cage cashiers receive.

(4) Employees directly concerned with management, supervision, accounting, security, or surveillance must not ask for, accept, or share any tip originating from players or patrons; however, this restriction does not apply to poker floor supervisors.

(5) House-banked card game licensees must:

(a) Establish and implement procedures for the accounting of tips received by authorized card room employees.

(b) Fully document the procedures in their internal controls and describe in detail any methods used to allocate tips.

(c) Establish procedures necessary to ensure that the floor supervisor and surveillance observe card room employees accepting tips. Procedures must include an overt display of received tips, for example tapping the table with the tip before placing it in the tip container.

(6) Employees must:

(a) Drop all tips into a locked tip container which prevents the removal of tips except by unlocking the container. Tips may be accumulated on the table, exchanged into higher denomination chips, and then deposited into the tip container. Tip containers must remain under camera coverage of the closed circuit television system at all times; and

(b) Keep all tips received or pool them with tips of all card room employees according to the licensee's internal controls; and

(c) Redeem all tips received under surveillance at the cashier's cage; and

(d) Accurately report all tips to their employer as described in the licensee's internal controls.

(7) Licensees may determine whether employees must retain or pool tips among employees. Employees must redeem all pooled tips under surveillance at the cashier's cage, count room, or a gaming table.

**WSR 09-06-026**

**PROPOSED RULES**

**DEPARTMENT OF**

**SOCIAL AND HEALTH SERVICES**

(Aging and Disability Services Administration)

[Filed February 24, 2009, 7:11 a.m.]

Continuance of WSR 09-05-098.

Preproposal statement of inquiry was filed as WSR 09-01-140.

Title of Rule and Other Identifying Information: Amending and repealing sections in chapter 388-71 WAC, Home and community services and programs and chapter 388-106 WAC, Long-term care services.

Hearing Location(s): Office Building 2, Auditorium, DSHS Headquarters, 1115 Washington, Olympia, WA 98504 (public parking at 11th and Jefferson. A map is available at <http://www1.dshs.wa.gov/msa/rpau/RPAU-OB-2directions.html> or by calling (360) 664-6094), on April 7, 2009, at 10:00 a.m.

Date of Intended Adoption: Not earlier than April 8, 2009.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504-5850, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail DSHSRPARRulesCoordinator@dshs.wa.gov, fax (360) 664-6185, by 5:00 p.m. on April 7, 2009.

Assistance for Persons with Disabilities: Contact Jenisha Johnson, DSHS rules consultant, by March 24, 2009, TTY (360) 664-6178 or (360) 664-6094 or by e-mail at [johnsjl4@dshs.wa.gov](mailto:johnsjl4@dshs.wa.gov).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: DSHS is filing this continuance to change the hearing location to the Office Building 2 Auditorium at DSHS headquarters. The original proposal was filed as WSR 09-05-098 on February 18, 2009.

Reasons Supporting Proposal: See above.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Anne Vanderbeek, P.O. Box 45600, Olympia, WA 98504-5600, (360) 725-2558; and Enforcement: Chris Imhoff, P.O. Box 45600, Olympia, WA 98504-5600, (360) 725-2272.

February 24, 2009  
Stephanie E. Schiller  
Rules Coordinator



**WSR 09-06-027****PROPOSED RULES****DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES**

(Aging and Disability Services Administration)

[Filed February 24, 2009, 7:12 a.m.]

Continuance of WSR 09-05-099.

Preproposal statement of inquiry was filed as WSR 09-01-136.

Title of Rule and Other Identifying Information: WAC 388-825-068 What medicaid state plan services can DDD authorize?

Hearing Location(s): Office Building 2, Auditorium, DSHS Headquarters, 1115 Washington, Olympia, WA 98504 (public parking at 11th and Jefferson. A map is available at <http://www1.dshs.wa.gov/msa/rpau/RPAU-OB-2directions.html> or by calling (360) 664-6094), on April 7, 2009, at 10:00 a.m.

Date of Intended Adoption: Not sooner than April 8, 2009.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail DSHSRPAURulesCoordinator@dshs.wa.gov, fax (360) 664-6185, by 5 p.m. on April 7, 2009.

Assistance for Persons with Disabilities: Contact Jenisha Johnson, DSHS rules consultant, by March 24, 2009, TTY (360) 664-6178 or (360) 664-6094 or by e-mail at johnsj14@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department is filing this continuance to change the hearing location to the Office Building 2 Auditorium at the DSHS headquarters. The original proposal was filed as WSR 09-05-099 on February 18, 2009.

Reasons Supporting Proposal: See above.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting: Debbie Roberts, 640 Woodland Square Loop S.E., Lacey, WA 98503-1045, P.O. Box 45310, Olympia, WA 98507-5310, e-mail roberdx@dshs.wa.gov, (360) 725-3400, fax (360) 404-0955; Implementation: Shannon Manion, 640 Woodland Square Loop S.E., Lacey, WA 98503-1045, P.O. Box 45310, Olympia, WA 98507-5310, e-mail maniosk@dshs.wa.gov, (360) 725-3454, fax (360) 404-0955; and Enforcement: Don Clintsman, 640 Woodland Square Loop S.E., Lacey, WA 98503-1045, P.O. Box 45310, Olympia, WA 98507-5310, e-mail clintdl@dshs.wa.gov, (360) 725-3421, fax (360) 404-0955.

February 24, 2009  
Stephanie E. Schiller  
Rules Coordinator**WSR 09-06-041****PROPOSED RULES****SUPERINTENDENT OF  
PUBLIC INSTRUCTION**

[Filed February 25, 2009, 9:38 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 08-20-006.

Title of Rule and Other Identifying Information: WAC 392-347-023 State assistance in post 1993 facilities.

Hearing Location(s): Office of Superintendent of Public Instruction (OSPI), Old Capitol Building, Brouillet Conference Room, 600 Washington Street, Olympia, WA 98504, on April 7, 2009, at 9:00 a.m.

Date of Intended Adoption: April 8, 2009.

Submit Written Comments to: Scott Black, P.O. Box 47200, Olympia, WA 98504-7200, e-mail Scott.Black@k12.wa.us, by April 6, 2009.

Assistance for Persons with Disabilities: Contact Penny Coker by April 6, 2009, TTY (360) 664-3631 or (360) 725-6133.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Repeal WAC 392-347-023 language and replace with language that replaces an accounting based system to a performance based system of school facility management by implementing an asset preservation program consisting of school district board policy, maintenance planning, evaluations of buildings to meet a determined building standard and a reporting of the facilities to the school districts and OSPI.

Statutory Authority for Adoption: RCW 28A.525.020.

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

Name of Proponent: [OSPI], governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Scott Black, OSPI, (360) 725-6268; and Enforcement: Gordon Beck, OSPI, (360) 725-6261.

No small business economic impact statement has been prepared under chapter 19.85 RCW.

A cost-benefit analysis is not required under RCW 34.05.328.

February 24, 2009  
Randy Dorn  
Superintendent of  
Public InstructionAMENDATORY SECTION (Amending WSR 08-09-024, filed 4/8/08, effective 5/9/08)**WAC 392-347-023 State assistance in post 1993 facilities.** (~~State assistance for modernization of school facilities accepted by the school district board of directors after January 1, 1994, shall be limited according to the following conditions:~~~~(1) A school facility shall be ineligible for state assistance if the total expenditures for maintenance of plant and equipment for that facility during the fifteen year period immediately preceding the project application was below one-half of one percent of the total of the annually determined building replacement values during the same period;~~

(2) The allowable cost per square foot used to determine the amount of state assistance in any modernization project where the total expenditures for maintenance of plant and equipment for that facility during the fifteen-year period immediately preceding the project application was at least one-half but less than two percent of the total of the annually determined building replacement values during the same period shall be reduced as follows:

(a) The allowable cost per square foot shall be reduced by twenty-two and one-half percent where the above expenditure is at least one-half but less than one percent;

(b) The allowable cost per square foot shall be reduced by fifteen percent where the above expenditure is at least one but less than one and one-half percent;

(c) The allowable cost per square foot shall be reduced by seven and one-half percent where the above expenditure is at least one and one-half but less than two percent;

(3) No reduction in the allowable cost per square foot shall be applied to any modernization project where the total expenditures for maintenance of plant and equipment for that facility during the fifteen-year period immediately preceding the project application was two percent, or greater, of the total of the annually determined building replacement values during the same period;

(4) A district shall not be allowed to replace a school facility through new construction in lieu of modernization under WAC 392-347-042 where the total expenditures for maintenance of plant and equipment for that facility during the fifteen-year period immediately preceding the project application was below two percent of the total of the annually determined building replacement values during the same period;

(5) For the purpose of this section "maintenance of plant and equipment" shall be general fund expenditures charged to maintenance and operations activities 61-supervision and 64-maintenance and capital projects fund expenditures charged to type code 22-remodeling and 42-capital improvements as defined in the *Accounting Manual for Public School Districts*.) As a condition precedent to receiving state assistance for modernization under WAC 392-347-015 or new-in-lieu of modernization under WAC 392-347-042, school districts that received state assistance for new and new-in-lieu school buildings and whose buildings were accepted as complete by school board of directors as of January 1, 1994, and later, shall adopt by board resolution and implement an asset preservation program (APP).

(1) Definitions: For purposes of this chapter:

(a) An asset preservation program is a systematic approach to ensure performance accountability; promote student health and safety; create an encouraging learning environment; and extend building life, thus minimizing future capital needs.

(b) An asset preservation system is a system of tasks or projects that are active, reactive, or proactive in maintaining the day to day health, safety, and instructional quality of the school facility and tasks or projects that are proactive, predictive or preventative in maintaining the school facility over its thirty-year expected life cycle.

(c) A building condition evaluation is an evaluation of the condition of building components and systems using a standardized scoring matrix.

(d) A building condition standard is a numeric scoring table with a scale identifying the expected condition score for each year of the building's expected life cycle.

(2) The office of the superintendent of public instruction shall establish and adopt a uniform program of specifications, standards, and requirements for implementing and maintaining the asset preservation program.

(3) School districts with affected buildings under this chapter are required to:

(a) Adopt or implement an asset preservation system;

(b) Annually perform a building condition evaluation and report the condition of such building to the school district's board of directors no later than April 1st of each year;

(c) Thereafter in six year intervals during the thirty-year expected life span of the building, have a certified evaluator, as approved by the office of the superintendent of public instruction, perform a building condition evaluation and report the condition to the school district's board of directors and to the office of the superintendent of public instruction no later than April 1st.

(4) A school district building affected under this chapter and that does not meet the minimum building condition standard score of forty points at the end of the thirty years from the accepted date shall:

(a) Have its allowable cost per square foot used to determine the amount of state assistance in any modernization project reduced at a rate of two percent for each point below forty points, not to exceed a total twenty percent reduction; or

(b) Be ineligible for state assistance when the building condition score is less than thirty points.

(5) The following schedule shall apply to school districts with buildings affected under this chapter, and the requirements set forth shall replace the former requirements of this section:

(a) Buildings accepted by the school board in 1994 must begin an asset preservation program in 2009, and shall fully implement the program within no more than one and one-half years;

(b) Buildings accepted by the school board in 1995 must begin an asset preservation program in 2010, and shall fully implement the program within no more than one year;

(c) Buildings accepted by the school board in 1996 through 2010 must begin an asset preservation program in 2011, and shall fully implement the program within no more than six months;

(d) Buildings accepted by the school board after 2010 must implement APP program upon facility acceptance.

**WSR 09-06-050**  
**PROPOSED RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
(Aging and Disability Services Administration)

[Filed February 25, 2009, 3:10 p.m.]

Supplemental Notice to WSR 09-04-065.

Preproposal statement of inquiry was filed as WSR 08-12-070.

Title of Rule and Other Identifying Information: The department is amending WAC 388-105-0005 The daily medicaid payment rates for clients assessed using the comprehensive assessment reporting evaluation (CARE) tool and that reside in adult family homes (AFH) and boarding homes contracted to provide assisted living (AL), adult residential care (ARC), and enhanced adult residential care (EARC) services, and 388-105-0045 Bed or unit hold—Medicaid resident discharged for a hospital or nursing home stay from an adult family home (AFH) or a boarding home contracted to provide adult residential care (ARC), enhanced adult residential care (EARC), or assisted living services (AL).

Hearing Location(s): Office Building 2, Auditorium, DSHS Headquarters, 1115 Washington, Olympia, WA 98504 (public parking at 11th and Jefferson. A map is available at <http://www1.dshs.wa.gov/msa/rpau/RPAU-OB-2directions.html> or by calling (360) 664-6094), on April 7, 2009, at 10:00.

Date of Intended Adoption: Not earlier than April 8, 2009.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504-5850, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail DSHS RPAURulesCoordinator@dshs.wa.gov, fax (360) 664-6185, by 5 p.m. on April 7, 2009.

Assistance for Persons with Disabilities: Contact Jenisha Johnson, DSHS rules consultant, by March 24, 2009, TTY (360) 664-6178 or (360) 664-6094 or by e-mail at [johnsj14@dshs.wa.gov](mailto:johnsj14@dshs.wa.gov).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 388-105-0005, this supplemental is to reduce the daily medicaid payment rates for clients assessed using the comprehensive assessment reporting evaluation (CARE) tool and that reside [at] AFHs and licensed boarding homes contracted to provide AL, ARC, and EARC services proposed for July 1, 2008, and emergency adopted by three percent effective May 1, 2009.

WAC 388-105-0045 Requiring notice within twenty-four [hours] when a resident is discharged on medical leave to a nursing home or hospital from the AFH, ARC, EARC, or AL facility and adopting consequences for failure to notify.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 74.39A.30 [74.39A.030] and 18.20.290, chapter 329, Laws of 2008.

Statute Being Implemented: RCW 74.39A.30 [74.39A.-030] and 18.20.290.

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

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting: Patricia Hague, Mailstop 45600, Olympia, WA 98504, (360) 725-2447; Implementation and Enforcement: Ken Callaghan, Mailstop 45600, Olympia, WA 98504, (360) 725-2499.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Under RCW 19.85.025 (3) and [19.85.]030 (1)(a), 34.05.310 (4)(f), the department is exempt from preparing a small business economic impact statement.

RCW 19.85.025(3), this chapter [section] does not apply to the adoption of a rule described in RCW 34.05.310(4).

RCW 34.05.310 (4)(f), this section does not apply to rules that set or adjust fees or rates pursuant to legislative standards.

The adoption of rules to set or adjust fees is cost neutral.

RCW 19.85.030 (1)(a) In the adoption of a rule under chapter 34.05 RCW, an agency shall prepare a small business economic impact statement if the proposed rule will impose more than minor costs on businesses in an industry.

A cost-benefit analysis is not required under RCW 34.05.328. Under RCW 34.05.328 (5)(b)(vi), the department is exempt from preparing a cost-benefit analysis for these rules. The rules set or adjust fees or rates pursuant to legislative standards.

RCW 34.05.328 (5)(b)(vi), this section does not apply to rules that set or adjust fees or rates pursuant to legislative standards.

