



# Status of the Wetland Mitigation Banking Pilot Program

*December, 2006 Status Report*



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Ecology's Shorelands and Environmental Assistance Program

Address: PO Box 47600, Olympia WA 98504-7600

E-mail: [TISC461@ecy.wa.gov](mailto:TISC461@ecy.wa.gov)

Phone: (360) 407-7000

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## *December, 2006 Status Report*

Washington Department of Ecology  
Olympia, Washington 98504-7710

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# Summary Statement

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The Washington State Legislature created the Wetland Banking Program, and directed the Department of Ecology (Ecology) to administer a Wetland Mitigation Banking Pilot Program (Pilot Program) in 2004. This status report is intended to provide the Legislature with an update of the Pilot Program and an outline for the future direction of the program. Included in this report is the following:

- ❖ A discussion of wetland banking and why it is important.
- ❖ An overview of the legislative history of wetland banking in Washington.
- ❖ A summary of the Pilot Program from 2004 to 2006.
- ❖ An outline of Ecology's future plans for the Pilot Program.

## Importance of Wetland Banking in Washington

Wetland mitigation banking is one of the more innovative strategies under the *Mitigation That Works Initiative*. This initiative represents Ecology's commitment to find mitigation solutions that work for Washington State. This commitment includes identifying improvements that will enhance the overall effectiveness of the Pilot Program.

## Pilot Program Goals

The first goal of the Pilot Program is to identify potential improvements to the draft rule that would be incorporated prior to going through rule adoption. The second is to ensure the certification process and requirements are appropriate, feasible, and ecologically sound. The third goal is to evaluate a wide range of bank proposals. The final goal is to demonstrate the feasibility of wetland mitigation banking in Washington State. This report reviews Ecology's progress towards meeting these goals.

## Concerns Expressed by Stakeholders

Throughout the Pilot Program Ecology has made an effort to encourage public involvement and provide opportunities for the public to comment on proposals, track the pilot process, and make suggestions. The public has opportunities to stay informed about the Pilot Program through our wetland banking website and by joining our listserv. The public has an opportunity to comment on specific project proposals during public notice comment periods. The following section includes some of the comments Ecology has received from various stakeholders involved with the Pilot Program.

### *Bank Sponsors Involved in Pilot Program*

- ❖ The bank review and certification process is lengthy and expensive.
- ❖ There is a lack of predictable timeframe for existing process.
- ❖ There is a lack of accountability among individual MBRT member agencies, and collectively as a group.
- ❖ There is a need for increased collaboration among MBRT and bankers.
- ❖ The process of bank review needs to be more transparent.
- ❖ The review and approval process is not clearly understood.

- ❖ The process needs clear technical standards and sideboards.
- ❖ Bank sponsors in the Pilot Program recommend that Ecology not proceed with rule revision and that staff time be dedicated to permitting those projects remaining in the pilot program.

### *Environmental Community*

- ❖ Most wetland banks are being sited in rural and agricultural areas to compensate for urban impacts, resulting in a shift of natural resources from urban to rural.
- ❖ The draft rule does not effectively address the impact of wetland banking on current land use activities.
- ❖ Ecology should increase opportunities for early public involvement and extend public comment periods.
- ❖ The banking program is significantly underfunded and understaffed.
- ❖ The service area for wetland banks should be within areas smaller than Watershed Resources Inventory Areas (WRIAs), and if possible within the subbasin.
- ❖ Strong technical requirements based on measurable standards should be incorporated consistently during project development.

### *Local Government*

- ❖ The banking program needs to be consistent with local government existing rules and regulations.
- ❖ Local land use plans and development codes did not anticipate the need to address wetland mitigation banking development.

## **Identified Improvements to the Program**

The comments we received have helped us to recognize areas where we can make improvements. While we are still working to address some of the concerns listed above we are moving forward in several of these areas of concern. Based on the experience gained through the pilot and the feedback we have received Ecology is doing the following:

- ❖ Developing guidance and template documents to help clarify and streamline the bank certification process.
- ❖ Improving coordination efforts with tribal, local, state, and federal governments early and throughout the bank proposal review and monitoring process.
- ❖ Continuing to collaborate with local governments to address how mitigation banking can fit in with local land use regulations and codes.
- ❖ Working with the agricultural community and project sponsors to ensure that bank proposals are consistent with maintaining viable and productive farmlands.
- ❖ Continuing to work collaboratively with the Advisors Group and bank sponsors to improve the Wetland Banking Program.

Ecology looks forward to using the lessons we learned and the strategic priorities established under the Environmental Mitigation that Works Initiative to improve the banking program and move toward formal rule adoption of a revised draft rule (WAC 173-700, Appendix B). We will continue to work diligently with our partners to improve



upon the foundation we have built during this Pilot Program phase. With mitigation that works, we can better sustain our wetlands and all they do for the people, communities, and the environment of our state.



# Introduction

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The Washington State Legislature created the Wetland Banking Program and directed the Washington Department of Ecology (Ecology) to administer a Wetland Mitigation Banking Pilot Program (Pilot Program) in 2004. In order to keep the Legislature informed on the progress, the following is an overview of the Pilot Program from 2004 through 2006. Also included is an outline of Ecology's Pilot Program plans for the upcoming year.

We hope you find this update informative and encourage you to contact us if you have any questions or concerns. We are proud of the progress we have made thus far and want to maintain effective communication with the Legislature as we continue to improve upon the Pilot Program.

## What is Wetland Banking?

Wetland mitigation banking is another natural resource management tool available to resource managers and local governments that require compensation for unavoidable impacts to wetlands in Washington State. The use of wetland banking as a tool for providing compensatory mitigation is not an avenue that allows applicants to reduce environmental protection or bypass the requirements to avoid, minimize, or compensate for negative wetland impacts.

Private entrepreneurs and public entities such as local ports, transportation departments, or public works agencies can establish and maintain wetland banks. A main goal of a wetland bank is to provide the equivalent value and function of a destroyed or degraded wetland somewhere else in a designated portion of the same watershed.

An owner of a mitigation bank restores, creates, enhances, or preserves a wetland in a particular watershed. A wetland mitigation bank represents valuable wetland functions, such as flood control, improved water quality, groundwater recharge, and fish and wildlife habitat, necessary to maintain a healthy watershed. Based on these values and functions, the regulatory agencies overseeing the bank certification determine the number of "credits" the bank is worth and thus the number of credits available to the banker.

When a bank project achieves its pre-determined performance standards, the regulatory agencies release credits. Bank credits are used when other options for compensation are not possible, appropriate, or ecologically preferable. Bankers can then sell or use these credits to those needing to compensate for unavoidable, negative impacts to another wetland. This process ensures that the wetland bank performs as expected before the regulatory agencies release credits to the bank owner. This helps address the loss of wetlands due to failures of traditional mitigation or the time lag between wetland impacts and wetland compensation.

Regulatory agencies determine the service area where these credits may be used. These service areas represent the markets the banks may serve - and are usually within the same watershed. This ensures the mitigation replaces wetland functions impacted within the same watershed.

## Why is Wetland Mitigation Banking Important?

To stop further loss of wetlands, federal and state policies aim for “no net loss” of wetlands. In Washington State - in an effort to achieve no net loss - there has been an increased interest in the use of mitigation banking as a regulatory tool. This interest is driven by the acknowledgement that our traditional approach to mitigation is not working quite as it should.

Because we must offer wetland mitigation strategies that do work, Ecology is highlighting wetland banking as one of the more innovative strategies under the *Mitigation That Works Initiative*. As strategic agency priority, the *Mitigation That Works Initiative* underscores Ecology’s commitment to identify problems associated with traditional mitigation practices and fix them.

Historically, wetland acreage in Washington ranged from 1.17 to 1.53 million acres. Over the past two centuries, Washington has lost approximately 50 percent of its pre-settlement wetlands. Some urbanized areas of Puget Sound have experienced losses from 70 to 100 percent. Some estimates say that Washington loses anywhere from 700 to 2,000 acres per year.

When a wetland is damaged or lost to development, developers are required to mitigate for that loss by providing comparable substitute wetlands - typically through restoration and creation activities. This form of compensation, known as concurrent mitigation, traditionally occurs after a project impacts wetland resources, resulting in temporary losses of important wetland functions. Several recent studies have shown that the success of concurrent mitigation is variable and a significant percentage of concurrent mitigation projects are not successfully replacing wetland functions.

Mitigation banking differs from traditional concurrent mitigation in two important ways. First, banks are constructed and functioning in advance of development impacts. This assures the success of the mitigation before unavoidable damage occurs at another site. Second, mitigation banking makes it possible to consolidate what may otherwise be small, fragmented wetland mitigation projects into a larger, potentially more ecologically valuable site. With the proper implementation and guidelines, mitigation banking has the potential to increase the overall success of wetland mitigation in the state.

Another benefit of the mitigation bank program is the establishment of a Mitigation Bank Review Team (MBRT). The MBRT is a multi-agency review team that reviews banking proposals for certification and ensures the monitoring and maintenance required after construction is accomplished. The Washington MBRT members vary based on bank locations and design, but Environmental Protection Agency (EPA) Region 10, the Seattle District Corps of Engineers (Corps), Ecology, and local government are core members of the MBRT. Some of the agencies that are invited to participate in the MBRT are the Washington Department of Natural Resources (DNR), Washington Department of Fish and Wildlife (WDFW), National Oceanic and Atmospheric Administration (NOAA), U.S. Fish and Wildlife Service (USFWS), and the Tribes. This multi-agency team also conducts project oversight for the banks once they are approved for construction. This oversight helps ensure that the project is successful through construction and during the monitoring phases.

## Legislative History of Wetland Banking in Washington

Wetland mitigation banking activity in Washington State began in the early 1990's. During this time several public and private banks were developed (Figure 1). In 1994, the Washington State Department of Transportation (WSDOT) and federal and state regulatory agencies signed a *Wetland Compensation Bank Program Memorandum of Agreement*. This agreement addressed how WSDOT would establish and operate a wetland mitigation banking program. In 1996, our state's first private entrepreneurial wetland mitigation bank was established to provide mitigation for development impacts in the Salmon Creek Basin of Clark County. The bank was approved by the county to provide mitigation required under the local critical areas regulation.