February 23, 2009  
Stephanie E. Schiller  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 06-19-017, filed 9/8/06, effective 10/9/06)

**WAC 388-105-0005 The daily medicaid payment rates for clients assessed using the comprehensive assessment reporting evaluation (CARE) tool and that reside in adult family homes (AFH) and boarding homes contracted to provide assisted living (AL), adult residential care (ARC), and enhanced adult residential care (EARC) services.** For contracted AFH and boarding homes contracted to provide AL, ARC, and EARC services, the department pays the following daily rates for care of a Medicaid resident:

COMMUNITY RESIDENTIAL DAILY RATES FOR CLIENTS ASSESSED USING CARE KING COUNTY					
CARE CLASSIFICATION	AL Without Capital	AL With Capital	ARC	EARC	AFH
	Add-on	Add-on			
A Low ((1))	<del>\$(65.30)</del> <u>67.14</u>	<del>\$(70.41)</del> <u>72.56</u>	<del>\$(46.18)</del> <u>47.48</u>	<del>\$(46.18)</del> <u>47.48</u>	<del>\$(46.82)</del> <u>46.87</u>
A Med ((2))	<del>\$(70.71)</del> <u>72.70</u>	<del>\$(75.82)</del> <u>78.12</u>	<del>\$(52.40)</del> <u>53.87</u>	<del>\$(52.40)</del> <u>53.87</u>	<del>\$(53.13)</del> <u>53.19</u>
A High ((3))	<del>\$(79.34)</del> <u>81.58</u>	<del>\$(84.45)</del> <u>87.00</u>	<del>\$(66.92)</del> <u>59.17</u>	<del>\$(66.92)</del> <u>59.17</u>	<del>\$(59.45)</del> <u>59.51</u>
B Low ((4))	<del>\$(65.30)</del> <u>67.14</u>	<del>\$(70.41)</del> <u>72.56</u>	<del>\$(46.18)</del> <u>47.48</u>	<del>\$(46.18)</del> <u>47.48</u>	<del>\$(46.82)</del> <u>47.10</u>
B Med ((5))	<del>\$(72.87)</del> <u>74.92</u>	<del>\$(77.98)</del> <u>80.34</u>	<del>\$(58.62)</del> <u>60.28</u>	<del>\$(58.62)</del> <u>60.28</u>	<del>\$(59.45)</del> <u>59.81</u>
<u>B Med-High</u>	<u>\$84.86</u>	<u>\$90.28</u>	<u>\$64.09</u>	<u>\$64.09</u>	<u>\$64.08</u>
B High ((6))	<del>\$(86.88)</del> <u>89.33</u>	<del>\$(91.99)</del> <u>94.75</u>	<del>\$(75.23)</del> <u>73.26</u>	<del>\$(75.23)</del> <u>73.26</u>	<del>\$(67.85)</del> <u>73.26</u>
C Low ((7))	<del>\$(70.71)</del> <u>72.70</u>	<del>\$(75.82)</del> <u>78.12</u>	<del>\$(52.40)</del> <u>53.87</u>	<del>\$(52.40)</del> <u>53.87</u>	<del>\$(53.13)</del> <u>53.19</u>
C Med ((8))	<del>\$(79.34)</del> <u>81.58</u>	<del>\$(84.45)</del> <u>87.00</u>	<del>\$(66.92)</del> <u>67.63</u>	<del>\$(66.92)</del> <u>67.63</u>	<del>\$(67.85)</del> <u>67.92</u>
C ((High-9))	<del>\$(98.77)</del> <u>101.56</u>	<del>\$(103.88)</del> <u>106.98</u>	<del>\$(87.68)</del> <u>90.15</u>	<del>\$(87.68)</del> <u>90.15</u>	<del>\$(88.89)</del> <u>88.98</u>
<u>Med-High</u>	<u>\$101.56</u>	<u>\$106.98</u>	<u>\$90.15</u>	<u>\$90.15</u>	<u>\$88.98</u>
<u>C High</u>	<u>\$102.57</u>	<u>\$107.99</u>	<u>\$91.01</u>	<u>\$91.01</u>	<u>\$90.22</u>
D Low ((10))	<del>\$(72.87)</del> <u>74.92</u>	<del>\$(77.98)</del> <u>80.34</u>	<del>\$(58.62)</del> <u>72.82</u>	<del>\$(58.62)</del> <u>72.82</u>	<del>\$(67.85)</del> <u>69.24</u>
D Med ((11))	<del>\$(79.34)</del> <u>83.25</u>	<del>\$(84.45)</del> <u>88.67</u>	<del>\$(66.92)</del> <u>84.37</u>	<del>\$(66.92)</del> <u>84.37</u>	<del>\$(76.28)</del> <u>84.74</u>
<u>D Med-High</u>	<u>\$107.65</u>	<u>\$113.07</u>	<u>\$107.29</u>	<u>\$107.29</u>	<u>\$101.97</u>
D High ((12))	<del>\$(98.77)</del> <u>116.00</u>	<del>\$(103.88)</del> <u>121.42</u>	<del>\$(87.68)</del> <u>116.00</u>	<del>\$(87.68)</del> <u>116.00</u>	<del>\$(88.89)</del> <u>116.10</u>
<u>E Med</u>	<u>\$140.19</u>	<u>\$145.61</u>	<u>\$140.19</u>	<u>\$140.19</u>	<u>\$140.29</u>
<u>E High</u>	<u>\$164.39</u>	<u>\$169.81</u>	<u>\$164.39</u>	<u>\$164.39</u>	<u>\$164.48</u>

COMMUNITY RESIDENTIAL DAILY RATES FOR CLIENTS ASSESSED USING CARE METROPOLITAN COUNTIES*					
CARE CLASSIFICATION	AL Without Capital	AL With Capital	ARC	EARC	AFH
	Add-on	Add-on			
A Low ((1))	<del>\$(59.90)</del> <u>61.59</u>	<del>\$(64.54)</del> <u>66.51</u>	<del>\$(46.18)</del> <u>47.48</u>	<del>\$(46.18)</del> <u>47.48</u>	<del>\$(46.82)</del> <u>46.87</u>
A Med ((2))	<del>\$(63.15)</del> <u>64.93</u>	<del>\$(67.79)</del> <u>69.85</u>	<del>\$(50.32)</del> <u>51.74</u>	<del>\$(50.32)</del> <u>51.74</u>	<del>\$(51.03)</del> <u>51.08</u>
A High ((3))	<del>\$(77.18)</del> <u>79.36</u>	<del>\$(81.82)</del> <u>84.28</u>	<del>\$(63.81)</del> <u>56.42</u>	<del>\$(63.81)</del> <u>56.42</u>	<del>\$(56.28)</del> <u>56.34</u>

CARE CLASSIFICATION	AL Without Capital	AL With Capital	ARC	EARC	AFH
	Add-on	Add-on			
B Low ((4))	\$((59.90)) <u>61.59</u>	\$((64.54)) <u>66.51</u>	\$((46.18)) <u>47.48</u>	\$((46.18)) <u>47.48</u>	\$((46.82)) <u>47.10</u>
B Med ((5))	\$((68.54)) <u>70.47</u>	\$((73.18)) <u>75.39</u>	\$((55.51)) <u>57.07</u>	\$((55.51)) <u>57.07</u>	\$((56.28)) <u>56.62</u>
<u>B Med-High</u>	<u>\$79.82</u>	<u>\$84.74</u>	<u>\$60.69</u>	<u>\$60.69</u>	<u>\$60.72</u>
B High ((6))	\$((84.73)) <u>87.12</u>	\$((89.37)) <u>92.04</u>	\$((71.08)) <u>71.20</u>	\$((71.08)) <u>71.20</u>	\$((64.70)) <u>71.20</u>
C Low ((7))	\$((63.15)) <u>64.93</u>	\$((67.79)) <u>69.85</u>	\$((50.32)) <u>51.95</u>	\$((50.32)) <u>51.95</u>	\$((51.03)) <u>51.46</u>
C Med ((8))	\$((77.18)) <u>79.36</u>	\$((81.82)) <u>84.28</u>	\$((63.81)) <u>66.76</u>	\$((63.81)) <u>66.76</u>	\$((64.70)) <u>66.26</u>
C ((High (9)) <u>Med-High</u> <u>C High</u>	\$((95.52)) <u>98.21</u> <u>\$99.19</u>	\$((100.16)) <u>103.13</u> <u>\$104.11</u>	\$((81.45)) <u>83.75</u> <u>\$89.08</u>	\$((81.45)) <u>83.75</u> <u>\$89.08</u>	\$((82.59)) <u>82.67</u> <u>\$87.72</u>
D Low ((10))	\$((68.54)) <u>70.47</u>	\$((73.18)) <u>75.39</u>	\$((55.51)) <u>71.82</u>	\$((55.51)) <u>71.82</u>	\$((64.70)) <u>67.71</u>
D Med ((11))	\$((77.18)) <u>80.98</u>	\$((81.82)) <u>85.90</u>	\$((63.81)) <u>82.68</u>	\$((63.81)) <u>82.68</u>	\$((72.06)) <u>82.46</u>
<u>D Med-High</u>	<u>\$104.11</u>	<u>\$109.03</u>	<u>\$104.63</u>	<u>\$104.63</u>	<u>\$98.86</u>
D High ((12))	\$((95.52)) <u>112.81</u>	\$((100.16)) <u>117.73</u>	\$((81.45)) <u>112.81</u>	\$((81.45)) <u>112.81</u>	\$((82.59)) <u>112.32</u>
<u>E Med</u>	<u>\$135.84</u>	<u>\$140.76</u>	<u>\$135.84</u>	<u>\$135.84</u>	<u>\$135.34</u>
<u>E High</u>	<u>\$158.87</u>	<u>\$163.79</u>	<u>\$158.87</u>	<u>\$158.87</u>	<u>\$158.37</u>

\*Benton, Clark, Franklin, Island, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, and Yakima counties.

COMMUNITY RESIDENTIAL DAILY RATES FOR CLIENTS ASSESSED USING CARE NONMETROPOLITAN COUNTIES**					
CARE CLASSIFICATION	AL Without	AL With Capital	ARC	EARC	AFH
	Capital Add-on	Add-on			
A Low ((1))	\$((58.83)) <u>60.49</u>	\$((63.77)) <u>65.73</u>	\$((46.18)) <u>47.48</u>	\$((46.18)) <u>47.48</u>	\$((46.82)) <u>46.87</u>
A Med ((2))	\$((63.15)) <u>64.93</u>	\$((68.09)) <u>70.17</u>	\$((49.29)) <u>50.68</u>	\$((49.29)) <u>50.68</u>	\$((49.98)) <u>50.03</u>
A High ((3))	\$((77.18)) <u>79.36</u>	\$((82.12)) <u>84.60</u>	\$((62.78)) <u>55.51</u>	\$((62.78)) <u>55.51</u>	\$((55.24)) <u>55.30</u>
B Low ((4))	\$((58.83)) <u>60.49</u>	\$((63.77)) <u>65.73</u>	\$((46.18)) <u>47.48</u>	\$((46.18)) <u>47.48</u>	\$((46.82)) <u>47.10</u>
B Med ((5))	\$((68.54)) <u>70.47</u>	\$((73.48)) <u>75.71</u>	\$((54.48)) <u>56.02</u>	\$((54.48)) <u>56.02</u>	\$((55.24)) <u>55.57</u>
<u>B Med-High</u>	<u>\$79.82</u>	<u>\$85.06</u>	<u>\$59.56</u>	<u>\$59.56</u>	<u>\$59.54</u>
B High ((6))	\$((84.73)) <u>87.12</u>	\$((89.67)) <u>92.36</u>	\$((69.00)) <u>67.34</u>	\$((69.00)) <u>67.34</u>	\$((63.66)) <u>67.34</u>

CARE CLASSIFICATION	AL Without Capital Add-on	AL With Capital Add-on	ARC	EARC	AFH
C Low <del>((7))</del>	<del>\$((63.15))</del> 64.93	<del>\$((68.09))</del> 70.17	<del>\$((49.29))</del> 50.68	<del>\$((49.29))</del> 50.68	<del>\$((49.98))</del> 50.03
C Med <del>((8))</del>	<del>\$((77.18))</del> 79.36	<del>\$((82.12))</del> 84.60	<del>\$((62.78))</del> 63.10	<del>\$((62.78))</del> 63.10	<del>\$((63.66))</del> 63.73
C <del>(High-9))</del> Med-High	<del>\$((95.52))</del> 98.21	<del>\$((100.46))</del> 103.45	<del>\$((78.34))</del> 80.55	<del>\$((78.34))</del> 80.55	<del>\$((79.44))</del> 79.52
C High	\$99.19	\$104.43	\$84.21	\$84.21	\$82.95
D Low <del>((10))</del>	<del>\$((68.54))</del> 70.47	<del>\$((73.48))</del> 75.71	<del>\$((54.48))</del> 67.89	<del>\$((54.48))</del> 67.89	<del>\$((63.66))</del> 64.03
D Med <del>((11))</del>	<del>\$((77.18))</del> 80.98	<del>\$((82.12))</del> 86.22	<del>\$((62.78))</del> 78.15	<del>\$((62.78))</del> 78.15	<del>\$((69.96))</del> 77.98
D Med-High	\$104.11	\$109.35	\$98.90	\$98.90	\$93.48
D High <del>((12))</del>	<del>\$((95.52))</del> 106.63	<del>\$((100.46))</del> 111.87	<del>\$((78.34))</del> 106.63	<del>\$((78.34))</del> 106.63	<del>\$((79.44))</del> 106.20
E Med	\$128.39	\$133.63	\$128.39	\$128.39	\$127.96
E High	\$150.16	\$155.40	\$150.16	\$150.16	\$149.73

\*\* Nonmetropolitan counties: Adams, Asotin, Chelan, Clallam, Columbia, Cowlitz, Douglas, Ferry, Garfield, Grant, Grays Harbor, Jefferson, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pend Orielle, San Juan, Skagit, Skamania, Stevens, Wahkiakum, Walla Walla and Whitman.

**AMENDATORY SECTION** (Amending WSR 06-19-017, filed 9/8/06, effective 10/9/06)

**WAC 388-105-0045 Bed or unit hold—Medicaid resident discharged for a hospital or nursing home stay from an adult family home (AFH) or a boarding home contracted to provide adult residential care (ARC), enhanced adult residential care (EARC), or assisted living services (AL).** (1) When an AFH, ARC, EARC, or AL contracts to provide services under chapter 74.39A RCW, the AFH, ARC, EARC, and AL contractor must hold a Medicaid eligible resident's bed or unit when:

- (a) Short-term care is needed in a nursing home or hospital;
- (b) The resident is likely to return to the AFH, ARC, EARC, or AL; and
- (c) Payment is made under subsection (3) of this section.

(2)(a) When the department pays the contractor to hold the Medicaid resident's bed or unit during the resident's short-term nursing home or hospital stay, the contractor must hold the bed or unit for up to twenty days. If during the twenty day bed hold period, a department case manager determines that the Medicaid resident's hospital or nursing home stay is not short term and the Medicaid resident is unlikely to return to the AFH, ARC, EARC or AL facility, the department will cease paying for the bed hold the day the case manager notifies the contractor of his/her decision.

(b) A Medicaid resident's discharge from an AFH, ARC, EARC, or an AL facility for a short term stay in a nursing home or hospital must be longer than twenty-four hours before subsection (3) of WAC 388-105-0045 applies.

(c) When a Medicaid resident on bed hold leave returns to an AFH, ARC, EARC, or an AL facility but remains less than twenty-four hours, the bed hold leave on which the resident returned applies after the resident's discharge. A new bed hold leave will begin only when the returned resident has resided in the facility for more than twenty-four hours before the resident's next discharge.

(3) The department will compensate the contractor for holding the bed or unit for the:

- (a) First through seventh day at seventy percent of the Medicaid daily rate paid for care of the resident before the hospital or nursing home stay; and
- (b) Eighth through the twentieth day, at eleven dollars a day.

(4) The AFH, ARC, EARC, or AL facility may seek third-party payment to hold a bed or unit for twenty-one days or longer. The third-party payment shall not exceed the Medicaid daily rate paid to the facility for the resident. If third-party payment is not available and the returning Medicaid resident continues to meet the admission criteria under chapter 388-71 and/or 388-106 WAC, then the Medicaid resident may return to the first available and appropriate bed or unit.

(5) The department's social worker or case manager determines whether the:

- (a) Stay in a nursing home or hospital will be short-term; and
- (b) Resident is likely to return to the AFH, ARC, EARC, or AL facility.

(6) When the resident's stay in the hospital or nursing home exceeds twenty days or the department's social worker

or case manager determines that the Medicaid resident's stay in the nursing home or hospital is not short-term and the resident is unlikely to return to the AFH, ARC, EARC, or AL facility, then only subsection (4) of this section applies to any private contractual arrangements that the contractor may make with a third party in regard to the discharged resident's unit or bed.

**WSR 09-06-064**  
**PROPOSED RULES**

**DEPARTMENT OF TRANSPORTATION**

[Filed March 2, 2009, 8:32 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 08-24-031.

Title of Rule and Other Identifying Information: WAC 468-18-040 Design Standards for rearranged county roads, access roads, intersections, ramps and crossings, and 468-30-070 Procedure for transfer of abandoned state highways to counties, 468-30-075 Procedure for transfer of abandoned state highways to cities and towns.

Hearing Location(s): Transportation Commission Board Room, Transportation Building, 310 Maple Park Avenue S.E., Olympia, WA 98501-3261, on April 8, 2009, at 2:00 p.m.

Date of Intended Adoption: April 8, 2009.

Submit Written Comments to: Rebecca Hawkins, Department of Transportation, P.O. Box 4733, Olympia, WA 98504-7410, e-mail [Hawkire@wsdot.wa.gov](mailto:Hawkire@wsdot.wa.gov), fax (360)705-6815, by April 7, 2009.

Assistance for Persons with Disabilities: Contact Grant Heap by April 3, 2009, TTY (800) 833-6388 or (360) 705-7760.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Revising language for clarity, and consistency with Washington state department of transportation (WSDOT) policies and practices.

Anticipated effects: Creates an alternative mechanism for "certification" as required under RCW 36.75.090 and 47.24.010.

Reasons Supporting Proposal: The revisions would allow WSDOT and local agencies to coordinate property transfers in a more efficient manner, which will help to conserve state and local resources.

Statutory Authority for Adoption: RCW 36.75.090, 47.24.010.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: RCW 36.75.090 and 47.24.010 require WSDOT to "certify" portions of highway to be transferred to cities or counties.

WAC 468-30-070 and 468-30-075 established a 10-step certification process for this purpose. This change would create an alternative, where a more streamlined coordination process is appropriate.

Revision of WAC 468-30-040 also updates and clarifies the process.

Name of Proponent: WSDOT, governmental.

Name of Agency Personnel Responsible for Drafting: Rebecca Hawkins, 310 Maple Park Avenue S.E., Olympia, WA 98504-7336, (360) 705-7248; Implementation: Ahmer Nizam, 310 Maple Park Avenue S.E., Olympia, WA 98504-7336, (360) 705-7271; and Enforcement: Pasco Bakotich III, 310 Maple Park Avenue S.E., Olympia, WA 98504-7336, (360) 705-7231.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Economically we are not changing anything, just clarifying the process and providing an alternative to the "certification" process.

A cost-benefit analysis is not required under RCW 34.05.328. There is no impact to small businesses.

March 2, 2009

Stephen T. Reinmuth  
Chief of Staff

AMENDATORY SECTION (Amending Order 186, filed 12/21/98, effective 1/21/99)

**WAC 468-18-040 Design standards for rearranged county roads, frontage roads, access roads, intersections, ramps and crossings.** Because of the wide variety of rearranged county roads, frontage or access roads, intersections, ramps and crossings encountered by the freeway construction and relocation of other state highways, further understandings are desirable as to the jurisdiction and the responsibility between the county and state.

Following are the criteria, procedure and design standards that the state department of transportation shall use in the planning for frontage roads and access roads that counties will be requested to accept as county roads and the construction of rearranged county roads, intersections, ramps and crossings:

(1) At the early stages of planning, (~~before the right of way maps are prepared;~~) the state and county shall review the proposed improvement and determine what cooperative agreements will be needed between the state and county.