To improve the success of Washington's mitigation efforts, the 1998 Legislature passed Chapter 90.84 RCW, *Wetlands Mitigation Banking* (Appendix A). The law set minimum guidelines for the establishment of banks and required Ecology to use a collaborative process for developing a statewide rule for certification, operation, and long-term management of wetland mitigation banks.

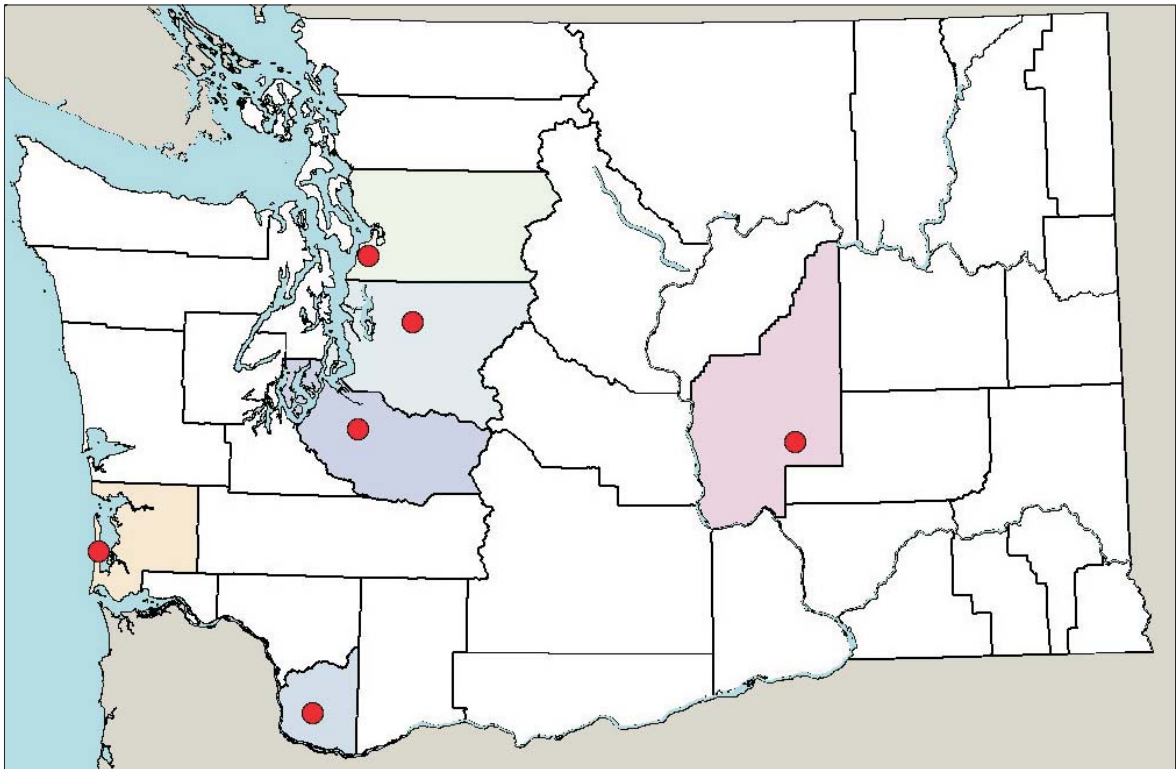


Figure 1. Location of wetland mitigation banks in Washington prior to the Wetland Mitigation Banking Pilot Program

The legislation required Ecology to develop a rule that was streamlined, predictable, and consistent with existing Federal Guidance. In addition, the rule was required to address the procedural elements of the certification process and technical criteria for evaluating wetland mitigation banking proposals. Lawmakers appropriated initial funding for rule development in the 1998 supplemental budget. The following year the Legislature appropriated funding for the 1999-2001 Biennium.

Ecology used a negotiated rulemaking process to incorporate a wide-variety of viewpoints and interests into the process. In November 1998, Ecology convened an 18-member Advisory Team to determine the contents of the rule. The Advisory Team played a pivotal role by bringing to the table diverse viewpoints from a wide range of stakeholders, including local, state, and federal agencies, tribes, environmental interests, private bank developers, and agriculture and business representatives. After 18 months of negotiations, a draft rule was developed (WAC 173-700, Appendix B). In January 2001, Ecology published the draft rule for public review and comment.

However, on June 30, 2001, due to budget shortfalls, Ecology placed the wetland banking rule on indefinite hold. We withdrew the proposed rule on May 30, 2001, and published the notice of withdrawal in the Washington State Register (WSR 02-12-058).

Then, in 2004, the Legislature appropriated funds for Ecology to implement a Pilot Program for wetland mitigation banking. The Pilot Program has given us the opportunity to assess the rule and its regulatory impacts, identify implementation and administration costs, and review and analyze the results.

## **Pilot Project Summary: 2004 - 2006**

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### **Pilot Project Startup**

During the 2004 legislative session, the Legislature appropriated \$120,000 for Ecology to implement a Pilot Program for wetland banking during fiscal year 2005. The funding was used to implement the Pilot Program and test the draft rule (WAC 173-700) that was previously developed through the negotiated rulemaking process.

The goals of the Pilot Program are:

- ❖ To test the implementation of the draft rule and identify necessary revisions.
- ❖ To ensure the certification process and requirements are appropriate, feasible, and ecologically sound.
- ❖ To evaluate a range of bank proposals
- ❖ To certify 6 banks during the life of the Pilot Program
- ❖ To demonstrate the feasibility of wetland mitigation banking in Washington

### ***Pilot Project Funding***

In 2005, the Legislature appropriated \$400,000 for Ecology to continue implementation of the Pilot Program during the 2005-2007 Biennium. While the proviso monies approved in 2004 funded the administration of the Pilot Program, applicants paid for their proposal review with cost reimbursement agreements (CRA). Ecology extended the CRA's with the bank sponsors in order to complete the technical review of the bank proposals.

One contract for \$32,400 pays for approximately one-third of a full time employee. The time to complete certification depends on the individual project: complexity of proposal and design, length of negotiations, permit timelines, sponsors response to comments, and agency responses to submittals. Costs have varied greatly between bank proposals ranging from \$7,000 to \$36,000. To date Ecology has spent a total of \$94, 234 under CRA's.

The CRA's for two approved banks are \$10,426 and \$24,690. The CRA's for three of the banks being processed are \$7,657<sup>1</sup>, \$11,474, and \$35,882.

Once banks are certified the cost reimbursement agreements between Ecology and the sponsor ends. It then becomes Ecology's responsibility to provide resources to review these sites to ensure banks are meeting their monitoring performance standard requirements prior to credit releases as well as maintain ledgers.

## Wetland Bank Certification Process

### *Proposal Screening*

Ecology identified an Advisors Group to help implement the Pilot Program. The members of the Advisors Group were chosen based on their background and involvement with wetland mitigation in the state. The first action item for the group involved selecting projects that would be part of the Pilot Program. The Advisors Group reviewed twelve projects in July of 2004 using the following criteria:

- ❖ Market demand (i.e. the need for a bank)
- ❖ Local/tribal support
- ❖ Proposed project location
- ❖ Level of sponsors banking experience

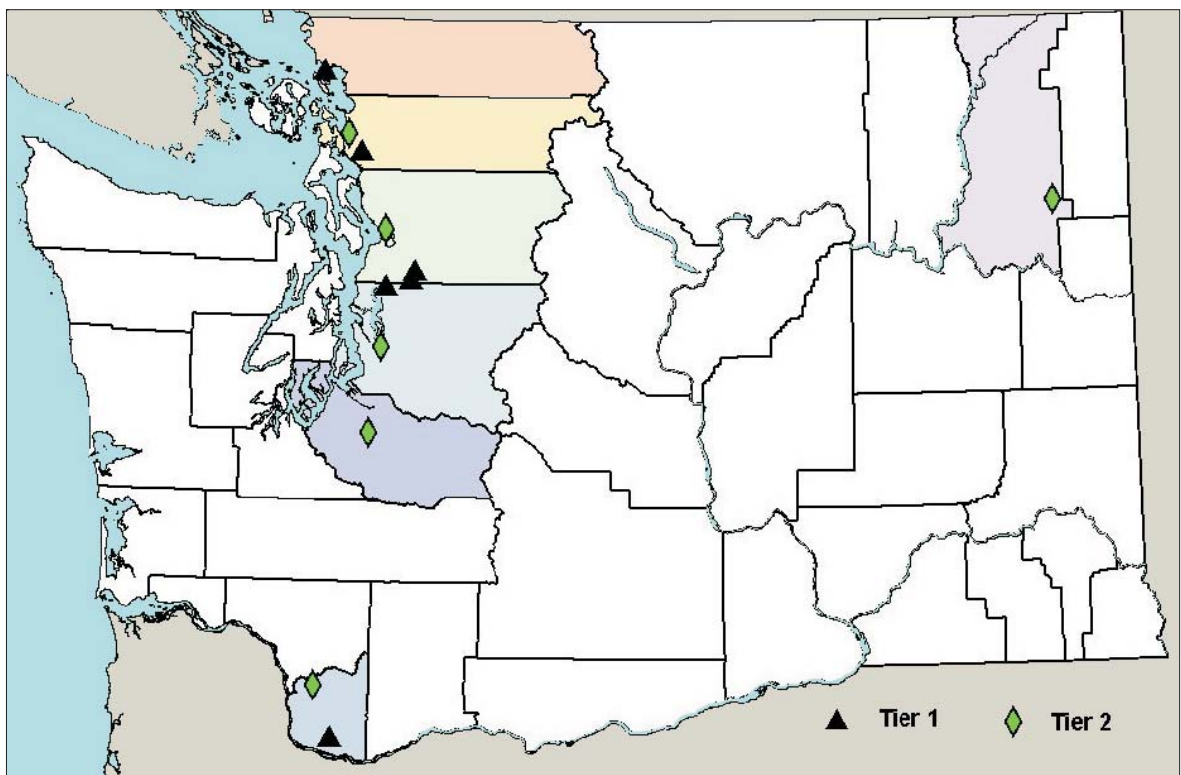


Figure 2. Location of the original twelve banks selected to participate in Washington's Wetland Mitigation Banking Pilot Program

1 This proposal has since been merged with a private proposal and processing fees are being covered under a proviso from the legislature.