(2) The proposed design standards shall not be less than the current (~~"Washington state county arterial design standards;"~~) "city-county design standards" located within the "Local Agency Guideline Manual," except where an individual county shall have adopted a higher design standard, in which case the higher standard shall apply.

(3) (~~The required right of way for the proposed improvement, which shall not be less than that called for by the current "Washington state county arterial design standards," shall be either deeded to the county or the county given an easement for rights of way purposes.~~)

(4) The proposed construction shall include all the necessary traffic control and safety devices and be signed in accordance with the Manual on Uniform Traffic Control Devices for Streets and Highways, as modified and adopted by the Washington state department of transportation, to protect the driving public.

(~~5) An agreement shall be negotiated between the state and county at this early stage of planning, before right of way~~)

~~maps are approved for each rearranged county road, frontage or access road, intersection or crossing, which shall cover the standards of construction, right of way, and outline)) (4) Unless otherwise agreed to between the state and county, the ((responsibility)) responsibilities of each agency ((which)) shall conform to the following basic principles ((of maintenance responsibilities)):~~

(a) Where an existing county road is crossed by a state highway underpass, the state will construct the underpass and necessary approaches and maintain the underpass.

The roadway to be provided for county traffic will be constructed by the state.

If illumination exists on the county road at the time of construction of the underpass, the state shall provide the necessary facilities for illuminating the county's portion of the road over the state highway and the necessary approach roadway.

If it is determined that illumination will be necessary at a later date and it will be necessary to place conduits in the structure, the state shall provide same.

The county will maintain the roadway providing for county traffic including traffic stripe, snow removal, sanding and illumination, if needed, for the county road.

(b) Where an existing county road is crossed by a state highway overpass, the state will construct the structure and necessary approach roadway and maintain the structure.

The county will maintain the entire roadway under the structure except special drainage, if needed.

The state shall provide the necessary facilities for illuminating the county's portion of the road under the structure and necessary approach roadway, unless otherwise agreed.

(c) When an existing county road is crossed at grade by a new state highway, the state will assume all costs for the construction including taper sections, acceleration and deceleration lanes and be responsible for all maintenance to the right of way line.

Stop signs after installation shall be maintained in accordance with the state statutes.

The construction and maintenance of illumination will be the responsibility of the state.

When a new county road intersects a state highway, the maintenance responsibilities will be the same as outlined above. The construction costs shall be the responsibility of the county.

(d) Whenever, because of increased traffic, heavy turning movements, accident frequency or other good cause, it becomes necessary to initiate a project for the improvement of an existing intersection not incidental to a construction project, the state and county will cooperate in the cost of the improvement in each case by mutual agreement in accordance with the following formula:

(i) Ascertain the number of legs of the intersection under the existing responsibility of each agency involved.

(ii) Ascertain the traffic volume on each leg.

(iii) Add the traffic counts on each agency's intersection legs.

(iv) The resulting percentage of the traffic volume total falling to each jurisdiction should be the relative proportion of the improvement's cost to be borne by each agency: Pro-

vided, That in no case shall the county's share of the total cost of the improvement exceed fifty percent of that cost.

The maintenance responsibilities will be the same as outlined above in subparagraph (c) of this subsection.

(e) When an interchange is constructed at an intersection of a state highway and county road, the ramps, structure and crossroad within the interchange area shall be maintained and reconstructed, if necessary, by the state. Illumination, if required, shall be constructed by the state and that portion located on state right of way maintained by the state or as otherwise agreed.

Traffic signals on state right of way, if required at ramp terminals, shall be constructed, operated and maintained by the state.

(f) Where it is necessary to relocate an existing county road, the state will construct the road and the county will maintain the road.

(g) If a county road or street is dead-ended, the state will construct a cul-de-sac to the county standards.

(h) When it is necessary for the state to construct service roads, landlock prevention roads or dead-end roads, which may be desirable in lieu of damages to property, the provisions of RCW 47.52.105 shall be the guide.

~~((These)) All roads under this subsection shall be the state's responsibility unless ((by agreement in accordance with the procedures outlined in the policy statement, the county will accept these roads as county roads and if such an agreement is entered into, all dead end roads shall have a cul-de-sac constructed to the county's standard)) otherwise agreed to between the state and county.~~

(i) Upon completion of the construction of each rearranged county road, frontage road, access road, intersection or crossing for which an agreement has been entered into between the state and county, an inspection by the state and county road engineer shall be made to determine that all the requirements of the agreement have been fulfilled. Upon fulfillment of the agreement, the ~~((district engineer))~~ state shall notify the county in writing and the county shall ~~((accept the road as a county road or))~~ assume the responsibilities as set forth in said agreement.

~~((Within one year the state will turn over the right of way to the county for any construction accepted by the county as a county maintained road.)) (5) The transfer of any right of way by the state to a county for any rearranged county road, frontage road, access road, intersection, crossing, or improvements constructed under this chapter shall be in accordance with WAC 468-30-070, as amended.~~

**AMENDATORY SECTION** (Amending DOT Order 10 and Comm. Order 1, Resolution No. 13, filed 12/20/78)

**WAC 468-30-070 Procedure for transfer of abandoned state highways to counties.** A public highway which is or has been a part of the route of a state highway and is no longer necessary as such may be certified to the county in which it is located in the following manner:

The ~~((state aid engineer))~~ department of transportation shall notify the affected board of county commissioners and the county engineer of any certifications anticipated for the ensuing calendar year not later than August 1 of the previous



year, so that the county may provide in its budget for the maintenance and/or reconstruction of roads which are transferred to it by the department of transportation in accordance with RCW 36.75.090.

(1) When a tentative date has been determined on which the transfer of the highway is to be made, the ~~((district engineer))~~ appropriate department of transportation region shall arrange for a joint maintenance inspection by representatives of the ~~((highway))~~ department of transportation and the county.

~~((2))~~ ~~((The highway department shall be represented by the district state aid engineer and the district maintenance engineer or his designated representative.~~

~~((3))~~ ~~The county shall be represented by the county road engineer and his maintenance engineer, supervisor or designated representative.~~

~~((4))~~ Any and all routine maintenance deficiencies which are noted at the time of this inspection shall be corrected by the ~~((district))~~ department of transportation region maintenance forces.

~~((5))~~ (3) Upon completion of any maintenance work deemed necessary, the ~~((district engineer))~~ department of transportation shall by letter inform the county engineer to the effect that all maintenance deficiencies noted during the inspection have been corrected.

~~((6))~~ (4) The county engineer shall by letter subsequently inform the ~~((district engineer))~~ department of transportation that the road or highway to be transferred is either (a) in a condition acceptable to the county, or (b) in a condition not acceptable to the county, in which case the unacceptable conditions shall be enumerated in detail.

~~((7))~~ (5) In the event that the ~~((district engineer))~~ department of transportation feels that additional maintenance work is required, ~~((he))~~ it shall direct such work to be done and again follow the procedure outlined in subsection ~~((5))~~ (3) of this section; and the county engineer shall then follow the procedure outlined in subsection ~~((6))~~ (4) of this section.

~~((8))~~ (6) In the event that it becomes impossible for the ~~((district))~~ department of transportation and the county to reach agreement, a full report of the initial inspection and the apparent points of disagreement shall be transmitted to the ~~((state aid))~~ highways and local programs engineer, who will then consult with the state maintenance engineer and the county engineer and provide the ~~((director))~~ secretary of transportation with all significant information and with ~~((his))~~ their own recommendations.

~~((9))~~ (7) The secretary of transportation will take final action on the transfer of the road and the county shall be provided with a copy of ~~((his))~~ the decision two weeks before the certification is made.

~~((10))~~ (8) After the certification has been made, the ~~((state))~~ department of transportation will provide the county with all available maps, conveyances, permits, franchises and other documents which may relate to that portion of the road or highway transferred.

Maintenance is described as being the preservation and upkeep of a highway, including all of its elements, in as nearly its original, or as constructed, or as subsequently

improved, condition as possible. This includes traffic control devices and other safety control measures deemed necessary.

In the alternative, the department with any county may enter into an agreement that modifies the above highway certification process so long as the agreement complies with the provisions of RCW 36.75.090.

AMENDATORY SECTION (Amending Order 35, filed 8/20/79)

**WAC 468-30-075 Procedure for transfer of abandoned state highways to cities and towns.** A public highway which is or has been a part of the route of a state highway and is no longer necessary as such may be certified to the city or town in which it is located in the following manner:

The ~~((state aid engineer))~~ department of transportation shall notify the affected legislative body and the city or town engineer of any certifications anticipated for the first half of July of the ensuing calendar year not later than August 1 of the previous year, so that the city or town may provide in its budget for the maintenance and/or reconstruction of roads which are transferred to it by the department of transportation in accordance with RCW 36.75.090 and 47.24.010.

(1) The department of transportation shall make such certifications between the first and fifteenth of July each year. A reasonable time prior to the certification of a highway, the ~~((district administrator))~~ appropriate department of transportation region shall arrange for a joint maintenance inspection by representatives of the ~~((transportation))~~ department of transportation and the city or town.

~~((2))~~ ~~((The transportation department shall be represented by the district state aid engineer and the district maintenance engineer or his designated representative.~~

~~((3))~~ ~~The city or town shall be represented by the city or town engineer and his maintenance engineer, supervisor or designated representative.~~

~~((4))~~ Any and all routine maintenance deficiencies which are noted at the time of this inspection shall be corrected by the ~~((district))~~ department of transportation region maintenance forces or by contract.

~~((5))~~ (3) Upon completion of any maintenance work deemed necessary, the ~~((district administrator))~~ department of transportation shall by letter inform the city or town engineer to the effect that all maintenance deficiencies noted during the inspection have been corrected.

~~((6))~~ (4) The city or town engineer shall by letter subsequently inform the ~~((district administrator))~~ department of transportation that the road or highway to be transferred is either (a) in a condition acceptable to the city or town or (b) in a condition not acceptable to the city or town in which case the unacceptable conditions shall be enumerated in detail.

~~((7))~~ (5) In the event that the ~~((district administrator))~~ department of transportation feels that additional maintenance work is required, ~~((he))~~ it shall direct such work to be done and again follow the procedure outlined in subsection ~~((5))~~ (3) of this section; and the city or town engineer shall then follow the procedure outlined in subsection ~~((6))~~ (4) of this section.

~~((8))~~ (6) In the event that it becomes impossible for the ~~((district))~~ department of transportation and the city or town

to reach agreement, a full report of the initial inspection and the apparent points of disagreement shall be transmitted to the ~~((state aid))~~ highways and local programs engineer, who will then consult with the ~~((state))~~ department of transportation maintenance engineer and the city or town engineer and provide the secretary of transportation with all significant information and with ~~((his own))~~ their recommendations.

~~((9))~~ (7) The secretary of transportation will take final action on the transfer of the road and the city or town shall be provided with a copy of ~~((his))~~ the decision two weeks before the certification is made.

~~((10))~~ (8) After the certification has been made, the state will provide the city or town with all available maps, conveyances, permits, franchises and other documents which may relate to that portion of highway transferred.

Maintenance is described as a program to preserve and repair a system of roadways together with its elements to ensure its designed or established structural life and operational expectancy. This includes traffic control devices and other safety control measures deemed necessary.

In the alternative, the department with any city or town may enter into an agreement that modifies the above highway certification process so long as the agreement complies with the provisions of RCW 36.75.090.

**WSR 09-06-068**  
**PROPOSED RULES**  
**FOREST PRACTICES BOARD**

[Filed March 2, 2009, 3:39 p.m.]

Continuance of WSR 08-17-097.

Preproposal statement of inquiry was filed as WSR 05-2-097 [05-20-097].

Title of Rule and Other Identifying Information: Achieving desired future conditions in riparian management zones. This rule proposal amends WAC 222-30-021(1) to change timber harvest and leave tree requirements in riparian management zones adjacent to Type S and F Waters as defined in WAC 222-16-030. It pertains to forest lands in western Washington.

Date of Intended Adoption: March 31, 2009.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 222-30-021 provides prescriptions and options to harvesting trees in forested "riparian management zones" as defined in WAC 222-16-010. Pursuant to RCW 76.09.370, the forest practices board incorporates a scientific-based adaptive management process to determine the effectiveness of forest practices rules in aiding Washington's salmon recovery effort. Under this adaptive management process, a scientific study was completed by the forest practices board's cooperative monitoring, evaluation, and research committee. The study, entitled *Validation of the Western Washington Riparian Desired Future Condition (DFC) Performance Targets in the Washington State Forest Practices Rules with Data From Mature, Unmanaged, Conifer-Dominated Riparian Stands*, found that basal area per acre of mature, unmanaged conifer-dominated riparian stands are greater than the values used in the current rule.

In response to the DFC study findings, the board is considering three alternative rule amendments to WAC 222-30-021(1). The intended effects of all of the alternatives are to increase the basal area retained in riparian management zones, thereby decreasing allowable harvests.

- The first alternative would increase the target basal area per acre to 325 square feet for all site classes that a riparian forest stand is projected to reach at age one hundred forty in the riparian management zone.

- The second alternative would increase the target basal area per acre the same as the first alternative, and would also:
  - allow landowners to credit the required inner zone leave trees towards meeting the riparian zone basal area target; and

- expand the table, "Option 2. Leaving trees closest to water," to include site classes IV and V on streams greater than ten feet in width.

- The third would increase the target basal area per acre the same as the first alternative, and will allow landowners to credit the required inner zone leave trees towards meeting the riparian zone basal area target.

Reasons Supporting Proposal: The proposed rule changes are based on recommendations resulting from the scientifically based adaptive management process outlined in WAC 222-12-045. Through this process, the board has determined that the forest practices rules should be adjusted to ensure that appropriate riparian buffers are maintained on forest land covered by the Forest Practices Act.

Statutory Authority for Adoption: RCW 76.09.040 and 76.09.370(6).

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

Name of Proponent: Forest practices board, governmental.

Name of Agency Personnel Responsible for Drafting: Marc Engel, 1111 Washington Street S.E., Olympia, (360) 902-1390; Implementation: Mary McDonald, 1111 Washington Street S.E., Olympia, (360) 902-1415; and Enforcement: Gary Graves, 1111 Washington Street S.E., Olympia, (360) 902-1483.

A small business economic impact statement has been prepared under chapter 19.85 RCW. See WSR 08-13-087.

A copy of the statement may be obtained by contacting Gretchen Robinson, P.O. Box 47012, Olympia, WA 98504-7012, phone (360) 902-1705, fax (360) 902-1428, e-mail [gretchen.robinson@dnr.wa.gov](mailto:gretchen.robinson@dnr.wa.gov).

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Gretchen Robinson, P.O. Box 47012, Olympia, WA 98504-7012, phone (360) 902-1705, fax (360) 902-1428, e-mail [gretchen.robinson@dnr.wa.gov](mailto:gretchen.robinson@dnr.wa.gov).

February 27, 2009

Peter Goldmark  
Chair

AMENDATORY SECTION (Amending WSR 08-24-011, filed 11/21/08, effective 12/22/08)

**WAC 222-30-021 \*Western Washington riparian management zones.** These rules apply to all typed waters on

forest land in Western Washington, except as provided in WAC 222-30-023. RMZs are measured horizontally from the outer edge of the bankfull width or channel migration zone, whichever is greater, and extend to the limits as described in this section. See ~~((the))~~ board manual section 7 for riparian design and layout guidelines.

**\* (1) Western Washington RMZs for Type S and F Waters** have three zones: The core zone is nearest to the water, the inner zone is the middle zone, and the outer zone is furthest from the water. (See definitions in WAC 222-16-010.) RMZ dimensions vary depending on the site class of the land, the management harvest option, and the bankfull width of the stream. See tables for management options 1 and 2 below.

None of the limitations on harvest in each of the three zones listed below will preclude or limit the construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050, or the creation and use of yarding corridors in WAC 222-30-060(1).

The shade requirements in WAC 222-30-040 must be met regardless of harvest opportunities provided in the inner zone RMZ rules. See ~~((the))~~ board manual section 1.

(a) **Core zones.** No timber harvest or construction is allowed in the core zone except operations related to forest roads as detailed in subsection (1) of this section. Any trees cut for or damaged by yarding corridors in the core zone must be left on the site. Any trees cut as a result of road construction to cross a stream may be removed from the site, unless used as part of a large woody debris placement strategy or as needed to reach stand requirements.

(b) **Inner zones.** Forest practices in the inner zone must be conducted in such a way as to meet or exceed stand requirements to achieve the goal in WAC 222-30-010(2). The width of the inner zone is determined by site class, bankfull width, and management option. Timber harvest in this zone must be consistent with the stand requirements in order to reach the desired future condition targets.

**"Stand requirement"** means a number of trees per acre, the basal area and the proportion of conifer in the combined inner zone and adjacent core zone so that the growth of the trees would meet desired future conditions. The following table defines basal area targets when the stand is ~~((140))~~ one hundred forty years old.

Site Class	Desired future condition target basal area per acre (at 140 years)
I	<del>((285))</del> <u>325</u> sq. ft.
II	<del>((275))</del> <u>325</u> sq. ft.
III	<del>((258))</del> <u>325</u> sq. ft.
IV	<del>((224))</del> <u>325</u> sq. ft.
V	<del>((190))</del> <u>325</u> sq. ft.

Growth modeling is necessary to calculate whether a particular stand meets stand requirement and is on a trajectory towards these desired future condition basal area target. The appropriate growth model will be based on stand characteristics and will include at a minimum, the following components: The number of trees by diameter class, the percent of conifer and hardwood, and the age of the stand. See ~~((the))~~ board manual section 7.