- ❖ Size of proposed bank
- ❖ Level of permit readiness
- ❖ Type of work proposed for bank and proposed credit types
- ❖ Sponsor type (e.g. private, public, private-public partnership, tribal)
- ❖ Conservation benefit
- ❖ Other unique factors

Six projects were chosen for Tier 1 and six projects were chosen for Tier 2 level (Figure 2). In August 2004, project sponsors were notified of their inclusion in Tier 1 or Tier 2.

One of the banks selected for review under the pilot program was sponsored by WSDOT. In 2005, WSDOT and Ecology agreed to use their dedicated liaisons at Ecology and the Corps for the review of their banks. WSDOT worked with Ecology in an attempt to be consistent with both the draft rule and the 1994 Wetland Compensation Bank Memorandum of Agreement (WSDOT MOA). Ecology and WSDOT agreed to go forward with the project approval outside of the Pilot Program, reducing the number of pilot projects to eleven. The approval of WSDOT banks would be handled by the Banking Oversight Committee (BOC) that was established in 1995 by WSDOT as part of the WSDOT MOA. Although WSDOT did not participate in the Pilot Program, the lessons learned from the project review process translated across programs.

### *Processing Timeline*

The first bank approved in the Pilot Program was an 11-acre project in Stevens County, Watershed Resource Inventory Area (WRIA) 59. This bank was a smaller and less technical than other projects proposed and the sponsor had decided to pursue only state and local approvals of the bank. In July 2005, Ecology approved the Mitigation Banking Instrument (MBI), which serves as the technical agreement for the project. Ecology also approved the Memorandum of Agreement (MOA), the legally binding contract portion of the banking agreements made between the governing agencies and the banker. Completion of the MBI and MOA entailed 11 months of processing time.

The next bank approved in the Pilot Program was a 225-acre project in Snohomish County, WRIA 7. Federal, state, and local agencies approved the MBI in August 2005 and the MOA in November 2005. This was a total of 15 months of processing time. After processing the MBI and MOA separately, and seeing the inefficiencies of separate technical and legal documents, the MBRT decided to merge the two into a single document for future bank proposals.

The third bank, approved in August 2006, is a second entrepreneurial bank located in Snohomish County, WRIA 7. This bank is a 172-acre project that is creating and rehabilitating both wetlands and riverine side channels that directly connect to the Skykomish River. This project is a large and complex effort to increase flood storage capacity to this property. The total processing time for this bank was 24 months.

Currently there are three bank projects under review in the Pilot Program: one project is a Tier 1 proposal; the second project under review is a partnership between a Tier 1 and Tier 2 proposal; and the third project currently under review is a Tier 2 proposal.



The status of the remaining bank proposals:

- ❖ One project decided not to participate in the pilot program.
- ❖ One applicant decided to pursue alternative mitigation strategies.
- ❖ One project was put on hold due to problems with acquiring appropriate sites.
- ❖ One Tier 2 project is waiting to be reviewed as time allows

A concern expressed by sponsors is that the processing timelines and schedules for banks have varied widely. Timelines for bank proposal review have been excessively long during some periods of the Pilot Program. As staff has been added timelines have improved. This difficulty in meeting expectations around timelines has contributed significantly to the development of the bank sponsors view that there is a lack of accountability within the Pilot Program. The timelines for review should be further improved by the development of guidance documents, template documents, and the addition of more agency staff dedicated to banking project review and compliance. These improvements would require additional resources at the agencies at the state and federal levels.

### ***Non-Pilot Program Banks Approved***

In 1999, Ecology began review of the North Fork Newaukum Mitigation Bank, a WSDOT sponsored bank proposal. The BOC approved the North Fork Newaukum Mitigation Bank in 2005. Although reviewed with the draft rule in mind, the bank was not a part of the actual Pilot Program due to WSDOT sponsorship and the advanced stage of the project when the legislature approved the Pilot Program. This bank took nearly six years to complete.

In August 2006, a jointly managed bank between WSDOT and the City of Renton was approved. This bank is approximately 129-acres in size and is located in an urban environment. This bank took nearly 18 months to complete. Although these two banks were not evaluated as part of the Pilot Program (it was evaluated under the WSDOT evaluation system), the lessons learned from reviewing these banks are being shared with the MBRT for future improvement of the overall Pilot Program.

### ***Guidance and Template Documents***

Throughout the first two years of the Pilot Program, Ecology, as well as the MBRT, focused their time and efforts on processing proposals. The experience of processing several banks helped to highlight what types of guidance and template documents should be developed to help clarify, streamline, and provide more predictability in the process. The development of guidance and policy is needed to improve the Wetland Banking program.

In March 2006, the Corps, EPA, and Ecology issued the document “Wetland Mitigation in Washington State”, Parts 1 and 2. The documents were developed to help the regulated community comply with environmental laws and policies. This document describes different approaches to compensatory mitigation, including mitigation banking. Corps, EPA, and Ecology banking staff jointly developed the wetland banking portion of the guidance documents. One section of the guidance document addresses the use of wetland mitigation banking credits and provides guidance on the use of bank credits to compensate for wetland impacts.

The MBRT worked with a variety of documents while processing banks through the Pilot Program. In September 2006, the MBRT, after consultation with Corps and Ecology legal council, approved and released for use an MBI template. This document incorporates many of the lessons learned by the MBRT and BOC. The MBRT anticipates that the use of this template will decrease the processing time for entrepreneurial proposals.

At the national level, processing times for wetland bank permits has decreased significantly when templates are available for sponsors to follow. States that have guidance and templates in place for their banking programs, such as Alabama, Massachusetts, and Oregon, have reduced their processing time to one year or less.

### ***Environmental Standards***

Concerns have been expressed about the need for strong technical standards for wetland banks. These standards include baseline information requirements, performance standards to measure bank success and guidelines for determining service areas. The Multi-agency Mitigation Guidance document establishes standards for the information necessary for mitigation plans and performance standards. However, Ecology and the MBRT learned through the pilot that additional guidance is necessary to assist bankers in anticipating what service areas will be appropriate for specific proposed banks.

## **Government-to-Government Coordination**

### ***Local Government Involvement***

Ecology has invited local government to be involved with the MBRT early in the review process for each project. However, the availability of local staff time for review of projects varies significantly. With limited staff time, many local governments cannot dedicate review time until the permitting stage, when the proposal is near completion. The MBRT is developing guidance, internally and with the Advisors Group, to help ensure involvement with local governments and improve communications.

A key lesson learned throughout the Pilot Program was the importance of involving the local agencies early and throughout the proposal review process. Early local involvement helps streamline the permitting and bank certification process.

### ***Tribal, State, and Federal Coordination***

Coordination among all affected groups is an important element throughout the review and monitoring process of a bank proposal. Because resources are limited at various governmental levels, the MBRT needs to continually reach out and coordinate with various governmental entities to ensure adequate communication. This effort can be a time consuming process. The responsibility for contacting local government should be a shared effort between the bankers and the MBRT.

### ***Consistency with Existing Regulations***

Local governments have expressed concern that although the draft rule outlines the need for bank proposals to be consistent with local land use and watershed management plans, many plans do not anticipate such uses. In general, local land use plans and development codes do not address wetland mitigation banking development. Ecology is working with local governments on how mitigation banking and other forms of alternative mitigation may fit in with local planning and codes.

The MBRT has found that the draft rule does not address tying “bank certification” review process in with formal federal, state, and local permitting timelines and processes. These timelines are well defined and have distinct steps, which sometimes do not line up with the bank certification process outlined in the rule. The MBRT has been working with both local governments and with its own permitting teams to determine the best way to integrate both wetland banking certification review and the formal permitting process. This work involves clarifying what level of technical information is needed to progress through permitting review and the coordination and sequencing needed for efficient processing.

### ***Land Use Activity Coordination***

Land use on the proposed bank project property and on adjacent properties has become an important issue during the Pilot Program. One challenge is whether wetland banks can be located on lands designated as prime agricultural areas. Ecology is working with local governments to coordinate early on bank proposals and provide assistance where possible to determine where alternative mitigation options, such as wetland banking, fit in with local planning and codes. This issue highlights the importance of early coordination with local governments. Clarification on these issues early in the process will avoid unnecessary expense both for the project proponent and for the project reviewers. Ecology will continue to work with the agricultural community, project proponents, and local government to ensure that bank proposals are consistent with maintaining viable and productive farmlands.

Another challenge that Ecology and the MBRT are working with is the issue of public access to banks. The MBRT is discussing when and how it would be appropriate to allow the public limited, low impact access to banks. One challenge in bank development is the determination of appropriate buffer widths in areas with differing land uses. Buffers are important in order to protect the functions of the wetland bank. Ecology is working with the MBRT and the Advisors Group to create guidance to help with these types of decisions.

## **Communication**

### ***Public Outreach***

Ecology continually works on public outreach throughout the Pilot Program. The agency frequently updates a web page dedicated to wetland banking information:

<http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking>.

Ecology maintains an e-mail list serve and sends out information on wetland mitigation banking to people who have shown an interest in the topic:

<http://listserv.wa.gov/archives/wetland-mitigation-banking.html>

Throughout the Pilot Program Ecology has given informational presentations to local governments, interest groups, and the public. Recently, Ecology held a Wetland Mitigation Banking Workshop in Mount Vernon in July 2006 to address the many questions received from Skagit County stakeholders concerning the banking program. Over fifty stakeholders attended this workshop.

On December 5, 2006, Ecology held a wetland banking forum, “Wetland Banking in Washington State”, to inform all interested parties, stakeholders, and the general public on the progress of the wetland banking program. Over 120 stakeholders attended the forum.

Additionally Ecology and the MBRT have attempted to involve the public in project review through the Public Notice process for banks. According to the Federal banking rule (60 FR pages 58605-58614, 1995) proposed banks go out for public notice when a prospectus is received by the federal agency.

According to the state draft rule, Ecology is to ensure that information on banks is available to the public in a timely manner using existing public processes whenever possible. With these two directives in mind, Ecology and the MBRT have determined that projects should go out for a joint Ecology and Corps public notice during the conceptual design phase. This process ensures the public is aware of the project at an early stage and have an opportunity for commenting. This process also allows potential land use or permitting conflicts to emerge early in the process and therefore can be addressed.

A second opportunity for public comment occurs when the applicant submits the Joint Aquatic Resource Permit Application (JARPA) for public notice. This is an existing public process and usually occurs after the technical details of the proposal have been developed. The public can comment again at the detailed design stage if there are specific design issues with the project. Ecology has heard from the Advisors Group that notification even earlier in the process is desirable. Ecology will continue to work with the Advisors Group to identify earlier ways to appropriately incorporate public process.

### ***MBRT Communications***

Throughout the Pilot Program, the MBRT has worked on improving their communication with the public, banking community, environmental organizations, and governing agencies. One challenge the MBRT faces is the lack of staffing on all levels. Timely communications are an important part of the MBRT members' duties. However, communications between the MBRT and Stakeholders have not been as effective or timely as should be expected. Communications have improved as more staff has become available for the MBRT review process. Communications will also continue to improve as guidance, both external and internal, becomes available for MBRT members.

## **2007 and Beyond**

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### **Working with Advisors Group**

In the fall of 2006 Ecology asked for feedback on the Pilot Program from those involved and other parties interested in the Pilot Program. The comments submitted will help Ecology improve the environmental success and efficiency of the Pilot Program as the agency moves toward the rule making process. Many of the comments received have been incorporated in the Summary Statement of this report. Copies of comments received regarding the wetland bank program can be obtained by contacting Kate Thompson at 360-407-6749 or [kath461@ecy.wa.gov](mailto:kath461@ecy.wa.gov).

Ecology reconvened the pilot Advisors Group in October 2006 to discuss the submitted feedback and to hear their recommendations on improving the Pilot Program. With input from the Advisors Group and Pilot Program participants, Ecology hopes to improve the Pilot Program by continuing to work on guidance that clarifies the bank certification process for bank sponsors and interested parties. Ecology will continue to meet regularly with the Advisors Group to discuss and identify revisions to the draft rule.

## Rule Adoption

The state Legislature directed Ecology to develop a statewide rule for the certification of wetland mitigation banks (Chapter 90.84 RCW). It is Ecology's intent in 2007 to submit the draft rule, with the identified revisions, and begin the rule adopting process. We will incorporate recommendations made by the Advisors Group and other stakeholders into the draft rule. Ecology plans to submit a draft of the revised rule for public comment and then proceed to final adoption.

## Post-Certification Monitoring

Ecology will continue to monitor approved banks to ensure performance standards are met prior to releasing credits. Ecology will also work with bank sponsors on adaptive management strategies when needed to ensure banks are successful and reaching their performance standards and to ensure that credits are released in a timely manner.

## Processing Proposals

While working toward adoption of a wetland banking rule, Ecology will continue processing pilot wetland bank proposals. During this period, Ecology will also consider accepting new wetland banking proposals as soon as procedures and criteria for accepting new banks into the wetland banking program are developed. The map below highlights the established banks in Washington, including both pilot projects and projects existing prior to the Pilot Program, banks that are being processed through the Pilot Program, and potential banks in Washington (Figure 3).

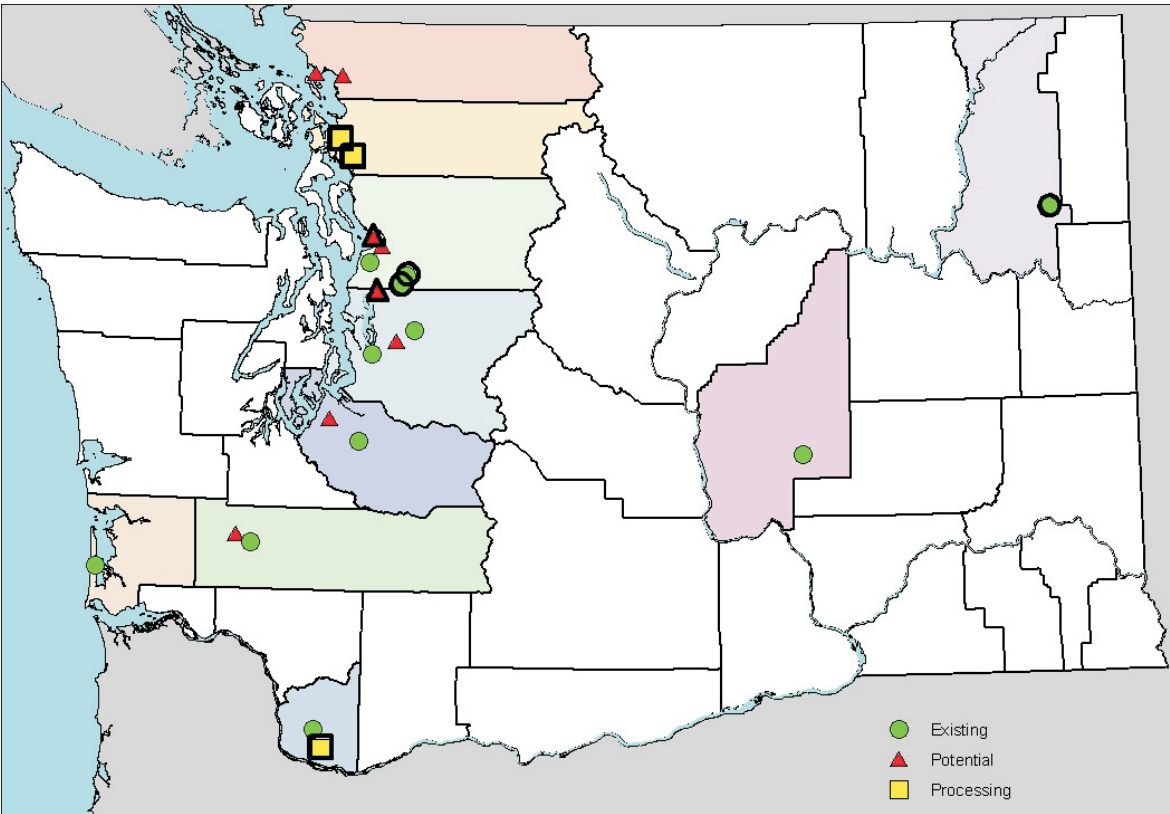


Figure 3. Location of existing wetland banks, wetland banks that are being processed, and potential wetland banks in Washington. Shapes outlined in thick black lines are banks that are part of the Pilot Program.



# Conclusions

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Ecology has gained valuable knowledge during the Pilot Program period that will allow development of a more environmentally successful wetland mitigation banking program. Testing the draft rule prior to implementation proved very helpful in identifying several areas for improvement. We have highlighted some the important lessons we learned below.

- ❖ Predictability in agency expectations and permitting is needed in the program.
- ❖ Guidance is important, both internally and externally, to clarify expectations, streamline the banking process, and improve predictability in bank development and processing.
- ❖ Involve local government early and often in the process for program success.
- ❖ Coordinate throughout the process to help ensure bank proposals are consistent with local land use planning.
- ❖ Identify limitations at various governmental levels and coordinate appropriately through the MBRT to ensure effective communication.
- ❖ Create a more comprehensive outreach plan to make it easier for the public to be aware of banking project proposals throughout the state.

The knowledge and experience gained from the Pilot Program will help facilitate the development of a more efficient and effective wetland mitigation banking rule and has furthered the agency's goal of improving mitigation around the state. Ecology looks forward to using the lessons we learned and the strategic priorities established under the *Environmental Mitigation that Works Initiative* to move forward toward improvements to the draft rule and eventually to formal rule adoption of the draft rule (WAC 173-700).

We would like to thank the Legislature for its continued support of the important work Ecology-with its partners- is doing with Wetland Mitigation Banking in Washington State. Ecology will continue to work diligently with our partners to improve upon the foundation we have built during this Pilot Program phase. With mitigation that works, we can better sustain our wetlands and all they do for the people, communities, and the environment of our state.

# Appendix A

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## CHAPTER 90.84 RCW WETLANDS MITIGATION BANKING

### Sections

- 90.84.005 Findings-Purpose-Intent.
- 90.84.010 Definitions.
- 90.84.020 Wetlands or wetlands banks – Authority for regulating.
- 90.84.030 Rules-Submission of proposed rules to legislative committees.
- 90.84.040 Certification of banks – Approval of use of credits by state and local governments.
- 90.84.050 Approval of use of credits by the department – Requirements.
- 90.84.060 Interpretation of chapter and rules.
- 90.84.070 Application to public and private mitigation banks.
- 90.84.900 Severability – 1998 c 248.

### ***RCW 90.84.005 Findings — Purpose — Intent.***

(1) The legislature finds that wetlands mitigation banks are an important tool for providing compensatory mitigation for unavoidable impacts to wetlands. The legislature further finds that the benefits of mitigation banks include: (a) Maintenance of the ecological functioning of a watershed by consolidating compensatory mitigation into a single large parcel rather than smaller individual parcels; (b) increased potential for the establishment and long-term management of successful mitigation by bringing together financial resources, planning, and scientific expertise not practicable for many project-specific mitigation proposals; (c) increased certainty over the success of mitigation and reduction of temporal losses of wetlands since mitigation banks are typically implemented and functioning in advance of project impacts; (d) potential enhanced protection and preservation of the state’s highest value and highest functioning wetlands; (e) a reduction in permit processing times and increased opportunity for more cost-effective compensatory mitigation for development projects; and (f) the ability to provide compensatory mitigation in an efficient, predictable, and economically and environmentally responsible manner. Therefore, the legislature declares that it is the policy of the state to authorize wetland mitigation banking.