(i) **Hardwood conversion in the inner zone.** When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone, except in connection with hardwood conversion.

(A) The landowner may elect to convert hardwood-dominated stands in the **inner zone** to conifer-dominated stands. Harvesting and replanting shall be in accordance with the following limits:

(I) Conversion activities in the **inner zone** of any harvest unit are only allowed where all of the following are present:

- Existing stands in the combined core and inner zone do not meet stand requirements (WAC 222-30-021 (1)(b));
- There are fewer than ~~((57))~~ fifty-seven conifer trees per acre ~~((8))~~ eight inches or larger dbh in the conversion area;
- There are fewer than ~~((100))~~ one hundred conifer trees per acre larger than ~~((4))~~ four inches dbh in the conversion area;
- There is evidence (such as conifer stumps, historical photos, or a conifer understory) that the conversion area can be successfully reforested with conifer and support the development of conifer stands;
- The landowner owns ~~((500))~~ five hundred feet upstream and ~~((500))~~ five hundred feet downstream of the harvest unit;
- The core and inner zones contain no stream adjacent parallel roads;
- Riparian areas contiguous to the proposed harvest unit are owned by the landowner proposing to conduct the conversion activities, and meet shade requirements of WAC 222-30-040 or have a ~~((75-))~~ seventy-five foot buffer with trees at least ~~((40))~~ forty feet tall on both sides of the stream for ~~((500))~~ five hundred feet upstream and ~~((500))~~ five hundred feet downstream of the proposed harvest unit (or the length of the stream, if less);
- If the landowner has previously converted hardwood-dominated stands, then post-harvest treatments must have been performed to the satisfaction of the department.

(II) In addition to the conditions set forth above, permitted conversion activities in the **inner zone** of any harvest unit are limited by the following:

- Each continuous conversion area is not more than ~~((500))~~ five hundred feet in length; two conversion areas will be considered "continuous" unless the no-harvest area separating the two conversion areas is at least half the length of the larger of the two conversion areas.
- Type S and F (Type 1, 2, or 3) Water: Up to ~~((50%))~~ fifty percent of the inner zone area of the harvest unit on one side of the stream may be converted provided that:
  - ◆ The landowner owns the opposite side of the stream and the landowner's riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a ~~((75-))~~ seventy-five foot buffer of trees at least ~~((40))~~ forty feet tall or:
  - ◆ The landowner does not own land on the opposite side of the stream but the riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a ~~((75-))~~ seventy-five foot buffer of trees at least ~~((40))~~ forty feet tall.

- Not more than ~~((25%))~~ twenty-five percent of the inner zone of the harvest unit on both sides of a Type S or F Water may be converted if the landowner owns both sides.

(III) Where conversion is allowed in the **inner zone**, trees within the conversion area may be harvested except that:

- Conifer trees larger than ~~((20))~~ twenty inches dbh shall not be harvested;

- Not more than ~~((40%))~~ ten percent of the conifer stems greater than ~~((8))~~ eight inches dbh, exclusive of the conifer noted above, within the conversion area may be harvested; and

- The landowner must exercise reasonable care in the conduct of harvest activities to minimize damage to all residual conifer trees within the conversion area including conifer trees less than ~~((8))~~ eight inches dbh.

(IV) Following harvest in conversion areas, the landowner must:

- Reforest the conversion area with **conifer** tree species suitable to the site in accordance with the requirements of WAC 222-34-010; and

- Conduct post-harvest treatment of the site until the conifer trees necessary to meet acceptable stocking levels in WAC 222-34-010(2) have crowns above the brush or until the conversion area contains a minimum of ~~((150))~~ one hundred fifty conifer trees greater than ~~((8))~~ eight inches dbh per acre.

- Notify the department in writing within three years of the approval of the forest practices application for hardwood conversion, if the hardwood conversion has been completed.

(V) **Tracking hardwood conversion.** The purpose of tracking hardwood conversion is to determine if hardwood conversion is resulting in adequate enhancement of riparian functions toward the desired future condition while minimizing the short term impacts on functions. The department will use existing or updated data bases developed in cooperation with the Washington Hardwoods Commission to identify watershed administrative units (WAUs) with a high percentage of hardwood-dominated riparian areas and, thus have the potential for excessive hardwood conversion under these rules. The department will track the rate of conversion of hardwoods in the riparian zone: (1) Through the application process on an annual basis; and (2) at a WAU scale on a biennial basis as per WAC 222-30-120 through the adaptive management process which will develop thresholds of impact for hardwood conversion at the watershed scale.

(ii) **Harvest options.**

(A) No inner zone management. When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone. When no harvest is permitted in the inner zone or the landowner chooses not to enter the inner zone, the width of core, inner and outer zones are as provided in the following table:

**No inner zone management RMZ widths for Western Washington**

Site Class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
			I	200'	50'	83'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(B) Inner zone management. If trees can be harvested and removed from the inner zone because of surplus basal area consistent with the stand requirement, the harvest and removal of the trees must be undertaken consistent with one of two options:

(I) **Option 1. Thinning from below.** The objective of thinning is to distribute stand requirement trees in such a way as to shorten the time required to meet large wood, fish habitat and water quality needs. This is achieved by increasing the potential for leave trees to grow larger than they otherwise would without thinning. Thinning harvest under option 1 must comply with the following:

- Residual trees left in the combined core and inner zones must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for guidelines.

- Thinning must be from below, meaning the smallest dbh trees are selected for harvest first, then progressing to successively larger diameters.

- Thinning cannot decrease the proportion of conifer in the stand.

- Shade retention to meet the shade rule must be confirmed by the landowner for any harvest inside of ~~((75))~~ seventy-five feet from the outer edge of bankfull width or outer edge of CMZ, whichever is greater.

- The number of residual conifer trees per acre in the inner zone will equal or exceed ~~((57))~~ fifty-seven.

**Option 1. Thinning from below.**

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
I	200'	50'	83'	100'	67'	50'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(II) **Option 2. Leaving trees closest to the water.** Management option 2 applies only to riparian management zones for site class I, II, and III on streams that are less than or equal to ~~(+0)~~ ten feet wide and RMZs in site class I and II for streams greater than ~~(+0)~~ ten feet wide. Harvest must comply with the following:

- Harvest is not permitted within ~~(30)~~ thirty feet of the core zone for streams less than or equal to ~~(+0)~~ ten feet wide and harvest is not permitted within ~~(50)~~ fifty feet of the core zone for streams greater than ~~(+0)~~ ten feet wide;
- Residual leave trees in the combined core and inner zone must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for calculating stand requirements;
- A minimum of ~~(20)~~ twenty conifers per acre, with a minimum ~~(+2-)~~ twelve inch dbh, will be retained in any por-

tion of the inner zone where even-age harvest occurs. These riparian leave trees will ~~((not))~~ be counted ~~((or considered))~~ towards meeting applicable stand requirements ~~((not can))~~. The number of riparian leave trees cannot be reduced below ~~((20))~~ twenty for any reason.

- Trees are selected for harvest starting from the outer most portion of the inner zone first then progressively closer to the stream.
- If (II) of this subsection results in surplus basal area per the stand requirement, the landowner may take credit for the surplus by harvesting additional riparian leave trees required to be left in the adjacent outer zone on a basal area-for-basal area basis. The number of leave trees in the outer zone can be reduced only to a minimum of ~~((+0))~~ ten trees per acre.

**Option 2. Leaving trees closest to water.**

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width				Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width ≤10'	stream width >10'	stream width >10'	stream width ≤10'	stream width >10'
				minimum floor distance		minimum floor distance		
			(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)		
I	200'	50'	84'	30'	84'	50'	66'	66'
II	170'	50'	64'	30'	70'	50'	56'	50'
III	140'	50'	44'	30'	**	**	46'	**

\*\*Option 2 for site class III on streams >10' is not permitted because of the minimum floor (100') constraint.

(iii) **Where the basal area components of the stand requirement cannot be met** within the sum of the areas in the inner and core zone due to the presence of a stream-adjacent parallel road in the inner or core zone, a determination must be made of the approximate basal area that would have been present in the inner and core zones if the road was not occupying space in the core or inner zone and the shortfall in the basal area component of the stand requirement. See definition of "stream-adjacent parallel road" in WAC 222-16-010.

(A) Trees containing basal area equal to the amount determined in (iii) of this subsection will be left elsewhere in the inner or outer zone, or if the zones contain insufficient riparian leave trees, substitute riparian leave trees will be left within the RMZ width of other Type S or F Waters in the same unit or along Type Np or Ns Waters in the same unit in addition to all other RMZ requirements on those same Type S, F, Np or Ns Waters.

(B) When the stream-adjacent road basal area calculated in (iii) of this subsection results in an excess in basal area

(above stand requirement) then the landowner may receive credit for such excess which can be applied on a basal area-by-basal area basis against the landowner's obligation to leave trees in the outer zone of the RMZ of such stream or other waters within the same unit, provided that the number of trees per acre in the outer zone is not reduced to less than ~~((40))~~ ten trees per acre.

(C) When the basal area requirement cannot be met, as explained in (iii) of this subsection, the shortfall may be reduced through the implementation of an acceptable large woody debris placement plan. See board manual section 26 for guidelines.

(iv) If a harvest operation includes both yarding and harvest activities within the RMZ, all calculations of basal area for stand requirements will be determined as if the yarding corridors were constructed prior to any other harvest activities. If trees cut or damaged by yarding are taken from excess basal area, these trees may be removed from the inner zone. Trees cut or damaged by yarding in a unit which does not meet the basal area target of the stand requirements cannot be removed from the inner zone. Any trees cut or damaged by yarding in the core zone may not be removed.

(c) **Outer zones.** Timber harvest in the outer zone must leave ~~((20))~~ twenty riparian leave trees per acre after harvest. "**Outer zone riparian leave trees**" are trees that must be left after harvest in the outer zone in Western Washington. Riparian leave trees must be left uncut throughout all future harvests:

**Outer zone riparian leave tree requirements**

Application	Leave tree spacing	Tree species	Minimum dbh required
Outer zone	Dispersed	Conifer	12" dbh or greater
Outer zone	Clumped	Conifer	12" dbh or greater
Protection of sensitive features	Clumped	Trees representative of the overstory including both hardwood and conifer	8" dbh or greater

The ~~((20))~~ twenty riparian leave trees to be left can be reduced in number under the circumstances delineated in (c)(iv) of this subsection. The riparian leave trees must be left on the landscape according to one of the following two strategies. A third strategy is available to landowners who agree to a LWD placement plan.

(i) **Dispersal strategy.** Riparian leave trees, which means conifer species with a diameter measured at breast height (dbh) of ~~((12))~~ twelve inches or greater, must be left dispersed approximately evenly throughout the outer zone. If riparian leave trees of ~~((12"))~~ twelve inches dbh or greater are not available, then the next largest conifers must be left. If conifers are not present, riparian leave trees must be left according to the clumping strategy in subsection (ii) below.

(ii) **Clumping strategy.** Riparian leave trees must be left clumped in the following way:

(A) Clump trees in or around one or more of the following **sensitive features** to the extent available within the outer zone. When clumping around sensitive features, riparian

leave trees must be ~~((8))~~ eight inches dbh or greater and representative of the overstory canopy trees in or around the sensitive feature and may include both hardwood and conifer species. Sensitive features are:

- (I) Seeps and springs;
- (II) Forested wetlands;
- (III) Topographic locations (and orientation) from which leave trees currently on the site will be delivered to the water;
- (IV) Areas where riparian leave trees may provide windthrow protection;
- (V) Small unstable, or potentially unstable, slopes not of sufficient area to be detected by other site evaluations. See WAC 222-16-050 (1)(d).
- (VI) Archaeological or historical sites registered with the Washington state department of archaeology and historic preservation. See WAC 222-16-050 (1)(g); or
- (VII) Sites containing evidence of Native American cairns, graves or glyptic records. See WAC 222-16-050 (1)(f).

(B) If sensitive features are not present, then clumps must be well distributed throughout the outer zone and the leave trees must be of conifer species with a dbh of ~~((12))~~ twelve inches or greater. When placing clumps, the applicant will consider operational and biological concerns. Tree counts must be satisfied regardless of the presence of stream-adjacent parallel roads in the outer zone.

(iii) **Large woody debris in-channel placement strategy.** A landowner may design a LWD placement plan in cooperation with the department of fish and wildlife. The plan must be consistent with guidelines in ~~((the))~~ board manual section 26. The landowner may reduce the number of trees required to be left in the outer zone to the extent provided in the approved LWD placement plan. Reduction of trees in the outer zone must not go below a minimum of ~~((40))~~ ten trees per acre. If this strategy is chosen, a complete forest practices application must include a copy of the WDFW approved hydraulics project approval (HPA) permit.

(iv) **Twenty riparian leave trees must be left after harvest** with the exception of the following:

(A) If a landowner agrees to implement a placement strategy, see (iii) of this subsection.

(B) If trees are left in an associated channel migration zone, the landowner may reduce the number of trees required to be left according to the following:

(I) Offsets will be measured on a basal area-for-basal area basis.

(II) Conifer in a CMZ equal to or greater than ~~((6"))~~ six inches dbh will offset conifer in the outer zone at a one-to-one ratio.

(III) Hardwood in a CMZ equal to or greater than ~~((40"))~~ ten inches dbh will offset hardwood in the outer zone at a one-to-one ratio.

(IV) Hardwood in a CMZ equal to or greater than ~~((40"))~~ ten inches dbh will offset conifer in the outer zone at a three-to-one ratio.

**\*2) Western Washington protection for Type Np and Ns Waters.**

(a) An **equipment limitation zone** is a ~~((30-))~~ thirty foot wide zone measured horizontally from the outer edge of the bankfull width of a Type Np or Ns Water where equipment

use and other forest practices that are specifically limited by these rules. It applies to all perennial and seasonal streams.

(i) On-site mitigation is required if any of the following activities exposes the soil on more than ~~((40%))~~ ten percent of the surface area of the zone:

- (A) Ground based equipment;
- (B) Skid trails;
- (C) Stream crossings (other than existing roads); or
- (D) Cabled logs that are partially suspended.

(ii) Mitigation must be designed to replace the equivalent of lost functions especially prevention of sediment delivery. Examples include water bars, grass seeding, mulching, etc.

(iii) Nothing in this subsection (2) reduces or eliminates the department's authority to prevent actual or potential material damage to public resources under WAC 222-46-030 or 222-46-040 or any related authority to condition forest practices notifications or applications.

**(b) Sensitive site and RMZs protection along Type Np Waters.** Forest practices must be conducted to protect Type Np RMZs and sensitive sites as detailed below:

(i) A ~~((50-))~~ fifty foot, no-harvest buffer, measured horizontally from the outer edge of bankfull width, will be established along each side of the Type Np Water as follows:

**Required no-harvest, 50-foot buffers on Type Np Waters.**

Length of Type Np Water from the confluence of Type S or F Water	Length of 50' buffer required on Type Np Water (starting at the confluence of the Type Np and connecting water)
Greater than 1000'	500'
Greater than 300' but less than 1000'	Distance of the greater of 300' or 50% of the entire length of the Type Np Water
Less than or equal to 300'	The entire length of Type Np Water

(ii) No timber harvest is permitted in an area within ~~((50))~~ fifty feet of the outer perimeter of a soil zone perennially saturated from a headwall seep.

(iii) No timber harvest is permitted in an area within ~~((50))~~ fifty feet of the outer perimeter of a soil zone perennially saturated from a side-slope seep.

(iv) No timber harvest is permitted within a ~~((56-))~~ fifty-six foot radius buffer patch centered on the point of intersection of two or more Type Np Waters.

(v) No timber harvest is permitted within a ~~((56-))~~ fifty-six foot radius buffer patch centered on a headwater spring or, in the absence of a headwater spring, on a point at the upper most extent of a Type Np Water as defined in WAC 222-16-030(3) and 222-16-031.

(vi) No timber harvest is permitted within an alluvial fan.

(vii) At least ~~((50%))~~ fifty percent of a Type Np Waters' length must be protected by buffers on both sides of the stream (2-sided buffers). Buffered segments must be a minimum of ~~((100))~~ one hundred feet in length. If an operating area is located more than ~~((500))~~ five hundred feet upstream from the confluence of a Type S or F Water and the Type Np

Water is more than ~~((1,000))~~ one thousand feet in length, then buffer the Type Np Water according to the following table. If the percentage is not met by protecting sensitive sites listed in (b)(i) through (vii) of this subsection, then additional buffers are required on the Type Np Water to meet the requirements listed in the table.

**Minimum percent of length of Type Np Waters to be buffered when more than 500 feet upstream from the confluence of a Type S or F Water**

Total length of a Type Np Water upstream from the confluence of a Type S or F Water	Percent of length of Type Np Water that must be protected with a 50 foot no harvest buffer more than 500 feet upstream from the confluence of a Type S or F Water
1000 feet or less	Refer to table in this subsection (i) above
1001 - 1300 feet	19%
1301 - 1600 feet	27%
1601 - 2000 feet	33%
2001 - 2500 feet	38%
2501 - 3500 feet	42%
3501 - 5000 feet	44%
Greater than 5000 feet	45%

The landowner must select the necessary priority areas for additional ~~((2))~~ two-sided buffers according to the following priorities:

- (A) Low gradient areas;
- (B) Perennial water reaches of nonsedimentary rock with gradients greater than ~~((20%))~~ twenty percent in the tailed frog habitat range;
- (C) Hyporheic and ground water influence zones; and
- (D) Areas downstream from other buffered areas.

Except for the construction and maintenance of road crossings and the creation and use of yarding corridors, no timber harvest will be allowed in the designated priority areas. Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a designated priority area buffer.

(c) None of the limitations on harvest in or around Type Np Water RMZs or sensitive sites listed in (b) of this subsection will preclude or limit:

(i) The construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050.

(ii) The creation and use of yarding corridors in WAC 222-30-060(1).

To the extent reasonably practical, the operation will both avoid creating yarding corridors or road crossings through Type Np Water RMZ or sensitive sites and associated buffers, and avoid management activities which would result in soil compaction, the loss of protective vegetation or sedimentation in perennially moist areas.

Where yarding corridors or road crossings through Type Np Water RMZs or sensitive sites and their buffers cannot reasonably be avoided, the buffer area must be expanded to protect the sensitive site by an area equivalent to the disturbed area or by providing comparable functions through other management initiated efforts.

Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a Type Np Water RMZs or sensitive site buffer.

**AMENDATORY SECTION** (Amending WSR 08-24-011, filed 11/21/08, effective 12/22/08)

**WAC 222-30-021 \*Western Washington riparian management zones.** These rules apply to all typed waters on forest land in Western Washington, except as provided in WAC 222-30-023. RMZs are measured horizontally from the outer edge of the bankfull width or channel migration zone, whichever is greater, and extend to the limits as described in this section. See ~~((the))~~ board manual section 7 for riparian design and layout guidelines.

**\*(1) Western Washington RMZs for Type S and F Waters** have three zones: The core zone is nearest to the water, the inner zone is the middle zone, and the outer zone is furthest from the water. (See definitions in WAC 222-16-010.) RMZ dimensions vary depending on the site class of the land, the management harvest option, and the bankfull width of the stream. See tables for management options 1 and 2 below.

None of the limitations on harvest in each of the three zones listed below will preclude or limit the construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050, or the creation and use of yarding corridors in WAC 222-30-060(1).

The shade requirements in WAC 222-30-040 must be met regardless of harvest opportunities provided in the inner zone RMZ rules. See ~~((the))~~ board manual section 1.

(a) **Core zones.** No timber harvest or construction is allowed in the core zone except operations related to forest roads as detailed in subsection (1) of this section. Any trees cut for or damaged by yarding corridors in the core zone must be left on the site. Any trees cut as a result of road construction to cross a stream may be removed from the site, unless used as part of a large woody debris placement strategy or as needed to reach stand requirements.

(b) **Inner zones.** Forest practices in the inner zone must be conducted in such a way as to meet or exceed stand requirements to achieve the goal in WAC 222-30-010(2). The width of the inner zone is determined by site class, bankfull width, and management option. Timber harvest in this zone must be consistent with the stand requirements in order to reach the desired future condition targets.

**"Stand requirement"** means a number of trees per acre, the basal area and the proportion of conifer in the combined inner zone and adjacent core zone so that the growth of the trees would meet desired future conditions. The following table defines basal area targets when the stand is ~~((140))~~ one hundred forty years old.

Site Class	Desired future condition target basal area per acre (at 140 years)
I	<del>((285))</del> <u>325</u> sq. ft.
II	<del>((275))</del> <u>325</u> sq. ft.
III	<del>((258))</del> <u>325</u> sq. ft.
IV	<del>((224))</del> <u>325</u> sq. ft.
V	<del>((190))</del> <u>325</u> sq. ft.

Growth modeling is necessary to calculate whether a particular stand meets stand requirement and is on a trajectory towards these desired future condition basal area target. The appropriate growth model will be based on stand characteristics and will include at a minimum, the following components: The number of trees by diameter class, the percent of conifer and hardwood, and the age of the stand. See ~~((the))~~ board manual section 7.

(i) **Hardwood conversion in the inner zone.** When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone, except in connection with hardwood conversion.

(A) The landowner may elect to convert hardwood-dominated stands in the **inner zone** to conifer-dominated stands. Harvesting and replanting shall be in accordance with the following limits:

(I) Conversion activities in the **inner zone** of any harvest unit are only allowed where all of the following are present:

- Existing stands in the combined core and inner zone do not meet stand requirements (WAC 222-30-021 (1)(b));
- There are fewer than ~~((57))~~ fifty-seven conifer trees per acre ~~((8))~~ eight inches or larger dbh in the conversion area;
- There are fewer than ~~((100))~~ one hundred conifer trees per acre larger than ~~((4))~~ four inches dbh in the conversion area;
- There is evidence (such as conifer stumps, historical photos, or a conifer understory) that the conversion area can be successfully reforested with conifer and support the development of conifer stands;
- The landowner owns ~~((500))~~ five hundred feet upstream and ~~((500))~~ five hundred feet downstream of the harvest unit;
- The core and inner zones contain no stream adjacent parallel roads;
- Riparian areas contiguous to the proposed harvest unit are owned by the landowner proposing to conduct the conversion activities, and meet shade requirements of WAC 222-30-040 or have a ~~((75-))~~ seventy-five foot buffer with trees at least ~~((40))~~ forty feet tall on both sides of the stream for ~~((500))~~ five hundred feet upstream and ~~((500))~~ five hundred feet downstream of the proposed harvest unit (or the length of the stream, if less);
- If the landowner has previously converted hardwood-dominated stands, then post-harvest treatments must have been performed to the satisfaction of the department.

(II) In addition to the conditions set forth above, permitted conversion activities in the **inner zone** of any harvest unit are limited by the following:

- Each continuous conversion area is not more than ~~((500))~~ five hundred feet in length; two conversion areas will be considered "continuous" unless the no-harvest area sepa-



rating the two conversion areas is at least half the length of the larger of the two conversion areas.

- Type S and F (Type 1, 2, or 3) Water: Up to ~~((50%))~~ fifty percent of the inner zone area of the harvest unit on one side of the stream may be converted provided that:

- ◆ The landowner owns the opposite side of the stream and the landowner's riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a ~~((75-))~~ seventy-five foot buffer of trees at least ~~((40))~~ forty feet tall or:

- ◆ The landowner does not own land on the opposite side of the stream but the riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a ~~((75-))~~ seventy-five foot buffer of trees at least ~~((40))~~ forty feet tall.

- Not more than ~~((25%))~~ twenty-five percent of the inner zone of the harvest unit on both sides of a Type S or F Water may be converted if the landowner owns both sides.

(III) Where conversion is allowed in the **inner zone**, trees within the conversion area may be harvested except that:

- Conifer trees larger than ~~((20))~~ twenty inches dbh shall not be harvested;

- Not more than ~~((10%))~~ ten percent of the conifer stems greater than ~~((8))~~ eight inches dbh, exclusive of the conifer noted above, within the conversion area may be harvested; and

- The landowner must exercise reasonable care in the conduct of harvest activities to minimize damage to all residual conifer trees within the conversion area including conifer trees less than ~~((8))~~ eight inches dbh.

(IV) Following harvest in conversion areas, the landowner must:

- Reforest the conversion area with **conifer** tree species suitable to the site in accordance with the requirements of WAC 222-34-010; and

- Conduct post-harvest treatment of the site until the conifer trees necessary to meet acceptable stocking levels in WAC 222-34-010(2) have crowns above the brush or until the conversion area contains a minimum of ~~((150))~~ one hundred fifty conifer trees greater than ~~((8))~~ eight inches dbh per acre.

- Notify the department in writing within three years of the approval of the forest practices application for hardwood conversion, if the hardwood conversion has been completed.

(V) **Tracking hardwood conversion.** The purpose of tracking hardwood conversion is to determine if hardwood conversion is resulting in adequate enhancement of riparian functions toward the desired future condition while minimizing the short term impacts on functions. The department will use existing or updated data bases developed in cooperation with the Washington Hardwoods Commission to identify watershed administrative units (WAUs) with a high percentage of hardwood-dominated riparian areas and, thus have the potential for excessive hardwood conversion under these rules. The department will track the rate of conversion of hardwoods in the riparian zone: (1) Through the application process on an annual basis; and (2) at a WAU scale on a biennial basis as per WAC 222-30-120 through the adaptive management process which will develop thresholds of impact for hardwood conversion at the watershed scale.

(ii) **Harvest options.**

(A) No inner zone management. When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone. When no harvest is permitted in the inner zone or the landowner chooses not to enter the inner zone, the width of core, inner and outer zones are as provided in the following table:

**No inner zone management RMZ widths for Western Washington**

Site Class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
			I	200'	50'	83'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(B) Inner zone management. If trees can be harvested and removed from the inner zone because of surplus basal area consistent with the stand requirement, the harvest and removal of the trees must be undertaken consistent with one of two options:

(I) **Option 1. Thinning from below.** The objective of thinning is to distribute stand requirement trees in such a way as to shorten the time required to meet large wood, fish habitat and water quality needs. This is achieved by increasing the potential for leave trees to grow larger than they otherwise

would without thinning. Thinning harvest under option 1 must comply with the following:

- Residual trees left in the combined core and inner zones must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for guidelines.

- Thinning must be from below, meaning the smallest dbh trees are selected for harvest first, then progressing to successively larger diameters.

- Thinning cannot decrease the proportion of conifer in the stand.

- Shade retention to meet the shade rule must be confirmed by the landowner for any harvest inside of ~~((75))~~ seventy-five feet from the outer edge of bankfull width or outer edge of CMZ, whichever is greater.

- The number of residual conifer trees per acre in the inner zone will equal or exceed ~~((57))~~ fifty-seven.

**Option 1. Thinning from below.**

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
			I	200'	50'	83'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(II) **Option 2. Leaving trees closest to the water.** Management option 2 applies only to riparian management zones for site class I, II, and III on streams that are less than or equal to ~~((+0))~~ ten feet wide and RMZs in site class I and II for streams greater than ~~((+0))~~ ten feet wide. Harvest must comply with the following:

- Harvest is not permitted within ~~((30))~~ thirty feet of the core zone for streams less than or equal to ~~((+0))~~ ten feet wide and harvest is not permitted within ~~((50))~~ fifty feet of the core zone for streams greater than ~~((+0))~~ ten feet wide;
- Residual leave trees in the combined core and inner zone must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for calculating stand requirements;

- A minimum of ~~((20))~~ twenty conifers per acre, with a minimum ~~((+2-))~~ twelve inch dbh, will be retained in any portion of the inner zone where harvest occurs. These riparian leave trees will not be counted or considered towards meeting applicable stand requirements nor can the number be reduced below ~~((20))~~ twenty for any reason.

- Trees are selected for harvest starting from the outer most portion of the inner zone first then progressively closer to the stream.

- If (II) of this subsection results in surplus basal area per the stand requirement, the landowner may take credit for the surplus by harvesting additional riparian leave trees required to be left in the adjacent outer zone on a basal area-for-basal area basis. The number of leave trees in the outer zone can be reduced only to a minimum of ~~((+0))~~ ten trees per acre.

**Option 2. Leaving trees closest to water.**

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width				Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width ≤10'	stream width >10'	stream width >10'	stream width ≤10'	stream width >10'
				minimum floor distance		minimum floor distance		
			(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)		
I	200'	50'	84'	30'	84'	50'	66'	66'
II	170'	50'	64'	30'	70'	50'	56'	50'
III	140'	50'	44'	30'	**	**	46'	**

\*\*Option 2 for site class III on streams >10' is not permitted because of the minimum floor (100') constraint.

(iii) **Where the basal area components of the stand requirement cannot be met** within the sum of the areas in the inner and core zone due to the presence of a stream-adjacent parallel road in the inner or core zone, a determination must be made of the approximate basal area that would have been present in the inner and core zones if the road was not

occupying space in the core or inner zone and the shortfall in the basal area component of the stand requirement. See definition of "stream-adjacent parallel road" in WAC 222-16-010.

(A) Trees containing basal area equal to the amount determined in (iii) of this subsection will be left elsewhere in

the inner or outer zone, or if the zones contain insufficient riparian leave trees, substitute riparian leave trees will be left within the RMZ width of other Type S or F Waters in the same unit or along Type Np or Ns Waters in the same unit in addition to all other RMZ requirements on those same Type S, F, Np or Ns Waters.

(B) When the stream-adjacent road basal area calculated in (iii) of this subsection results in an excess in basal area (above stand requirement) then the landowner may receive credit for such excess which can be applied on a basal area-by-basal area basis against the landowner's obligation to leave trees in the outer zone of the RMZ of such stream or other waters within the same unit, provided that the number of trees per acre in the outer zone is not reduced to less than ~~((10))~~ ten trees per acre.

(C) When the basal area requirement cannot be met, as explained in (iii) of this subsection, the shortfall may be reduced through the implementation of an acceptable large woody debris placement plan. See board manual section 26 for guidelines.

(iv) If a harvest operation includes both yarding and harvest activities within the RMZ, all calculations of basal area for stand requirements will be determined as if the yarding corridors were constructed prior to any other harvest activities. If trees cut or damaged by yarding are taken from excess basal area, these trees may be removed from the inner zone. Trees cut or damaged by yarding in a unit which does not meet the basal area target of the stand requirements cannot be removed from the inner zone. Any trees cut or damaged by yarding in the core zone may not be removed.

(c) **Outer zones.** Timber harvest in the outer zone must leave ~~((20))~~ twenty riparian leave trees per acre after harvest. "**Outer zone riparian leave trees**" are trees that must be left after harvest in the outer zone in Western Washington. Riparian leave trees must be left uncut throughout all future harvests:

**Outer zone riparian leave tree requirements**

Application	Leave tree spacing	Tree species	Minimum dbh required
Outer zone	Dispersed	Conifer	12" dbh or greater
Outer zone	Clumped	Conifer	12" dbh or greater
Protection of sensitive features	Clumped	Trees representative of the overstory including both hardwood and conifer	8" dbh or greater

The ~~((20))~~ twenty riparian leave trees to be left can be reduced in number under the circumstances delineated in (c)(iv) of this subsection. The riparian leave trees must be left on the landscape according to one of the following two strategies. A third strategy is available to landowners who agree to a LWD placement plan.

(i) **Dispersal strategy.** Riparian leave trees, which means conifer species with a diameter measured at breast height (dbh) of ~~((12))~~ twelve inches or greater, must be left dispersed approximately evenly throughout the outer zone. If riparian leave trees of ~~((12"))~~ twelve inches dbh or greater are

not available, then the next largest conifers must be left. If conifers are not present, riparian leave trees must be left according to the clumping strategy in subsection (ii) below.

(ii) **Clumping strategy.** Riparian leave trees must be left clumped in the following way:

(A) Clump trees in or around one or more of the following **sensitive features** to the extent available within the outer zone. When clumping around sensitive features, riparian leave trees must be ~~((8))~~ eight inches dbh or greater and representative of the overstory canopy trees in or around the sensitive feature and may include both hardwood and conifer species. Sensitive features are:

- (I) Seeps and springs;
- (II) Forested wetlands;
- (III) Topographic locations (and orientation) from which leave trees currently on the site will be delivered to the water;
- (IV) Areas where riparian leave trees may provide windthrow protection;
- (V) Small unstable, or potentially unstable, slopes not of sufficient area to be detected by other site evaluations. See WAC 222-16-050 (1)(d).
- (VI) Archaeological or historical sites registered with the Washington state department of archaeology and historic preservation. See WAC 222-16-050 (1)(g); or
- (VII) Sites containing evidence of Native American cairns, graves or glyptic records. See WAC 222-16-050 (1)(f).

(B) If sensitive features are not present, then clumps must be well distributed throughout the outer zone and the leave trees must be of conifer species with a dbh of ~~((12))~~ twelve inches or greater. When placing clumps, the applicant will consider operational and biological concerns. Tree counts must be satisfied regardless of the presence of stream-adjacent parallel roads in the outer zone.

(ii) **Large woody debris in-channel placement strategy.** A landowner may design a LWD placement plan in cooperation with the department of fish and wildlife. The plan must be consistent with guidelines in ~~((the))~~ board manual section 26. The landowner may reduce the number of trees required to be left in the outer zone to the extent provided in the approved LWD placement plan. Reduction of trees in the outer zone must not go below a minimum of ~~((10))~~ ten trees per acre. If this strategy is chosen, a complete forest practices application must include a copy of the WDFW approved hydraulics project approval (HPA) permit.

(iv) **Twenty riparian leave trees must be left after harvest** with the exception of the following:

(A) If a landowner agrees to implement a placement strategy, see (iii) of this subsection.

(B) If trees are left in an associated channel migration zone, the landowner may reduce the number of trees required to be left according to the following:

(I) Offsets will be measured on a basal area-for-basal area basis.

(II) Conifer in a CMZ equal to or greater than ~~((6"))~~ six inches dbh will offset conifer in the outer zone at a one-to-one ratio.

(III) Hardwood in a CMZ equal to or greater than ~~((40"))~~ ten inches dbh will offset hardwood in the outer zone at a one-to-one ratio.

(IV) Hardwood in a CMZ equal to or greater than ~~((40"))~~ ten inches dbh will offset conifer in the outer zone at a three-to-one ratio.

**\* (2) Western Washington protection for Type Np and Ns Waters.**

(a) An **equipment limitation zone** is a ~~((30-))~~ thirty foot wide zone measured horizontally from the outer edge of the bankfull width of a Type Np or Ns Water where equipment use and other forest practices that are specifically limited by these rules. It applies to all perennial and seasonal streams.

(i) On-site mitigation is required if any of the following activities exposes the soil on more than ~~((40%))~~ ten percent of the surface area of the zone:

- (A) Ground based equipment;
- (B) Skid trails;
- (C) Stream crossings (other than existing roads); or
- (D) Cabled logs that are partially suspended.

(ii) Mitigation must be designed to replace the equivalent of lost functions especially prevention of sediment delivery. Examples include water bars, grass seeding, mulching, etc.