(2) The purpose of this chapter is to support the establishment of mitigation banks by: (a) Authorizing state agencies and local governments, as well as private entities, to achieve the goals of this chapter; and (b) providing a predictable, efficient, regulatory framework, including timely review of mitigation bank proposals. The legislature intends that, in the development and adoption of rules for banks, the department establish and use a collaborative process involving interested public and private entities. [1998 c 248 § 1.]

### ***RCW 90.84.010 Definitions.***

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) “Banking instrument” means the documentation of agency and bank sponsor concurrence on the objectives and administration of the bank that describes in detail the physical and legal characteristics of the bank, including the service area, and how the bank will be established and operated.

(2) “Bank sponsor” means any public or private entity responsible for establishing and, in most circumstances, operating a bank.

(3) “Credit” means a unit of trade representing the increase in the ecological value of the site, as measured by acreage, functions, and/or values, or by some other assessment method.

(4) “Department” means the department of ecology.

(5) “Wetlands mitigation bank” or “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 authorized impacts to similar resources.

(6) “Mitigation” means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

(7) “Practicable” means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(8) “Service area” means the designated geographic area in which a bank can reasonably be expected to provide appropriate compensation for unavoidable impacts to wetlands.

(9) “Unavoidable” means adverse impacts that remain after all appropriate and practicable avoidance and minimization have been achieved. [1998 c 248 § 3.]

### ***RCW 90.84.020 Wetlands or wetlands banks — Authority for regulating.***

This chapter does not create any new authority for regulating wetlands or wetlands banks beyond what is specifically provided for in this chapter. No authority is granted to the department under this chapter to adopt rules or guidance that apply to wetland projects other than banks under this chapter. [1998 c 248 § 2.]

### ***RCW 90.84.030 Rules — Submission of proposed rules to legislative committees.***

Subject to the requirements of this chapter, the department, through a collaborative process, shall adopt rules for:

(1) Certification, operation, and monitoring of wetlands mitigation banks. The rules shall include procedures to assure that:

(a) Priority is given to banks providing for the restoration of degraded or former wetlands;

(b) Banks involving the creation and enhancement of wetlands are certified only where there are adequate assurances of success and that the bank will result in an overall environmental benefit; and



(c) Banks involving the preservation of wetlands or associated uplands are certified only when the preservation is in conjunction with the restoration, enhancement, or creation of a wetland, or in other exceptional circumstances as determined by the department consistent with this chapter;

(2) Determination and release of credits from banks. Procedures regarding credits shall authorize the use and sale of credits to offset adverse impacts and the phased release of credits as different levels of the performance standards are met;

(3) Public involvement in the certification of banks, using existing statutory authority;

(4) Coordination of governmental agencies;

(5) Establishment of criteria for determining service areas for each bank;

(6) Performance standards; and

(7) Long-term management, financial assurances, and remediation for certified banks.

Before adopting rules under this chapter, the department shall submit the proposed rules to the appropriate standing committees of the legislature. By January 30, 1999, the department shall submit a report to the appropriate standing committees of the legislature on its progress in developing rules under this chapter. [1998 c 248 § 4.]

#### ***RCW 90.84.040 Certification of banks — Approval of use of credits by state and local governments.***

(1) The department may certify only those banks that meet the requirements of this chapter. Certification shall be accomplished through a banking instrument. The local jurisdiction in which the bank is located shall be signatory to the banking instrument.

(2) State agencies and local governments may approve use of credits from a bank for any mitigation required under a permit issued or approved by that state agency or local government to compensate for the proposed impacts of a specific public or private project. [1998 c 248 § 5.]

#### ***RCW 90.84.050 Approval of use of credits by the department — Requirements.***

Prior to authorizing use of credits from a bank as a means of mitigation under a permit issued or approved by the department, the department must assure that all appropriate and practicable steps have been undertaken to first avoid and then minimize adverse impacts to wetlands. In determining appropriate steps to avoid and minimize adverse impacts to wetlands, the department shall take into consideration the functions and values of the wetland, including fish habitat, ground water quality, and protection of adjacent properties. The department may approve use of credits from a bank when:

(1) The credits represent the creation, restoration, or enhancement of wetlands of like kind and in close proximity when estuarine wetlands are being mitigated;

(2) There is no practicable opportunity for on-site compensation; or

(3) Use of credits from a bank is environmentally preferable to on-site compensation. [1998 c 248 § 6.]

***RCW 90.84.060 Interpretation of chapter and rules.***

The interpretation of this chapter and rules adopted under this chapter must be consistent with applicable federal guidance for the establishment, use, and operation of wetlands mitigation banks as it existed on June 11, 1998, or such subsequent date as may be provided by the department by rule, consistent with the purposes of this chapter. [1998 c 248 § 7.]

***RCW 90.84.070 Application to public and private mitigation banks.***

This chapter applies to public and private mitigation banks. [1998 c 248 § 8.]

***RCW 90.84.900 Severability — 1998 c 248.***

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1998 c 248 § 9.]

# Appendix B

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## Chapter 173-700 WAC WETLAND MITIGATION BANKS

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## PART I

### *Overview*

**173-700-010 Background** (1) The Wetlands Mitigation Banking Act, Chapter 90.84 RCW, sets forth fundamental elements of a mitigation banking policy to ensure that a predictable, statewide process exists for certifying environmentally sound wetland mitigation banks.

(2) The act finds wetland mitigation banking an important regulatory tool for providing compensatory mitigation for unavoidable impacts to wetlands and declares it the policy of the state to support wetland mitigation banking. The act directs the department of ecology (the department) to adopt rules establishing a statewide process for certifying wetland mitigation banks.

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

(4) Wetland mitigation banks (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.

**173-700-020 Purpose** (1) This rule is intended to facilitate wetland mitigation banking by providing an efficient, predictable statewide framework for the certification and operation of environmentally sound wetland mitigation banks. In addition, this rule sets out to accomplish the following:

- (a) Provide a systematic approach for reviewing and approving environmentally sound wetland mitigation banks;
- (b) Provide for the timely review of bank proposals;
- (c) Establish coordination among state and local agencies involved in the certification and approval of banks;
- (d) Avoid duplication with federal processes by encouraging early involvement with federal agencies; and
- (e) Provide incentives to encourage bank sponsors to locate and design banks that provide the greatest ecological benefits.

(2) The purpose of this rule is to support the establishment of wetland mitigation banks as an important tool for providing compensatory wetland mitigation by authorizing state agencies, local governments and private entities to achieve the goals of the authorizing statute, Chapter 90.84 RCW.

**173-700-030 Integrating banks with watershed planning** (1) This rule should facilitate the establishment and operation of wetland mitigation banks that are integrated with local land-use plans and science-based watershed or sub-watershed management plans.

(2) Local and state agencies are encouraged to use wetland mitigation banks as a useful tool for implementing watershed management plans. Wetland banks can restore habitats and functions that are priorities within the watershed.

(3) Wetland banks should experience an expedited review process when they are established as part of a science-based resource management program, which has been endorsed by state and federal resource agencies.

**173-700-040 Applicability** This rule applies to private and public wetland mitigation banks established under Chapter 90.84 RCW.

## **PART II**

### *Definitions*

#### **173-700-100 Definitions**

**“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 non-vegetated wetlands or aquatic sites (e.g. mudflats, deepwater habitats, lakes and streams).

**“As-built plans”** means a document, that describes the physical, biological and, if required, the chemical condition of a compensatory bank site after complete implementation of each phase of an approved construction plan.

**“Available credits”** means those credits that have been released by the department and can be used. Available credits do not include credits that have been debited (used for a permit requirement) from the bank.

**“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 authorized impacts to aquatic resources.

**“Bank instrument”** means the documentation of agency and bank sponsor concurrence on the objectives and administration of the bank. The “bank 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.

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

**“Buffer”** means those areas surrounding 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.

**“Compensatory mitigation”** means the restoration, creation, enhancement or in exceptional circumstances, preservation of wetlands or other aquatic resources, or both, 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 has 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 site, as measured by acreage, functions, and values, or by some other assessment method.

“**Debit project**” means those projects that use credits from a wetland mitigation bank to fulfill regulatory requirements for compensation of impacts to aquatic resources. A debit project may require more than one regulatory approval under federal, state and local rules.

“**Department**” means the department of ecology.

“**Ecoregions**” means those areas that are considered to be regions of relative homogeneity in ecological systems or in relationships between organisms and their environments.

“**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.

“**Financial assurance**” means the money or other form of financial instrument (for example 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 subject bank are achieved and maintained over the long-term in accordance with the terms and conditions of the bank instrument.

“**Function assessment**” means an assessment of the degree to which a wetland is performing, or is capable of performing, specific wetland functions. Function assessments include the use of scientifically-based quantitative and qualitative methods developed for assessing functions, as well as the use of best professional judgement for determining the degree to which a wetland or other habitat is performing, or is capable of performing, specific functions.

“**Hydrogeomorphic (HGM) classification**” means a wetland classification scheme that groups wetlands based on their geomorphic setting and water regime.

“**Local jurisdiction**” means any local government such as a town, city, or county.

“**Mitigation**” means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to wetlands.

“**Mitigation bank review team**” or “**MBRT**” means an interagency group of federal, state, tribal and local regulatory and resource agency representatives that are invited to participate in negotiations with the bank sponsor on the terms and conditions of the bank instrument.

“**Mitigation bank review team process**” or “**MBRT Process**” means a process in which the department strives to reach consensus with the MBRT members on the terms, conditions, and procedural elements of the bank instrument.

“**Operational life**” or “**operational life of a bank**” means the period during which the terms and conditions of the bank 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:

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

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

**“Performance standards”** are measurable benchmarks for a specific project objective. Performance standards are usually designed to allow evaluation of the development of ecological characteristics associated with specific wetland functions.

**“Potential credits”** mean the credits anticipated to be provided at a bank site, but which are not available for use. Once potential credits are released by the department, they convert to available credits.