(iii) Nothing in this subsection (2) reduces or eliminates the department's authority to prevent actual or potential material damage to public resources under WAC 222-46-030 or 222-46-040 or any related authority to condition forest practices notifications or applications.

(b) **Sensitive site and RMZs protection along Type Np Waters.** Forest practices must be conducted to protect Type Np RMZs and sensitive sites as detailed below:

(i) A ~~((50-))~~ fifty foot, no-harvest buffer, measured horizontally from the outer edge of bankfull width, will be established along each side of the Type Np Water as follows:

**Required no-harvest, 50-foot buffers on Type Np Waters.**

Length of Type Np Water from the confluence of Type S or F Water	Length of 50' buffer required on Type Np Water (starting at the confluence of the Type Np and connecting water)
Greater than 1000'	500'
Greater than 300' but less than 1000'	Distance of the greater of 300' or 50% of the entire length of the Type Np Water
Less than or equal to 300'	The entire length of Type Np Water

(ii) No timber harvest is permitted in an area within ~~((50))~~ fifty feet of the outer perimeter of a soil zone perennially saturated from a headwall seep.

(iii) No timber harvest is permitted in an area within ~~((50))~~ fifty feet of the outer perimeter of a soil zone perennially saturated from a side-slope seep.

(iv) No timber harvest is permitted within a ~~((56-))~~ fifty-six foot radius buffer patch centered on the point of intersection of two or more Type Np Waters.

(v) No timber harvest is permitted within a ~~((56-))~~ fifty-six foot radius buffer patch centered on a headwater spring or, in the absence of a headwater spring, on a point at the upper most extent of a Type Np Water as defined in WAC 222-16-030(3) and 222-16-031.

(vi) No timber harvest is permitted within an alluvial fan.

(vii) At least ~~((50%))~~ fifty percent of a Type Np Waters' length must be protected by buffers on both sides of the stream (2-sided buffers). Buffered segments must be a minimum of ~~((400))~~ one hundred feet in length. If an operating area is located more than ~~((500))~~ five hundred feet upstream from the confluence of a Type S or F Water and the Type Np Water is more than ~~((1,000))~~ one thousand feet in length, then buffer the Type Np Water according to the following table. If the percentage is not met by protecting sensitive sites listed in (b)(i) through (vii) of this subsection, then additional buffers are required on the Type Np Water to meet the requirements listed in the table.

**Minimum percent of length of Type Np Waters to be buffered when more than 500 feet upstream from the confluence of a Type S or F Water**

Total length of a Type Np Water upstream from the confluence of a Type S or F Water	Percent of length of Type Np Water that must be protected with a 50 foot no harvest buffer more than 500 feet upstream from the confluence of a Type S or F Water
1000 feet or less	Refer to table in this subsection (i) above
1001 - 1300 feet	19%
1301 - 1600 feet	27%
1601 - 2000 feet	33%
2001 - 2500 feet	38%
2501 - 3500 feet	42%
3501 - 5000 feet	44%
Greater than 5000 feet	45%

The landowner must select the necessary priority areas for additional ~~((2))~~ two-sided buffers according to the following priorities:

- (A) Low gradient areas;
- (B) Perennial water reaches of nonsedimentary rock with gradients greater than ~~((20%))~~ twenty percent in the tailed frog habitat range;
- (C) Hyporheic and ground water influence zones; and
- (D) Areas downstream from other buffered areas.

Except for the construction and maintenance of road crossings and the creation and use of yarding corridors, no timber harvest will be allowed in the designated priority areas. Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a designated priority area buffer.

(c) None of the limitations on harvest in or around Type Np Water RMZs or sensitive sites listed in (b) of this subsection will preclude or limit:

(i) The construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050.

(ii) The creation and use of yarding corridors in WAC 222-30-060(1).

To the extent reasonably practical, the operation will both avoid creating yarding corridors or road crossings through Type Np Water RMZ or sensitive sites and associated buffers, and avoid management activities which would result in soil compaction, the loss of protective vegetation or sedimentation in perennially moist areas.

Where yarding corridors or road crossings through Type Np Water RMZs or sensitive sites and their buffers cannot reasonably be avoided, the buffer area must be expanded to protect the sensitive site by an area equivalent to the disturbed area or by providing comparable functions through other management initiated efforts.

Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a Type Np Water RMZs or sensitive site buffer.

**AMENDATORY SECTION** (Amending WSR 08-24-011, filed 11/21/08, effective 12/22/08)

**WAC 222-30-021 \*Western Washington riparian management zones.** These rules apply to all typed waters on forest land in Western Washington, except as provided in WAC 222-30-023. RMZs are measured horizontally from the outer edge of the bankfull width or channel migration zone, whichever is greater, and extend to the limits as described in this section. See ~~((the))~~ board manual section 7 for riparian design and layout guidelines.

**\* (1) Western Washington RMZs for Type S and F Waters** have three zones: The core zone is nearest to the water, the inner zone is the middle zone, and the outer zone is furthest from the water. (See definitions in WAC 222-16-010.) RMZ dimensions vary depending on the site class of the land, the management harvest option, and the bankfull width of the stream. See ~~((tables for))~~ management options 1 and 2 below.

None of the limitations on harvest in each of the three zones listed below will preclude or limit the construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050, or the creation and use of yarding corridors in WAC 222-30-060(1).

The shade requirements in WAC 222-30-040 must be met regardless of harvest opportunities provided in the ~~((inner zone))~~ RMZ rules. See ~~((the))~~ board manual section 1.

(a) **Core zones.** No timber harvest or construction is allowed ~~((in))~~ within the fifty-foot core zone except operations related to forest roads as detailed in subsection (1) of this section. Any trees cut for or damaged by yarding corridors in the core zone must be left on the site. Any trees cut as a result of road construction to cross a stream may be removed from the site, unless used as part of a large woody debris placement strategy or as needed to reach stand requirements.

(b) **Inner zones.** Forest practices in the inner zone must be conducted in such a way as to meet or exceed stand requirements to achieve the goal in WAC 222-30-010(2). The width of the inner zone is determined by site class, bankfull width, and management option as described in this section. Timber harvest in this zone must be consistent with the stand

requirements in order to reach the desired future condition targets.

**"Stand requirement"** means a number of trees per acre, the basal area and the proportion of conifer in the combined inner zone and adjacent core zone so that the growth of the trees would meet desired future conditions~~((The following table defines basal area targets when the stand is 140 years old:~~

Site Class	Desired future condition target basal area per acre (at 140 years)
I	285 sq. ft.
II	275 sq. ft.
III	258 sq. ft.
IV	224 sq. ft.
V	190 sq. ft.

~~Growth modeling is necessary to calculate whether a particular stand meets stand requirement and is on a trajectory towards these desired future condition basal area target. The appropriate growth model will be based on stand characteristics and will include at a minimum, the following components: The number of trees by diameter class, the percent of conifer and hardwood, and the age of the stand. See the board manual section 7.) of three hundred twenty-five square feet per acre for all site classes at age one hundred forty. The growth modeling program provided by the department must be used to calculate whether a particular stand meets the stand requirement and is on a trajectory towards the desired future condition basal area target.~~

(i) **Hardwood conversion in the inner zone.** When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone, except in connection with hardwood conversion.

(A) The landowner may elect to convert hardwood-dominated stands in the **inner zone** to conifer-dominated stands. Harvesting and replanting shall be in accordance with the following limits:

(I) Conversion activities in the **inner zone** of any harvest unit are only allowed where all of the following are present:

- Existing stands in the ~~((combined core and))~~ inner zone do not meet stand requirements (WAC 222-30-021 (1)(b));
- There are fewer than ~~((57))~~ fifty-seven conifer trees per acre ~~((8))~~ eight inches or larger dbh in the conversion area;
- There are fewer than ~~((100))~~ one hundred conifer trees per acre larger than ~~((4))~~ four inches dbh in the conversion area;
- There is evidence (such as conifer stumps, historical photos, or a conifer understory) that the conversion area can be successfully reforested with conifer and support the development of conifer stands;
- The landowner owns ~~((500))~~ five hundred feet upstream and ~~((500))~~ five hundred feet downstream of the harvest unit;
- The core and inner zones contain no stream adjacent parallel roads;
- Riparian areas contiguous to the proposed harvest unit are owned by the landowner proposing to conduct the conversion activities, and meet shade requirements of WAC 222-30-040 or have a ~~((75-))~~ seventy-five foot buffer with trees at

least ~~((40))~~ forty feet tall on both sides of the stream for ~~((500))~~ five hundred feet upstream and ~~((500))~~ five hundred feet downstream of the proposed harvest unit (or the length of the stream, if less);

- If the landowner has previously converted hardwood-dominated stands, then post-harvest treatments must have been performed to the satisfaction of the department.

(II) In addition to the conditions set forth above, permitted conversion activities in the **inner zone** of any harvest unit are limited by the following:

- Each continuous conversion area is not more than ~~((500))~~ five hundred feet in length; two conversion areas will be considered "continuous" unless the no-harvest area separating the two conversion areas is at least half the length of the larger of the two conversion areas.

- Type S and F (Type 1, 2, or 3) Water: Up to ~~((50%))~~ fifty percent of the inner zone area of the harvest unit on one side of the stream may be converted provided that:

- ◆ The landowner owns the opposite side of the stream and the landowner's riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a ~~((75-))~~ seventy-five foot buffer of trees at least ~~((40))~~ forty feet tall or:

- ◆ The landowner does not own land on the opposite side of the stream but the riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a ~~((75-))~~ seventy-five foot buffer of trees at least ~~((40))~~ forty feet tall.

- Not more than ~~((25%))~~ twenty-five percent of the inner zone of the harvest unit on both sides of a Type S or F Water may be converted if the landowner owns both sides.

(III) Where conversion is allowed in the **inner zone**, trees within the conversion area may be harvested except that:

- Conifer trees larger than ~~((20))~~ twenty inches dbh shall not be harvested;

- Not more than ~~((10%))~~ ten percent of the conifer stems greater than ~~((8))~~ eight inches dbh, exclusive of the conifer noted above, within the conversion area may be harvested; and

- The landowner must exercise reasonable care in the conduct of harvest activities to minimize damage to all residual conifer trees within the conversion area including conifer trees less than ~~((8))~~ eight inches dbh.

(IV) Following harvest in conversion areas, the landowner must:

- Reforest the conversion area with **conifer** tree species suitable to the site in accordance with the requirements of WAC 222-34-010; and

- Conduct post-harvest treatment of the site until the conifer trees necessary to meet acceptable stocking levels in WAC 222-34-010(2) have crowns above the brush or until the conversion area contains a minimum of ~~((150))~~ one hundred fifty conifer trees greater than ~~((8))~~ eight inches dbh per acre.

- Notify the department in writing within three years of the approval of the forest practices application for hardwood conversion, if the hardwood conversion has been completed.

(V) **Tracking hardwood conversion.** The purpose of tracking hardwood conversion is to determine if hardwood conversion is resulting in adequate enhancement of riparian functions toward the desired future condition while minimizing the short term impacts on functions. The department will use existing or updated data bases developed in cooperation with the Washington Hardwoods Commission to identify watershed administrative units (WAUs) with a high percentage of hardwood-dominated riparian areas and, thus have the potential for excessive hardwood conversion under these rules. The department will track the rate of conversion of hardwoods in the riparian zone: (1) Through the application process on an annual basis; and (2) at a WAU scale on a biennial basis as per WAC 222-30-120 through the adaptive management process which will develop thresholds of impact for hardwood conversion at the watershed scale.

(ii) **Harvest options.**

(A) No inner zone management. When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone. When no harvest is permitted in the inner zone or the landowner chooses not to enter the inner zone, the width of core, inner and outer zones are as provided in the following table:

**No inner zone management RMZ widths for Western Washington**

Site Class	RMZ width	( <del>((Core zone width</del> (measured from outer edge of bankfull width or outer edge of CMZ of water))	<u>Combined core and inner zone width</u> (measured from outer edge of ( <del>((core zone))</del> <u>bankfull width or outer edge of CMZ</u> )		<u>Outer zone width</u> (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
			I	200'	50'	<del>((83'))</del> <u>133'</u>
II	170'	50'	<del>((63'))</del> <u>113'</u>	<del>((78'))</del> <u>128'</u>	57'	42'
III	140'	50'	<del>((43'))</del> <u>93'</u>	<del>((55'))</del> <u>105'</u>	47'	35'
IV	110'	50'	<del>((23'))</del> <u>73'</u>	<del>((33'))</del> <u>83'</u>	37'	27'
V	90'	50'))	<del>((10'))</del> <u>60'</u>	<del>((18'))</del> <u>68'</u>	30'	22'

(B) Inner zone management. If trees can be harvested and removed from the inner zone because of surplus basal area consistent with the stand requirement, the harvest and removal of the trees must be undertaken consistent with one of two options:

(I) **Option 1. Thinning from below.** The objective of thinning is to distribute stand requirement trees in such a way as to shorten the time required to meet large wood, fish habitat and water quality needs. This is achieved by increasing the potential for leave trees to grow larger than they otherwise would without thinning. Thinning harvest under option 1 must comply with the following:

- Residual trees left in the combined core and inner zones must meet stand requirements necessary to be on a trajectory

to desired future condition. See board manual section 7 for guidelines.

- Thinning must be from below, meaning the smallest dbh trees are selected for harvest first, then progressing to successively larger diameters.
- Thinning cannot decrease the proportion of conifer in the stand.
- Shade retention to meet the shade rule must be confirmed by the landowner for any harvest inside of ~~((75))~~ seventy-five feet from the outer edge of bankfull width or outer edge of CMZ, whichever is greater.
- The number of residual conifer trees per acre in the inner zone will equal or exceed ~~((57))~~ fifty-seven.

**Option 1. Thinning from below.**

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
I	200'	50'	83'	100'	67'	50'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(II) **Option 2. Leaving trees closest to the water.** (~~Management option 2 applies only to riparian management zones for site class I, II, and III on streams that are less than or equal to 10 feet wide and RMZs in site class I and II for streams greater than 10 feet wide. Harvest must comply with the following:~~

- ~~• Harvest is not permitted within 30 feet of the core zone for streams less than or equal to 10 feet wide and harvest is not permitted within 50 feet of the core zone for streams greater than 10 feet wide;~~
- ~~• Residual leave trees in the combined core and inner zone must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for calculating stand requirements;~~
- ~~• A minimum of 20 conifers per acre, with a minimum 12 inch dbh, will be retained in any portion of the inner zone where harvest occurs. These riparian leave trees will not be counted or considered towards meeting applicable stand requirements nor can the number be reduced below 20 for any reason.~~
- ~~• Trees are selected for harvest starting from the outer most portion of the inner zone first then progressively closer to the stream.~~
- ~~• If (II) of this subsection results in surplus basal area per the stand requirement, the landowner may take credit for the surplus by harvesting additional riparian leave trees required to be left in the adjacent outer zone on a basal area for basal area basis. The number of leave trees in the outer zone can be reduced only to a minimum of 10 trees per acre.)~~ The objective of this option is to retain an RMZ width that will maintain current riparian functions. The stand must provide suffi-

cient residual conifer trees in the combined core and inner zones to reach the target basal area of three hundred twenty-five square feet per acre at age one hundred forty.

Inner zone harvest may occur under option 2 if the projected future basal area within the combined width of the core and inner zones exceeds the target basal area. The combined core and inner zone width must be determined using the leaving trees closest to the water table below; the future basal area must then be calculated using the growth model program provided by the department. The model will produce a minimum inner zone floor width. (The minimum floor width extends outward from the outer edge of the fifty-foot core zone.)

Harvest is permitted under option 2 in the following order:

- If the projected basal area within the combined core and inner zones exceeds the target basal area, an even-age harvest may occur starting at the outermost portion of the inner zone and progressing to the inner zone floor edge.
- In any portion of the inner zone where an even-age harvest method occurs, at least twenty conifer trees per acre with a minimum dbh of twelve inches must be retained. The basal area of these trees will be counted towards meeting applicable stand requirements.
- If the projected basal area within the combined core and inner zones still exceeds the target basal area, the conifer trees otherwise required to be left in the outer zone may be harvested on a basal-area-for-basal-area basis; however, only a maximum of ten conifer trees per acre may be harvested in the outer zone. (Tree counts, minimum size and placement of outer zone trees are specified below in (c) of this subsection.)

Option 2. Leaving trees closest to water.

Site class	Total RMZ width	((Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Combined core and inner zone width (measured from outer edge of bankfull width or outer edge of CMZ)				Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width ≤10'	stream width >10'	stream width >10'	stream width ≤10'	stream width >10'
			core and inner zone width	minimum floor ((distance)) width	core and inner zone width	minimum floor ((distance)) width		
		((measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone))			
I	200'	50'	((84')) 134'	((30')) 80'	((84')) 134'	((50')) 100'	66'	66'
II	170'	50'	((64')) 114'	((30')) 80'	((70')) 120'	((50')) 100'	56'	50'
III	140'	50'))	((44')) 94'	((30')) 80'	((**)) 105'	((**)) 80'	46'	((**)) 35'
IV	110'		74'		83'	80'	36'	27'
V	90'		61'		68'		29'	22'

((\*\*Option 2 for site class III on streams >10' is not permitted because of the minimum floor (100') constraint.))

(iii) Where the basal area components of the stand requirement cannot be met within the sum of the areas in the inner and core zone due to the presence of a stream-adjacent parallel road in the inner or core zone, a determination must be made of the approximate basal area that would have been present in the inner and core zones if the road was not occupying space in the core or inner zone and the shortfall in the basal area component of the stand requirement. See definition of "stream-adjacent parallel road" in WAC 222-16-010.