**“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.

**“Prospectus”** is the conceptual proposal for a mitigation bank project.

**“Restoration”** means actions taken to intentionally re-establish wetland area, function and values at a site where wetlands previously existed, but are no longer present because of the lack of water or hydric soils. Restoration can also include the re-establishment of historic wetland HGM classes on sites that have been altered due to human activities to a different HGM class, and which are significantly degraded with low levels of functions and values.

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

**“Signatories”** means those entities that have documented their approval of the terms and conditions of the bank instrument through their signature on the bank instrument.

**“Sustainability”** means the ability of the aquatic system to be self-maintaining and self-regulating. Sustainable bank sites must have sufficient buffer areas to protect the site from degradations due to activities on adjacent lands.

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

**“Water resource inventory areas”** or **“WRIA”** refers to the sixty-two water resource divisions of the state as described in Chapter 173-500 WAC, Water Resources Management Program Established Pursuant to the Water Resources Act of 1971, as amended.

**“Wetland”** or **“wetlands”** mean 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.

**“Wetland mitigation bank”** or **“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 authorized impacts to aquatic resources.

## PART III

### *Certification Process*

**173-700-200 How does certification relate to other rules?** (1) Many federal, state, and local laws and rules and treaty rights relate to the establishment of a compensatory wetland mitigation bank.

(2) Mitigation banks certified under this rule must be consistent with existing federal, state and local laws and rules.

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

(4) Mitigation Bank Review Team (MBRT) members shall advise the bank sponsor of pertinent federal state or local rules that may apply to a specific bank proposal and that may delay the certification process.

**173-700-201 Why have a certification process?** The department must certify banks to ensure that they are technically feasible, environmentally sound, and in compliance with this rule.

**173-700-202 Overview of the wetland mitigation bank certification process** (1) The certification process for wetland mitigation banks contains two parts. The first part is a pre-application process followed by a formal application process.

(2) The *pre-application process* begins when a bank sponsor submits a prospectus to the department.

(3) The department convenes a Mitigation Bank Review Team (MBRT) after determining that the prospectus contains sufficient information.

(4) The MBRT reviews and evaluates the bank prospectus and provides comments to the bank sponsor on the proposed bank.

(5) The bank sponsor develops a bank instrument using the comments provided by the MBRT on the prospectus.

(6) The *formal application process* begins when the bank sponsor submits a certification application and bank instrument to the department.

(7) The department determines if the application is complete.

(8) The department reconvenes the MBRT to review the complete application.

(9) The department begins the public comment period under WAC 173-700-232.

(10) The department issues a certification decision and notifies the local jurisdiction(s) in which the bank is located of that decision.

(11) The local jurisdiction(s) reviews the certification decision and determines whether it concurs with the department's decision.

(12) *Certification is complete* when the department, the local jurisdiction(s), and the bank sponsor all sign the bank instrument.

**173-700-203 Decision-making procedure** (1) All decisions rendered by the department must fully consider MBRT and public comments submitted as part of the certification evaluation process.

(2) The MBRT shall strive to achieve *consensus* on the terms and conditions of bank instruments.

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

(4) Advisory members of the Mitigation Bank Review Team may participate in MBRT discussions, however they may not participate in the decision-making of the MBRT. See WAC 173-700-732.

**173-700-204 Dispute resolution** (1) In the event that the MBRT is unable to reach consensus on any element of the bank certification, the department shall initiate the dispute resolution procedure under WAC 173-700-205.

(2) The department shall make every effort to resolve disputes within the MBRT forum before the conflict is elevated to the program manager of the department's Shorelands and Environmental Assistance Program.

**173-700-205 Dispute resolution procedure** The department shall use the following dispute resolution procedure for resolving concerns from members of the MBRT.

(1) The MBRT member(s) who has concerns with a particular decision or element of a bank certification shall submit the concern and accompanying rationale in writing to the chair(s) of the MBRT.

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

(3) The chair(s) of the MBRT shall present potential solutions to the MBRT and the MBRT shall work to resolve the concern.

(4) In the event that the MBRT is unable to resolve the concern, the MBRT member with the concern shall secure and pay for a facilitator to assist the MBRT in resolving the conflict.

(5) In the event that the MBRT is still unable to reach consensus, the MBRT member with the concern may request, through written notification, that the department's program management reviews the issue. Such a notification must include:

- (a) A detailed description of the issue, and
- (b) Recommendations for resolution.

(6) The written notification must be directed to the program manager of the Shorelands and Environmental Assistance Program or the program manager's designee. Within twenty days of receipt of a notification, the program manager, or its designee, shall contact the MBRT member and shall make a final decision. The resolution shall be forwarded to the other MBRT members.

**173-700-220 Pre-application process** (1) The bank sponsor must submit a prospectus, consistent with the requirements in WAC 173-700-223, to the department.

(2) The department must determine whether the prospectus contains enough information to form a Mitigation Bank Review Team (MBRT).

(a) If the department determines that the prospectus is not sufficient: the department shall notify the bank sponsor and identify any additional information necessary to complete the prospectus.

(b) If the department determines that the prospectus is sufficient, the department shall notify the local jurisdiction(s) and invite it to co-chair the MBRT.

(c) If the prospectus is sufficient, the department must invite representatives from the appropriate federal, state, and local regulatory and resource agencies, and tribes to participate on the MBRT. The department may invite advisory members to the MBRT under WAC 173-700-732

(3) The bank sponsor must send the department enough copies of the prospectus for all of the members of the MBRT.

(4) At least two weeks before a MBRT meeting, the department must send the prospectus to all agencies and tribes participating on the MBRT.

**173-700-221 MBRT review of the prospectus** (1)The MBRT shall strive to meet within sixty days of when the department notifies it of a new bank prospectus.

(2) The MBRT must meet to evaluate the technical and regulatory feasibility of a prospectus.

(3) The members of the MBRT shall provide comments to the department and the bank sponsor on the bank prospectus. Comments should include:

(a) The technical feasibility of the bank proposal;

(b) Its compliance with existing rules and ordinances;

(c) Any applicable permits or authorizations necessary for bank construction;  
and

(d) Any additional information necessary for the draft bank instrument, such as supporting studies and other documentation.

(4) The bank sponsor must use the comments received from the MBRT to develop a bank instrument, which is consistent with the requirements in WAC 173-700-240 and WAC 173-700-241.

(5) After completing the bank instrument, the sponsor may formally apply for wetland bank certification under WAC 173-700-230.

**173-700-222 Purpose of the prospectus** (1) The purpose of the prospectus is to provide a conceptual plan for a wetland mitigation bank proposal.

(2) The prospectus initiates dialogue with the department and MBRT members on a proposed bank.

(3) A prospectus must contain sufficient information to allow the department and the MBRT to provide feedback to the bank sponsor on whether the bank project is technically feasible and complies with existing state and local rules. Necessary information includes discussions of the proposed goals and objectives, the construction, and operation of the proposed bank.

**173-700-223 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) Site location information, including a detailed map with sufficient information to accurately identify site location, such as legal description and proximity to existing roads;
- (3) The rationale for site selection addressing the considerations listed in WAC 173-700-320;
- (4) A description of existing conditions of the proposed site(s) including, but not limited to:
  - (a) Land ownership;
  - (b) The landscape position of the site;
  - (c) Site size;
  - (d) Wetlands present on the site;
  - (e) Other habitat types present on the site;
  - (f) Available information on water sources, soils, and vegetation; and
  - (g) A preliminary analysis of functions provided by on-site wetlands;
- (5) Conceptual site design, including but not limited to:
  - (a) Proposed types and approximate sizes of wetlands;
  - (b) Other proposed habitat types to be provided on the site; and
  - (c) Proposed functions that the bank is anticipated to provide;
- (6) Potential adverse impacts to aquatic resources or other habitats from bank construction;
- (7) Proposed service area and accompanying rationale that demonstrates that the service area is ecologically appropriate;
- (8) Anticipated potential credits to be generated by the bank;
- (9) Discussion of whether water rights have been applied for or secured for the site, if needed;
- (10) Demonstration of adequate financial resources for the construction, operation, and long-term management of the bank site; and
- (11) Description of proposed permanent protection mechanism, such as a conservation easement.



**173-700-224 Optional MBRT pre-application meetings** (1) If a bank sponsor wants assistance from the MBRT during the drafting of a bank instrument, the bank sponsor may request that the department schedule an additional meeting(s) with the MBRT.

(2) If additional meetings are requested, the bank sponsor must submit to the department a draft bank instrument, consistent with the requirements of WAC 173-700-241, and sufficient copies of the instrument for distribution to the MBRT members.

(3) The department must reconvene the MBRT if:

(a) The sponsor requests another meeting with the MBRT;

(b) The bank sponsor submits a complete draft bank instrument with sufficient copies for the MBRT members to the department; and

(c) The department determines that the new draft bank instrument warrants another meeting with the MBRT.

(4) The MBRT shall provide comments to the department and the bank sponsor regarding any terms and conditions required for the bank instrument.

**173-700-230 Formal application phase** (1) The bank sponsor shall submit a complete certification application to the department.

(2) A complete application consists of the following:

(a) A completed wetland bank certification application form;

(b) A draft bank instrument consistent with the requirements of WAC 173-700-241;

(c) A completed checklist under RCW Chapter 43.21C, the State Environmental Policy Act;

(d) A Joint Aquatic Resources Permit Application (JARPA), if necessary; and

(e) Other supporting information as required by the department through the MBRT process. This supporting information may include, but is not limited to:

(i) Financial assurance documents;

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

(iii) Hydrologic and other ecological studies.

**173-700-231 What happens after an application is submitted?** (1) After receiving the application, the department shall determine whether the application is complete.

(a) If the department determines that the application is not complete, the department shall notify the bank sponsor of its determination and identify any additional information that is necessary to complete the application.

(b) If the department determines that the application is complete, the department shall notify the bank sponsor of its determination and assign a bank application number to the application.

(2) After the department notifies the bank sponsor that the application is complete, the bank sponsor must submit to the department sufficient copies of the draft bank instrument for distribution to MBRT members.