(A) Trees containing basal area equal to the amount determined in (iii) of this subsection will be left elsewhere in the inner or outer zone, or if the zones contain insufficient riparian leave trees, substitute riparian leave trees will be left within the RMZ width of other Type S or F Waters in the same unit or along Type Np or Ns Waters in the same unit in addition to all other RMZ requirements on those same Type S, F, Np or Ns Waters.

(B) When the stream-adjacent road basal area calculated in (iii) of this subsection results in an excess in basal area (above stand requirement) then the landowner may receive credit for such excess which can be applied on a basal area-by-basal area basis against the landowner's obligation to leave trees in the outer zone of the RMZ of such stream or other waters within the same unit, provided that the number of trees per acre in the outer zone is not reduced to less than ((10)) ten trees per acre.

(C) When the basal area requirement cannot be met, as explained in (iii) of this subsection, the shortfall may be reduced through the implementation of an acceptable large woody debris placement plan. See board manual section 26 for guidelines.

(iv) If a harvest operation includes both yarding and harvest activities within the RMZ, all calculations of basal area for stand requirements will be determined as if the yarding corridors were constructed prior to any other harvest activities. If trees cut or damaged by yarding are taken from excess

basal area, these trees may be removed from the inner zone. Trees cut or damaged by yarding in a unit which does not meet the basal area target of the stand requirements cannot be removed from the inner zone. Any trees cut or damaged by yarding in the core zone may not be removed.

(c) Outer zones. Timber harvest in the outer zone must leave ((20)) twenty riparian leave trees per acre after harvest. "Outer zone riparian leave trees" are trees that must be left after harvest in the outer zone in Western Washington. Riparian leave trees must be left uncut throughout all future harvests:

Outer zone riparian leave tree requirements

Application	Leave tree spacing	Tree species	Minimum dbh required
Outer zone	Dispersed	Conifer	12" dbh or greater
Outer zone	Clumped	Conifer	12" dbh or greater
Protection of sensitive features	Clumped	Trees representative of the overstory including both hardwood and conifer	8" dbh or greater

The ((20)) twenty riparian leave trees to be left can be reduced in number under the circumstances delineated in (c)(iv) of this subsection. The riparian leave trees must be left on the landscape according to one of the following two strategies. A third strategy is available to landowners who agree to a LWD placement plan.

(i) Dispersal strategy. Riparian leave trees, which means conifer species with a diameter measured at breast height (dbh) of ((12)) twelve inches or greater, must be left dispersed approximately evenly throughout the outer zone. If riparian leave trees of ((12")) twelve inches dbh or greater are not available, then the next largest conifers must be left. If



conifers are not present, riparian leave trees must be left according to the clumping strategy in subsection (ii) below.

(ii) **Clumping strategy.** Riparian leave trees must be left clumped in the following way:

(A) Clump trees in or around one or more of the following **sensitive features** to the extent available within the outer zone. When clumping around sensitive features, riparian leave trees must be ~~((8))~~ eight inches dbh or greater and representative of the overstory canopy trees in or around the sensitive feature and may include both hardwood and conifer species. Sensitive features are:

(I) Seeps and springs;

(II) Forested wetlands;

(III) Topographic locations (and orientation) from which leave trees currently on the site will be delivered to the water;

(IV) Areas where riparian leave trees may provide windthrow protection;

(V) Small unstable, or potentially unstable, slopes not of sufficient area to be detected by other site evaluations. See WAC 222-16-050 (1)(d).

(VI) Archaeological or historical sites registered with the Washington state department of archaeology and historic preservation. See WAC 222-16-050 (1)(g); or

(VII) Sites containing evidence of Native American cairns, graves or glyptic records. See WAC 222-16-050 (1)(f).

(B) If sensitive features are not present, then clumps must be well distributed throughout the outer zone and the leave trees must be of conifer species with a dbh of ~~((12))~~ twelve inches or greater. When placing clumps, the applicant will consider operational and biological concerns. Tree counts must be satisfied regardless of the presence of stream-adjacent parallel roads in the outer zone.

(iii) **Large woody debris in-channel placement strategy.** A landowner may design a LWD placement plan in cooperation with the department of fish and wildlife. The plan must be consistent with guidelines in ~~((the))~~ board manual section 26. The landowner may reduce the number of trees required to be left in the outer zone to the extent provided in the approved LWD placement plan. Reduction of trees in the outer zone must not go below a minimum of ~~((10))~~ ten trees per acre. If this strategy is chosen, a complete forest practices application must include a copy of the WDFW approved hydraulics project approval (HPA) permit.

(iv) **Twenty riparian leave trees must be left after harvest** with the exception of the following:

(A) If a landowner agrees to implement a placement strategy, see (iii) of this subsection.

(B) If trees are left in an associated channel migration zone, the landowner may reduce the number of trees required to be left according to the following:

(I) Offsets will be measured on a basal area-for-basal area basis.

(II) Conifer in a CMZ equal to or greater than ~~((6"))~~ six inches dbh will offset conifer in the outer zone at a one-to-one ratio.

(III) Hardwood in a CMZ equal to or greater than ~~((10"))~~ ten inches dbh will offset hardwood in the outer zone at a one-to-one ratio.

(IV) Hardwood in a CMZ equal to or greater than ~~((10"))~~ ten inches dbh will offset conifer in the outer zone at a three-to-one ratio.

**\* (2) Western Washington protection for Type Np and Ns Waters.**

(a) An **equipment limitation zone** is a ~~((30-))~~ thirty foot wide zone measured horizontally from the outer edge of the bankfull width of a Type Np or Ns Water where equipment use and other forest practices that are specifically limited by these rules. It applies to all perennial and seasonal streams.

(i) On-site mitigation is required if any of the following activities exposes the soil on more than ~~((10%))~~ ten percent of the surface area of the zone:

(A) Ground based equipment;

(B) Skid trails;

(C) Stream crossings (other than existing roads); or

(D) Cabled logs that are partially suspended.

(ii) Mitigation must be designed to replace the equivalent of lost functions especially prevention of sediment delivery. Examples include water bars, grass seeding, mulching, etc.

(iii) Nothing in this subsection (2) reduces or eliminates the department's authority to prevent actual or potential material damage to public resources under WAC 222-46-030 or 222-46-040 or any related authority to condition forest practices notifications or applications.

(b) **Sensitive site and RMZs protection along Type Np Waters.** Forest practices must be conducted to protect Type Np RMZs and sensitive sites as detailed below:

(i) A ~~((50-))~~ fifty foot, no-harvest buffer, measured horizontally from the outer edge of bankfull width, will be established along each side of the Type Np Water as follows:

**Required no-harvest, 50-foot buffers on Type Np Waters.**

Length of Type Np Water from the confluence of Type S or F Water	Length of 50' buffer required on Type Np Water (starting at the confluence of the Type Np and connecting water)
Greater than 1000'	500'
Greater than 300' but less than 1000'	Distance of the greater of 300' or 50% of the entire length of the Type Np Water
Less than or equal to 300'	The entire length of Type Np Water

(ii) No timber harvest is permitted in an area within ~~((50))~~ fifty feet of the outer perimeter of a soil zone perennially saturated from a headwall seep.

(iii) No timber harvest is permitted in an area within ~~((50))~~ fifty feet of the outer perimeter of a soil zone perennially saturated from a side-slope seep.

(iv) No timber harvest is permitted within a ~~((56-))~~ fifty-six foot radius buffer patch centered on the point of intersection of two or more Type Np Waters.

(v) No timber harvest is permitted within a ~~((56-))~~ fifty-six foot radius buffer patch centered on a headwater spring or, in the absence of a headwater spring, on a point at the upper most extent of a Type Np Water as defined in WAC 222-16-030(3) and 222-16-031.

(vi) No timber harvest is permitted within an alluvial fan.

(vii) At least ~~((50%))~~ fifty percent of a Type Np Waters' length must be protected by buffers on both sides of the stream (2-sided buffers). Buffered segments must be a minimum of ~~((100))~~ one hundred feet in length. If an operating area is located more than ~~((500))~~ five hundred feet upstream from the confluence of a Type S or F Water and the Type Np Water is more than ~~((1,000))~~ one thousand feet in length, then buffer the Type Np Water according to the following table. If the percentage is not met by protecting sensitive sites listed in (b)(i) through (vii) of this subsection, then additional buffers are required on the Type Np Water to meet the requirements listed in the table.

**Minimum percent of length of Type Np Waters to be buffered when more than 500 feet upstream from the confluence of a Type S or F Water**

Total length of a Type Np Water upstream from the confluence of a Type S or F Water	Percent of length of Type Np Water that must be protected with a 50 foot no harvest buffer more than 500 feet upstream from the confluence of a Type S or F Water
1000 feet or less	Refer to table in this subsection (i) above
1001 - 1300 feet	19%
1301 - 1600 feet	27%
1601 - 2000 feet	33%
2001 - 2500 feet	38%
2501 - 3500 feet	42%
3501 - 5000 feet	44%
Greater than 5000 feet	45%

The landowner must select the necessary priority areas for additional ~~((2))~~ two-sided buffers according to the following priorities:

- (A) Low gradient areas;
- (B) Perennial water reaches of nonsedimentary rock with gradients greater than ~~((20%))~~ twenty percent in the tailed frog habitat range;
- (C) Hyporheic and ground water influence zones; and
- (D) Areas downstream from other buffered areas.

Except for the construction and maintenance of road crossings and the creation and use of yarding corridors, no timber harvest will be allowed in the designated priority areas. Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a designated priority area buffer.

(c) None of the limitations on harvest in or around Type Np Water RMZs or sensitive sites listed in (b) of this subsection will preclude or limit:

(i) The construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050.

(ii) The creation and use of yarding corridors in WAC 222-30-060(1).

To the extent reasonably practical, the operation will both avoid creating yarding corridors or road crossings through Type Np Water RMZ or sensitive sites and associated buffers, and avoid management activities which would result in soil compaction, the loss of protective vegetation or sedimentation in perennially moist areas.

Where yarding corridors or road crossings through Type Np Water RMZs or sensitive sites and their buffers cannot reasonably be avoided, the buffer area must be expanded to protect the sensitive site by an area equivalent to the disturbed area or by providing comparable functions through other management initiated efforts.

Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a Type Np Water RMZs or sensitive site buffer.

**WSR 09-06-071**

**WITHDRAWAL OF PROPOSED RULES  
BUILDING CODE COUNCIL**

(By the Code Reviser's Office)

[Filed March 3, 2009, 8:31 a.m.]

WAC 51-11-0201, 51-11-1007 and 51-11-1313, proposed by the building code council in WSR 08-17-086 appearing in issue 08-17 of the State Register, which was distributed on September 3, 2008, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor  
Washington State Register

**WSR 09-06-072**

**WITHDRAWAL OF PROPOSED RULES  
BUILDING CODE COUNCIL**

(By the Code Reviser's Office)

[Filed March 3, 2009, 8:32 a.m.]

WAC 51-51-0806, proposed by the building code council in WSR 08-17-089 appearing in issue 08-17 of the State Register, which was distributed on September 3, 2008, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor  
Washington State Register

**WSR 09-06-073**  
**WITHDRAWAL OF PROPOSED RULES**  
**OFFICE OF**  
**INSURANCE COMMISSIONER**  
 (By the Code Reviser's Office)  
 [Filed March 3, 2009, 8:32 a.m.]

WAC 284-83-160, proposed by the office of the insurance commissioner in WSR 08-17-103 appearing in issue 08-17 of the State Register, which was distributed on September 3, 2008, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor  
 Washington State Register

**WSR 09-06-079**  
**PROPOSED RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
 (Aging and Disability Services Administration)  
 [Filed March 3, 2009, 11:13 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 09-01-142.

Title of Rule and Other Identifying Information: The department is amending WAC 388-513-1340 Determining excluded income for long-term care (LTC) services.

Hearing Location(s): Office Building 2, Auditorium, DSHS Headquarters, 1115 Washington, Olympia, WA 98504 (public parking at 11th and Jefferson. A map is available at <http://www1.dshs.wa.gov/msa/rpau/RPAU-OB-2directions.html> or by calling (360) 664-6094), on April 7, 2009, at 10:00 a.m.

Date of Intended Adoption: Not earlier than April 8, 2009.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504-5850, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail DSHS RPAURulesCoordinator@dshs.wa.gov, fax (360) 664-6185, by 5 p.m. on April 7, 2009.

Assistance for Persons with Disabilities: Contact Jenisha Johnson, DSHS rules consultant, by March 24, 2009, TTY (360) 664-6178 or (360) 664-6094 or by e-mail at johnsjl4@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: DSHS is amending WAC 388-513-1340 as follows:

- Adding interest or dividend income as an exclusion, except for the community spouse of an institutionalized client.
- Adding current child support payments received from an absent parent for a minor child who is not institutionalized.
- Removing exclusions based on federal rules.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.530.

Statute Being Implemented: RCW 74.04.050, 74.04.-057, 74.08.090, 74.09.500, 74.09.530, Social Security Act Sec. 1611, 1902, C.F.R. 435.725.

Rule is necessary because of federal law, Social Security Act Sec. 1611, 1902, C.F.R. 435.725.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Lori Rolley, P.O. Box 45600, Olympia, WA 98504-5600, (360) 725-2271.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The department has analyzed the rules and determined that no new costs will be imposed on small businesses or nonprofit organizations.

A cost-benefit analysis is not required under RCW 34.05.328. Rules are exempt, per RCW 34.05.328 (5)(b) (vii), relating only to client medical or financial eligibility.

February 25, 2009

Stephanie E. Schiller

Rules Coordinator

AMENDATORY SECTION (Amending WSR 00-01-087, filed 12/14/99, effective 1/14/00)

**WAC 388-513-1340 Determining excluded income for long-term care (LTC) services.** This section describes income the department excludes when determining a client's eligibility and participation in the cost of care for LTC services with the exception((s)) described in subsection((s-~~30~~) and(~~33~~)) (31).

- (1) Crime victim's compensation;
- (2) Earned income tax credit (EITC);
- (3) Native American benefits excluded by federal statute (refer to WAC 388-450-0040);
- (4) Tax rebates or special payments excluded by other statutes;
- (5) Any public agency's refund of taxes paid on real property and/or on food;
- (6) Supplemental security income (SSI) and certain state public assistance based on financial need;
- (7) The amount a representative payee charges to provide services when the services are a requirement for the client to receive the income;
- (8) The amount of expenses necessary for a client to receive compensation, e.g., legal fees necessary to obtain settlement funds;
- (9) Any portion of a grant, scholarship, or fellowship used to pay tuition, fees, and/or other necessary educational expenses at any educational institution;
- (10) Child support payments received from an absent parent for a ((minor)) child ((who is not institutionalized)) living in the home are considered the income of the child;
- (11) ((The amount of expenses related to impairments of a permanently and totally disabled client that allow the client to work;
- (12) ~~The amount of expenses related to blindness that allow the client to work;~~
- (13)) Self-employment income allowed as a deduction by the Internal Revenue Service (IRS);

~~((14))~~ (12) Payments to prevent fuel cut-offs and to promote energy efficiency that are excluded by federal statute;

~~((15))~~ (13) Assistance (other than wages or salary) received under the Older Americans Act;

~~((16))~~ (14) Assistance (other than wages or salary) received under the foster grandparent program;

~~((17))~~ (15) Certain cash payments a client receives from a governmental or nongovernmental medical or social service agency to pay for medical or social services;

~~((18))~~ (16) Interest earned on excluded burial funds and any appreciation in the value of an excluded burial arrangement that are left to accumulate and become part of the separately identified burial funds set aside;

~~((19))~~ (17) Tax exempt payments received by Alaska natives under the Alaska Native Settlement Act established by P.L. 100-241;

~~((20))~~ (18) Compensation provided to volunteers in ACTION programs under the Domestic Volunteer Service Act of 1973 established by P.L. 93-113;

~~((21))~~ (19) Payments made from the Agent Orange Settlement Fund or any other funds to settle Agent Orange liability claims established by P.L. 101-201;

~~((22))~~ (20) Payments made under section six of the Radiation Exposure Compensation Act established by P.L. 101-426;

~~((23))~~ (21) Restitution payment, and interest earned on such payment to a civilian of Japanese or Aleut ancestry established by P.L. 100-383;

~~((24))~~ (22) Payments made under sections 500 through 506 of the Austrian General Social Insurance Act;

~~((25))~~ (23) Payments made from *Susan Walker v. Bayer Corporation, et. al.*, 95-C-5024 (N.D. Ill.) (May 8, 1997) settlement funds;

~~((26))~~ (24) Payments made from the Ricky Ray Hemophilia Relief Fund Act of 1998 established by P.L. 105-369;

~~((27))~~ (25) Payments made under the Disaster Relief and Emergency Assistance Act established by P.L. 100-387;

~~((28))~~ (26) Payments made under the Netherlands' Act on Benefits for Victims of Persecution (WUV);

~~((29))~~ (27) Payments made to certain survivors of the Holocaust under the Federal Republic of Germany's Law for Compensation of National Socialist Persecution or German Restitution Act;

~~((30) Interest earned from payments described in subsections (24) through (29) is considered available and counted as nonexcluded income))~~ (28) Interest or dividends received by the client is excluded as income. Interest or dividends received by the community spouse of an institutional individual is counted as income of the community spouse. Dividends and interest are returns on capital investments such as stocks, bond, or savings accounts. Institutional status is defined in WAC 388-513-1320;

~~((31))~~ (29) Income received by an ineligible or nonapplying spouse from a governmental agency for services provided to an eligible client, e.g., chore services;

~~((32))~~ (30) Department of Veterans Affairs benefits designated for:

(a) The veteran's dependent;

(b) Unusual medical expenses, aid and attendance allowance, and housebound allowance, with the exception described in subsection ~~((33))~~ (31);

~~((33))~~ (31) Benefits described in subsection ~~((32)(b))~~ (30)(b) for a client who resides in a state veterans' home and has no dependents are excluded when determining eligibility, but are considered available when determining participation in the cost of care.

## WSR 09-06-086

### PROPOSED RULES

### DEPARTMENT OF ECOLOGY

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

Original Notice.

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

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

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

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

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

Date of Intended Adoption: July 31, 2009.

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

Assistance for Persons with Disabilities: Contact Max Willis at (360) 407-6908, by April 1, 2009. Persons with

hearing loss, call 711 for Washington relay service. Persons with a speech disability, call 877-833-6341.

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

1. Provide timely review of bank proposals;
2. Establish coordination among state, local, tribal, and federal agencies involved in the certification of banks;
3. Ensure consistency with existing federal mitigation rules;
4. Provide incentives to encourage bank sponsors to locate and design banks that provide the greatest ecological benefits.

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

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

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

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

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

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

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

#### Small Business Economic Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

proper implementation and guidelines, mitigation banking has the potential to:

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

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

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

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

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

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

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

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

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

90.84 RCW, creates an industry of WMB. The proposed rule implements the statute, and regulates that industry.

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

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

Ecology expects bank sponsors to incur costs for creating a banking prospectus, as based on the time commitment and level of expertise necessary to evaluate each element of the prospectus. Ecology expects that the size of the bank will be an important factor in the level of difficulty and expertise necessary to create the prospectus.

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

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

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

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

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

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

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

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

Monitoring and reporting includes, but is not limited to:

- Document baseline conditions after construction.
- Document development of the site.
- Document attainment of performance standards.
- Identify possible problems at the site.

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

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

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

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

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

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

**Mitigation Bank Prospectus:** To develop a prospectus for a proposed wetland mitigation bank, a bank sponsor must

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

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

**Banking Instrument:** To develop a WMB instrument, a bank sponsor must add to information provided in the banking prospectus. This involves additional information about bank design, construction, sponsor responsibilities, monitoring and maintenance, and how the bank will function and sell credits over time.

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

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

Multiplying the wage by the number of hours required to create a banking instrument for a wetland mitigation bank, ecology estimated that a bank will incur a banking instrument cost of \$177 thousand for creation of the instrument, plus \$194 thousand for engineering or design expertise. The total expected cost is \$371 thousand. Ecology assumed conserva-

tively that this entire cost is incurred up front, and did not discount it over time.

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

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

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

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

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

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

Based on an Army Corps of Engineers survey (see the associated cost-benefit analysis, ecology publication #09-06-002, for details), ecology calculated that the median price of

wetland bank credits is \$84 thousand per acre, in the Northwestern Corps Division. Using an annual discount rate of 1.88%,<sup>2</sup> ecology calculated an annualized cost of construction, monitoring, and maintenance of approximately \$5 thousand per acre, per year. Subtracting the annualized cost of construction over the life of the bank (see above section; divided by the median acreage of wetland banks in the state) of approximately \$4 thousand per acre, ecology calculated an annualized cost of long-run monitoring and maintenance of \$802 per acre. When accounting for inflation and discounting over time, this is equivalent to a payment of \$2.3 million upfront for the median size of wetland bank in the state.

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

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

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

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

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

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



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

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

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

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

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

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

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

523910: Individuals investing in financial contracts on own account.

237210: Land subdivision.

5222: Nondepository credit intermediation.

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

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

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

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

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

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

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

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

<sup>2</sup> Ecology uses a twenty-year timeframe for analyzing long-run and ongoing present values, as it typically encompasses the meaningful time period before discounted future values diminish below significant levels. Ecology used a discount rate of 1.88%, which equals the expected rate of return on invested capital (the risk-free rate of United States Treasury I-Bonds, adjusted for inflation). When possible, ecology uses an industry-specific rate of return, but could not determine this rate for the diverse set of sponsors – investor groups, individual owners, and development groups - involved in WMB.

<sup>3</sup> NAICS codes have largely taken the place of Standard Industry Classification (SIC) codes in the categorization of industries.

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

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

March 2, 2009

Polly Zehm  
Deputy Director

## Chapter 173-700 WAC

### WETLAND MITIGATION BANKS

#### PART I OVERVIEW

##### NEW SECTION

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

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

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

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

- (a) Provide timely review of bank proposals;
- (b) Establish coordination among state, local, tribal, and federal agencies involved in the certification of banks;
- (c) Ensure consistency with existing federal mitigation rules; and
- (d) Provide incentives to encourage bank sponsors (sponsors) to locate and design banks that provide the greatest ecological benefits.

##### NEW SECTION

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

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

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

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

- (a) Addition of sites under an umbrella instrument;
- (b) Expansion of an existing site; or
- (c) Addition of a different resource currency (e.g., flood storage credits).

##### NEW SECTION

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

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

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

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

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

(b) The department shall determine whether to allow the use of bank credits for projects under state jurisdiction on a case-by-case basis.

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

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

##### NEW SECTION

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

- (1) The prospectus;
- (2) The final instrument;
- (3) Other supporting materials; and
- (4) The comments received by the department during the public notice period(s).

##### NEW SECTION

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

eries, or livestock, and that has long-term commercial significance for agricultural production.

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

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

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

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

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

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

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

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

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

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

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

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

**"Days"** means calendar days.

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

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

**"Department"** means the department of ecology.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**"Preservation"** means the permanent protection of ecologically important wetlands or other aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection or enhancement of the aquatic systems, or both. Preservation does not result in a gain of aquatic resource area or functions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## PART II CERTIFICATION PROCESS

### NEW SECTION

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

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

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

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

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

NEW SECTION**WAC 173-700-201 Decision-making procedure.** (1)

All decisions made by the department must fully consider IRT, tribal, and public comments submitted to the department as part of the certification evaluation process.

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

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

NEW SECTION**WAC 173-700-210 Purpose of the prospectus.** (1) The

purpose of the prospectus is to provide a conceptual plan for a bank project.

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

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

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

NEW SECTION**WAC 173-700-211 Content of the prospectus.** At a

minimum, the prospectus must contain information on the following elements:

(1) The goals and objectives of the project;

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

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

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

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

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

(a) Total area of site;

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

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

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

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

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

(a) Land ownership;

(b) Local land use or zoning designation;

(c) Current use;

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

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

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

(g) Other habitat types present;

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

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

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

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

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

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

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

(a) Proposed types and approximate sizes of wetlands;

(b) Other proposed habitat types to be provided;

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

(d) Description of alterations to hydrology;

(e) Location of grading, if applicable; and

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

(9) Figures illustrating the conceptual bank design;

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

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

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

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

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

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

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

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

NEW SECTION**WAC 173-700-212 Submittal of the prospectus.** (1)

The sponsor must submit a complete electronic and a hard copy of the prospectus to the department.

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

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

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

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

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

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

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

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

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

(8) The department will review the comments received in response to the public notice and make a written initial evaluation. The department makes an initial evaluation on the ecological appropriateness of the proposed bank and its ability to provide appropriate compensatory mitigation for activities authorized by state or local permits. This initial evaluation letter must be provided to the sponsor within thirty days of the end of the public notice comment period.

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

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

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

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

#### NEW SECTION

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

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

#### NEW SECTION

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

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

#### NEW SECTION

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

(1) The goals and objectives of the project;

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

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

(a) Local land use or zoning designation;

(b) Current uses;

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

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

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

(f) Other habitat types present;

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

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

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

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

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

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

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

(i) Total area of site;

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

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

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

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

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

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

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

(a) The bank size;

(b) The landscape position of the site;

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

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

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

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

(g) Construction timing and schedules.

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

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

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

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

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

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

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

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

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

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

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

(18) Financial assurances;

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

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

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

(22) Any supporting documentation requested by the department;

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

(24) Default and closure provisions.

#### NEW SECTION

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

may attempt to address those issues prior to the start of the formal draft instrument review process.

#### NEW SECTION

##### **WAC 173-700-224 Submittal of the draft instrument.**

(1) If the sponsor chooses to proceed with the certification process, they must prepare a draft instrument and submit an electronic and hard copy to the department.

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

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

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

#### NEW SECTION

##### **WAC 173-700-225 Review of the draft instrument.**

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

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

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

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

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

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

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

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

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

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

NEW SECTION**WAC 173-700-230 Submittal of the final instrument.**

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

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

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

(b) Financial assurance documents;

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

(d) Hydrologic and other ecological studies.

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

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

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

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

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

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

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

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

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

NEW SECTION

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

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

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

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

NEW SECTION

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

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

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

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

(a) A detailed description of the issue; and

(b) Recommendations for resolution.

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

NEW SECTION

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

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

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

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

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

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

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



NEW SECTION

**WAC 173-700-240 Public notices.** (1) It is the department's goal to ensure that accurate information on the prospectus and the proposed bank certification is made available to the public, and to avoid duplicative processes for public comment.

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

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

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

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

NEW SECTION

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

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

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

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

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

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

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

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

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

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

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

NEW SECTION

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

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

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

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

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

**PART III  
BANK ESTABLISHMENT**

NEW SECTION

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

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

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

NEW SECTION

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

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

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

NEW SECTION

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

(1) The functions provided by the bank and the distance from the bank that the ecological functions can reasonably be expected to compensate for impacts;

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

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

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

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

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

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

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

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

(10) The degree to which the bank supports priorities found in, but not limited to, watershed management plans, watershed characterizations, wetland mapping or inventories,

storm water management plans, shoreline master programs, salmon recovery plans and comprehensive land use plans.

#### NEW SECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Other factors deemed appropriate.

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

(i) Whether the proposed location contains cultural resources;

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

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

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

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

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

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

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

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

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

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

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

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

#### NEW SECTION

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

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

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

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

(c) The intensity of adjacent land uses.

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

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

#### NEW SECTION

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

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

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

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

NEW SECTION

**WAC 173-700-311 Types of credits.** There are three types of credits associated with a bank: Potential, available, and debited.

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

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

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

NEW SECTION

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

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

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

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

NEW SECTION

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

<b>If the mitigation activity is:</b>	<b>The conversion rate can range from: Area of activity: Credit</b>
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

<b>If the mitigation activity is:</b>	<b>The conversion rate can range from: Area of activity: Credit</b>
Preservation: In combination with reestablishment, creation, rehabilitation, or enhancement of wetlands	5:1 to 10:1
Preservation: Alone	Case-by-case

NEW SECTION

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

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

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

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

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

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

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

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

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

NEW SECTION

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

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

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

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

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

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

#### NEW SECTION

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

- (1) Wetlands with special characteristics including:
  - (a) Estuarine wetlands;
  - (b) Natural Heritage wetlands;
  - (c) Bogs;
  - (d) Old-growth and mature forested wetlands;
  - (e) Interdunal wetlands;
  - (f) Vernal pools; and
  - (g) Alkali wetlands.
- (2) Bog-like wetlands, aspen-dominated wetlands, camas prairie wetlands, and marine water with eelgrass beds.
- (3) Category I wetlands (Washington state wetland rating system, 2004 or as amended).
- (4) Category II wetlands with a habitat score > 29 points (Washington state wetland rating system, 2004 or as amended).

#### NEW SECTION

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

- (1) WAC 173-700-314, 173-700-315, and 173-700-319;
- (2) Local land use zoning, anticipated future build-out, width of the buffer and its ability to protect the wetland or other aquatic resource from further degradation;
- (3) Integrated public education and directed access for passive recreation opportunities, where appropriate as determined by the department;
- (4) Whether the bank provides multiple functions; and
- (5) The degree to which the bank helps to implement local restoration priorities, shoreline master programs, local land use management plans, and watershed plans.

#### NEW SECTION

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

(2) Enhancement of upland and other habitats may generate credits at a conversion rate from 3:1 to 10:1. Preserva-

tion of high quality uplands and other habitats may generate credits at a conversion rate from 8:1 to 15:1.

#### NEW SECTION

**WAC 173-700-319 Considerations for determining credit conversion rates for uplands and other habitats.**

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

- (1) Degree of contribution to the ecological functioning of the bank;
- (2) The existing or proposed enhanced condition of the uplands and other habitats; and
- (3) Connectivity to other habitats and open space areas, based on existing connectivity and level of protection for those adjacent areas.

#### NEW SECTION

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

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

- (a) Made on a case-by-case basis, considering the specific circumstances of a bank; and
- (b) Based on ecological considerations.

#### NEW SECTION

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

- (1) The department approves of the method;
- (2) The method is applicable and appropriate for the Pacific Northwest;
- (3) The method is applicable for use on projects debiting from the bank; and
- (4) The method is documented in the instrument.

#### NEW SECTION

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

- (2) The department shall determine a schedule for the release of credits.
- (3) The department shall base the number of credits to be released on the following considerations, but not limited to:
  - (a) The amount of ecological gain at the time of the release;
  - (b) The sponsor's experience and success with similar types of projects;
  - (c) The expected length of time necessary to achieve project goals and performance standards; and
  - (d) The potential for design failure.

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

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

(6) The department may release credits generated by the preservation of existing wetlands or aquatic resources after the minimum requirements specified in WAC 173-700-331 have been met.

#### NEW SECTION

##### **WAC 173-700-331 Credit release—Preconstruction.**

(1) Up to fourteen percent of the total potential credits for the bank, or for the phase, may be released preconstruction. Initial physical and biological improvements must begin within one year following the release of credits.

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

- (a) The instrument is signed and approved;
- (b) The permanent protection mechanism for the site is established;
- (c) The proof of financial assurances has been received by the department;
- (d) The long-term management and maintenance endowment fund escrow account is established; and
- (e) All necessary permits and authorizations for site construction have been obtained.

#### NEW SECTION

##### **WAC 173-700-332 Credit release—Postconstruction.**

(1) Up to thirty percent of the total potential credits for the bank, or for the phase that has been constructed, may be released when the department, in consultation with signatories, approves:

(a) The complete implementation of construction plans; and

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

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

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

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

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

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

#### NEW SECTION

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

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

#### NEW SECTION

##### **WAC 173-700-334 Credit release—Final release.** (1)

The department, in consultation with the signatories, may adjust the final number of potential credits available at a bank based on actual conditions of the bank site at the time of the final release of credits. The number of potential credits may be adjusted in the following ways:

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

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

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

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

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

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

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

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

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

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

#### NEW SECTION

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

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

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

NEW SECTION

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

(2) Performance standards must be measurable.

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

NEW SECTION

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

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

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

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

NEW SECTION

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

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

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

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

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

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

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

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

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

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

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

NEW SECTION

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

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

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

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

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

NEW SECTION

**WAC 173-700-353 Financial assurances for monitoring and maintenance.** (1) The department must require a financial assurance for monitoring and maintenance for all banks that have credit releases prior to full attainment of all performance standards.

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

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

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

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

NEW SECTION

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

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

(3) The sponsor must secure sufficient funds for the anticipated long-term management costs. Appropriate long-term financing mechanisms include, but are not limited to, nonwasting endowments, trusts, contractual arrangements

with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the bank site.

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

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

#### **PART IV BANK OPERATION**

##### NEW SECTION

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

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

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

(c) Document the attainment of performance standards; and

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

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

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

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

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

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

##### NEW SECTION

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

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

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

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

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

(d) Data collected during the monitoring;

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

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

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

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

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

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

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

##### NEW SECTION

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

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

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

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

(a) Regular monitoring of the site;

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

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

##### NEW SECTION

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

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

(a) Identification of potential causes for site failure;

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

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

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

##### NEW SECTION

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

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

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

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

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

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

#### NEW SECTION

##### **WAC 173-700-411 Ledger tracking and reporting.**

(1) The sponsor must maintain a separate ledger for each bank.

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

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

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

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

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

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

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

#### NEW SECTION

**WAC 173-700-412 Master ledger.** (1) The department shall maintain a master ledger for each bank and must cross check the sponsor's annual ledger against the master ledger.

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

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

#### NEW SECTION

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

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

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

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

#### NEW SECTION

##### **WAC 173-700-420 Long-term management plan.** (1)

The instrument must identify the party responsible for the ownership and long-term management of the bank.

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

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

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

#### NEW SECTION

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

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

(3) The legal mechanisms must:

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

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

(c) Transfer with the property;

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

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

(f) Grant the department and its designated representatives the right to enter the bank at reasonable times for the



purpose of evaluating compliance with the terms of the instrument and the conservation easement or other approved legal mechanism.

## PART V USE OF BANK CREDITS

### NEW SECTION

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

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

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

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

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

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

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

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

### NEW SECTION

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

(2) The replacement ratios for debit projects should take into consideration that credit conversion rates for banks include adjustments for the site's overall ecological benefit.

One credit at a bank is not necessarily equal to one acre on the ground. In many cases, one credit from a bank represents more than one acre at the bank site.

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

### NEW SECTION

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

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

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

(b) The determination to allow use of credits for impacts lying outside of a bank's service area must take into consideration the elements used in determining the bank's service area.

## PART VI COMPLIANCE WITH CERTIFICATION

### NEW SECTION

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

### NEW SECTION

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

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

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

(a) A clear statement of the issue;

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

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

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

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

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

#### NEW SECTION

**WAC 173-700-602 Compliance with required remedial actions.** (1) If the sponsor does not complete the required remedial actions within the schedule specified by the department, the department must send a notice of non-compliance to the sponsor and to the signatories.

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

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

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

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

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

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

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

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

#### NEW SECTION

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

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

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

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

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

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

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

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

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

### **PART VII RESPONSIBILITIES AND ROLES**

#### NEW SECTION

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

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

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

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

#### NEW SECTION

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

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

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

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

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

### **PART VIII APPEALS**

#### NEW SECTION

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