**173-700-232 Review of the application** (1) Upon determining the application is complete and after receiving sufficient copies of the bank instrument from the bank sponsor, the department must notify and reconvene the MBRT.

(2) After determining that the application is complete, the department must also initiate the public notification, review, and comment process under WAC 173-700-252 through WAC 173-700-255.

(3) The MBRT shall review the draft bank instrument and provide comments to the department and the bank sponsor on the technical requirements, terms, and conditions of the proposed certification.

**173-700-233 Department's certification decision** (1) After the public comment period closes and the MBRT has concluded the review of the proposal, the department must:

(a) Notify the bank sponsor of all recommendations and comments received from the MBRT and the public;

(b) Identify any additional information that the sponsor must submit in order for the department to make a certification decision; and

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

(2) If the department requests additional information:

(a) The certification process shall stop until the information is received and approved by the department; and

(b) The department may reconvene the MBRT or reopen the public comment period if the department determines that the bank instrument has changed substantially.

(3) After review of the application is complete, the department shall issue a certification decision.

(4) The department shall indicate its approval of certification by signing the bank instrument. After signing the bank instrument, the department must notify the local jurisdiction and request its concurrence on the certification.

(5) If the application is denied, the department must send a notification to the bank sponsor and to the local jurisdiction in which the proposed bank is located. The notification must state the reasons for denial.

**173-700-234 Local jurisdiction's certification decision** (1) After receipt of the department's decision to approve certification, the local jurisdiction(s) in which the bank will be located shall review the certification decision.



(2) If the local jurisdiction(s) concurs with the bank certification, it must sign the bank instrument.

(3) If the local jurisdiction(s) does not concur with the certification, the local jurisdiction must send a notification to the bank sponsor and the department of its decision. The notification must state the reasons for the local jurisdiction's non-concurrence.

(4) If the local jurisdiction(s) does not concur with the certification, the department may not certify the bank.

**173-700-235 Signatories of the bank instrument** (1) A bank instrument must contain signatures from the department, the local jurisdiction(s) in which the bank will be located, and the bank sponsor for certification to be complete.

(2) No agency, except for the department and the local jurisdiction in which the bank is located, is required to sign a bank instrument in order for certification to be complete. However, MBRT member agencies and tribes are encouraged to sign a bank instrument to document their concurrence with the terms and conditions of the certification.

(3) If any other agency or tribe signs the bank instrument, it shall signify that entity's concurrence with the terms of the bank instrument.

**173-700- 240 The bank instrument** (1) A bank instrument details all of the physical characteristics, legal obligations, operational procedures, monitoring, and maintenance requirements for a wetland mitigation bank.

(2) Requirements for bank instruments vary based on the specific conditions of the bank site and should be developed in cooperation with the MBRT.

(3) The bank sponsor must develop the bank instrument using feedback from the MBRT on the prospectus and, if applicable, MBRT comments on a preliminary draft bank instrument.

**173-700-241 Contents of the bank instrument** The minimum elements required in the bank instrument are:

(1) A statement of bank goals and objectives;

(2) Documentation of the ownership of bank lands, including a legal description and map of the bank site and surrounding areas;

(3) A detailed description of bank sponsor responsibilities for construction implementation, monitoring and reporting, maintenance, and credit tracking and reporting;

(4) A description and map of the geographic service area;

(5) The potential number of credits to be generated by the bank and a credit description consistent with WAC 173-700-350;

- (6) A description of the types of impacts to wetlands or other aquatic resources suitable for compensation and any restrictions on uses of credits;
- (7) A detailed description of the proposed bank including, but not limited to:
- (a) The bank size;
  - (b) The landscape position of the site;
  - (c) The Cowardin and HGM classes and sizes of wetlands and aquatic resources proposed for the bank;
  - (d) A description of the buffers for the site and any other habitats provided on the site;
  - (e) The functions and values to be provided by the bank;
  - (f) Detailed site design plans and specifications to include grading plans, planting plans, and specifications for any structures; and
  - (g) Construction timing and schedules;
- (8) A description of existing ecological baseline conditions at the bank site, including supporting documentation requested by the department, through the MBRT process. The description must include, at a minimum:
- (a) Technical data on water sources and soils;
  - (b) Wetlands present on the site;
  - (c) Other habitat types present on the site;
  - (d) Existing vegetation communities; and
  - (e) Analysis of functions provided by on-site wetlands;
- (9) Documentation of water rights for the proposed bank, if required;
- (10) Credit tracking and accounting procedures, including reporting requirements;
- (11) Performance standards for determining credit release and bank success, including a schedule for the phased release of credits;
- (12) Reporting protocols and monitoring plan, including a clear statement of responsibility for conducting monitoring and for reporting;
- (13) A contingency plan and statement of responsibility for contingency actions;
- (14) Appropriate financial assurances;
- (15) Provisions for short-term and long-term management and maintenance, including a description of anticipated management and maintenance activities;
- (16) Provisions for permanent protection of the property on which the bank will be located; and
- (17) Force Majeure Clause (identification of sponsor responsibilities in the event of catastrophic events that are beyond the sponsor's control).

**173-700-250 Public involvement** (1) It is the department's goal to ensure that accurate certification information is made available to the public in a timely manner, and to avoid duplicative processes for public involvement.

**173-700-251 Public outreach** Applicants are strongly encouraged to solicit public input during the pre-application phase of bank certification.

**173-700-252 Joint public notices** (1) The department shall use existing public processes, whenever possible, to obtain public comment on a proposed bank certification. When an existing process is available to solicit public comment on a certification, the department shall strive to provide a joint public notice.

(2) The public notice for bank certification must include the information under WAC 173-700-253 and WAC 173-700-254.

(3) When an existing public notification process for the proposal is not available, the department shall issue a public notice on the proposed bank certification under WAC 173-700-253 through WAC 173-700-255.

**173-700-253 Notifying the public of certification applications** The department must notify the public of an application for certification. Public notice for the wetland bank certification shall include:

(1) Name and address of the department staff contact for information on the certification application;

(2) Name and address of the bank sponsor;

(3) A description of the bank proposal including, but not limited to, the following information:

(a) The location of the proposed bank site;

(b) The types of wetlands to be restored, enhanced, created or preserved on the bank site;

(c) The number and types of credits proposed;

(d) The service area proposed for the bank; and

(e) The credit release schedule proposed for the bank;

(4) Name, address, and telephone number of a person from whom interested persons may obtain further information, such as copies of the application, the draft bank instrument and supporting materials; and

(5) A brief description of the comment procedures, including:

(a) The time and place of any hearings scheduled for the certification;

(b) Where comments should be sent;

(c) The closing date for receiving comments; and

(d) The procedures to request a hearing.

**173-700-254 Who is notified of an application?** At a minimum, the department shall notify the following members of the public of the application for certification:

(1) Local and tribal governments located within the proposed service area, other interested persons and organizations that have requested information on wetland bank certifications, and all others deemed appropriate by the department;

(2) The latest recorded real property owners located within 300 feet of the boundaries of the property upon which the wetland bank site is proposed, as shown by the records of the county treasurer; and

(3) 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, and

(b) A notice posted in a conspicuous manner on the property upon which the proposed bank is to be located.

**173-700-255 Length of comment period** (1) The department must provide at least thirty-days for the public comment.

(2) Wetland banks that require an environmental impact statement may need longer comment periods.

(3) The comment period may be extended if the department holds a public hearing for a wetland bank proposal.

**173-700-256 Requesting a public hearing** (1) The bank sponsor, any interested government entity, any group or any person may request, in writing, a public hearing on the bank certification.

(2) The request must be received by the department before the end of the comment period specified on the public notice.

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

**173-700-257 When is a public hearing held?** (1) The department shall determine, in its sole discretion, if significant public interest exists to hold a public hearing.

(2) The department shall provide at least fourteen calendar days prior notice of any hearing.

**173-700-258 Public records** (1) The department must make available for public inspection the certification application, draft bank instrument and other supporting materials.

(2) The department shall keep a record of the comments received by the department and issues raised during the public participation process on the bank certification. Those records are available to the public.

(3) The department may not render a certification decision until the public comment period is complete.

## **PART IV**

### ***Bank Establishment – Technical Requirements***

**173-700-300 Ecological design incentives** (1) One of the goals of the wetland banking certification program is to encourage banks that provide significant ecological benefits. 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.

(2) The incentives include, but are not limited to, more favorable credit conversion rates, higher releases of credits, and larger service areas. For each of these elements, banks that satisfy more of the decision-making criteria or that satisfy those criteria to a higher degree generally receive more favorable conditions. The department, through the MBRT process, shall make decisions regarding the application of specific incentives on a case-by-case basis.

(3) Bank sponsors should consult the following sections of this rule for criteria that the department shall use for its decision-making:

(a) Determining the amount of credit generated by a bank site under WAC 173-700-355 and WAC 173-700-357;

(b) The designation of service areas under WAC 173-700-311; and

(c) The scheduling of credit releases under WAC 173-700-372 through WAC 173-700-375.

(4) The department shall encourage, with better credit conversion rates, banks that include restoration of wetland systems and banks that provide significant habitat value because they provide connections or corridors to other natural areas.

**173-700-310 Service area** (1) The department, through the MBRT process, must determine the appropriate service area for proposed banks.

(2) The bank sponsor must describe and include a map of the bank's proposed service area in the draft bank instrument.

(3) The extent of the service area must be based on the functions provided by the bank and the distance from the bank site that the ecological functions can reasonably be expected to compensate for impacts to wetlands. The department must consider the hydrologic and biotic criteria as identified in WAC 173-700-311 when designating a service area.

**173-700-311 Criteria for determining service area size** The size of a service area must be determined based on the following elements:

(1) The functions provided by the bank;

(2) Whether and how far the ecological and hydrological benefits of the bank extend beyond the bank site location;

- (3) The landscape position of the bank site within the watershed;
- (4) The WRIA in which the bank is located;
- (5) The ecoregion in which the requested service area is located;
- (6) The ecological sustainability of the bank site;
- (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) Consideration of the types of impacts to wetlands or other aquatic resources that may be compensated through the use of credits from the banks; and
- (10) Available information on baseline conditions in the requested service area such as that found in watershed management plans, function assessments, wetland mapping or inventories, storm water management plans, and comprehensive land use plans.

**173-700-320 Site selection** (1) Mitigation banks must be planned and designed to be self-sustaining over time. The department and the MBRT shall carefully consider ecological sustainability and suitability when determining if a site is an appropriate location for a mitigation bank.

- (2) Considerations shall include, but are not limited to:
  - (a) Whether the site includes areas that can be restored to wetland conditions;
  - (b) Whether the site possesses the physical, chemical and biological characteristics to support the bank goals and objectives;
  - (c) Whether the size and location of the bank is appropriate relative to the ecological features found at the site, such as sources of water;
  - (d) If the bank sponsor has obtained any necessary water rights for the site, if necessary;
  - (e) The wetland functions and values that the site has the potential to provide;
  - (f) Whether the bank site can provide increased or improved wetland functions and restore ecological processes within the basin or the watershed;
  - (g) If the bank site has a high potential to connect or complement existing wetlands;
  - (h) The types of unavoidable impacts that are anticipated to use bank credits for compensatory mitigation;
  - (i) Whether the site and bank objectives are compatible with surrounding land-uses lying both up and down gradient;
  - (j) Whether the bank site can be protected over time from direct, indirect, and cumulative impacts due to current and foreseeable future land-uses;
  - (k) Whether the bank site is consistent with existing planning documents, such as watershed, zoning, or comprehensive land-use plans and critical areas rules;

(l) Whether the bank site contributes to the improvement of identified management problems within the drainage basin or watershed, such as sedimentation, water quality degradation, or flood control;

(m) What the historical land-uses were at that site;

(n) The presence and quantity of invasive species on the site;

(o) The existence of a native seed bank on the site;

(p) Whether the process of establishing the bank at the site will compromise ecologically significant aquatic or upland resources, cultural sites, or habitat for threatened, endangered, or candidate species; and

(q) The degree of long-term maintenance necessary for the site.

(3) The establishment and use of mitigation banks in or adjacent to areas of national, state, or regional ecological significance is encouraged if the establishment and operation of the mitigation bank does not compromise the protection or functioning of the ecologically significant areas.

**173-700-330 Assessment of wetland functions** (1) The sponsor must assess the ecological functions provided by the bank site based on a method specified in the bank instrument.

(2) The department may require a sponsor to use either a “best professional judgement” method for assessing wetland functions or a specific regional function assessment method

**173-700-340 Minimum buffers** (1) The department, through the MBRT process, must determine a minimum buffer necessary for each bank. The minimum buffer for a bank must be sufficient to protect and enhance the functions at the bank.

(2) The department must consider the following criteria when it determines a minimum buffer for a bank:

(a) The quality of the wetlands in the bank and the level of sensitivity of the wetlands to off-site activities;

(b) The functions to be provided by the bank;

(c) The quality of the buffer, (existing conditions and proposed conditions);

(d) The functions that the buffer needs to provide; and

(e) The intensity of adjacent land-uses.

(2) Minimum buffers shall generally range between 50 and 300 feet in width.

(3) The minimum buffer does not generate credit.

(4) The bank sponsor must provide at least the minimum buffer required by the department.

**173-700-350 Credit description.** The bank sponsor must provide a description of what the bank credits represent in the bank instrument.



(1) For credits determined using a conversion rate under WAC 173-700-353, the bank sponsor shall describe the credits in terms of acreage of: the wetland rating category; hydrogeomorphic (HGM) class, and Cowardin class of wetland. The credit description must list the ecological functions provided by the bank.

(2) For credits determined using an alternative method under WAC 173-700-359, the bank sponsor shall describe, in the bank instrument, the method used to determine the credits and what the credits represent.

**173-700-351 Types of credits** (1) There are three stages in the life of a mitigation bank credit:

- (a) Potential credit;
- (b) Available credit; and
- (c) Debited credit.

(2) Credits are initially called potential credits because while they are anticipated to be generated by the bank, they do not actually exist until the bank meets specific performance standards. After a bank attains the performance standards specified in the bank instrument and the department releases a potential credit, then that credit becomes an available credit.

(3) Only available credits can be used to meet permit requirements.

**173-700-352 Determination of credits** (1) Credits may be generated at a bank site through the restoration, creation, enhancement, or preservation of wetlands or a combination thereof.

(2) Preservation alone may generate credits under WAC 173-700-360.

(3) Buffer areas, beyond the minimum required under WAC 173-700-340, and upland habitats may generate credits to the extent that those areas contribute to the overall ecological functioning and sustainability of the bank.

(4) The department must give priority to the restoration of degraded or former wetlands when determining credits.

(5) The method for credit determination must be the same for the life of the bank.

(6) Debits and credits must be determined using the same method and be in the same unit of "currency".

**173-700-353 Default method for determining credits.** (1) The department shall use acreage of wetland as the default credit unit for calculating credits at a bank site.

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

(3) The credit conversion rate uses a ratio of acre-credits generated at the bank site to acres of activity such as restoration, creation, enhancement or preservation:

**(Acre-credit : Acres of activity).**

(4) Except as provided in WAC 173-700-358, the department must determine the credit conversion rates for individual banks from within the ranges specified in this subsection.

(5) This section and WAC 173-700-354 through WAC 173-700-358 do not apply to banks using an alternative method to determine credits under WAC 173-700-359.

**173-700-354 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: Acre credit : Acre mit. activity</b>
Restoration	1:1 to 1:2
Creation	1:1 to 1:5
Enhancement	1:2 to 1:6
Preservation: In combination with restoration or creation of wetlands	1:2 to 1:10
Preservation alone	1:5 to 1:20

**173-700-355 Criteria for determining conversion rates for wetlands** Unless an alternate credit determination method is used under WAC 173-700-359, the department, through the MBRT process, shall use the following criteria to determine specific conversion rates for wetlands on a bank site:

- (1) The anticipated net gains in wetland functions at the bank site;
- (2) The quality of the wetlands and habitats at the bank site;
- (3) The rarity of the wetlands and habitats at the bank site;
- (4) The degree to which the bank provides functions that are degraded or limited in a watershed;
- (5) The habitat value of the bank site;
- (6) The site's contribution to the protection or 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 size, quality, and functioning of the buffers for the site;
- (8) The degree of connectivity to other habitats and open space areas;
- (9) The likelihood of the successful implementation of the site design and successful performance of the targeted wetland functions;
- (10) The quality of supporting information provided; and,
- (11) Public education and access, if ecologically appropriate.

**173-700-356 Conversion rates for uplands and buffer areas** (1) Buffers provided above and beyond the minimum buffer required under WAC 173-700-340 are eligible to generate credit. Such buffer areas are called eligible buffers.

(2) Eligible buffers and other upland habitats may generate credits at a conversion rate from 1:5 to 1:20.

**173-700-357 Criteria for determining conversion rates for uplands and eligible buffer areas** Unless an alternate credit determination method is used under WAC 173-700-359, the department, through the MBRT process, shall use the following criteria to determine specific conversion rates for uplands and eligible buffers on a bank site:

- (1) Degree of contribution to the ecological functioning of the bank;
- (2) The adequacy of the area to perform the desired function(s);
- (3) Adjacent land uses including foreseeable future land uses; and
- (4) Connectivity to other habitats and open space areas.

**173-700-358 Exceptions to credit conversion ranges** (1) The department, through the MBRT process, may allow a conversion rate for wetlands or non-wetland areas that are outside of the ranges specified in WAC 173-700-354 and WAC 173-700-356.

- (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.

**173-700-359 Using an alternative method to calculate credits** The department may allow the use of an alternative method to determine credits so long as:

- (1) The department, through the MBRT process, 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 same method is applied to the bank throughout the operational life of the bank.

**173-700-360 Credits for preservation** (1) Preserving wetlands or associated uplands may generate credit when the preservation occurs in conjunction with the restoration, enhancement, or creation of a wetland.

(2) Preservation of wetlands as the sole means of generating credits may be approved in exceptional circumstances by the department, through the MBRT process if:

- (a) The area proposed for preservation is a high quality system; and

(b) 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.

**173-700-361 Determining high quality wetland systems** (1) The department shall determine whether a site is a high quality system for preservation when the preservation is the only credit-generating activity in a bank.

(2) The factors that the department must consider in making this determination include whether the wetland:

- (a) Has a Category I or II wetland rating (Category III only in exceptional cases);
- (b) Is a rare wetland type;
- (c) Provides habitat for threatened or endangered species;
- (d) Is located in a floodway, or in a portion of a floodplain that is documented as a frequently flooded area, or is providing flood retention and storage;
- (e) Provides biological or hydrological connectivity or both;
- (f) Is of high regional or watershed importance, such as listed as a priority site in a watershed plan; or
- (g) Contains high native species diversity.

**173-700-370 Schedule for the release of credits** (1) Releases of credits must be tied to the attainment of performance standards (See WAC 173-700-380) specified in the bank instrument.

(2) The department, through the MBRT process, shall determine a schedule for the release of credits at individual banks.

(3) The department must determine the number of credits to be released when the bank attains specific performance standards.

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

- (a) The amount of ecological gain at the time of the release;
- (b) The bank sponsor's experience and success with similar types of wetland projects;
- (c) The expected length of time necessary to achieve project goals for wetland function performance and wetland types; and
- (d) The possibility of design failure.

(5) The bank sponsor shall include in the bank instrument the schedule for release of credits at the attainment of specific performance standards, and the amount of credit available for each release.

**173-700-371 Limits on credit releases** (1) The credit-release schedule and amount of credits eligible for release may not exceed the maximum amounts under WAC 173-700-372 through WAC 173-700-375.

(2) The department must release credits when it concurs that the bank has attained all of the performance standards required for a specific release.

(3) The maximum percentages of credits able to be released under WAC 173-700-372 through WAC 173-700-374 do not include credits generated by preservation of wetlands.

(4) The department, through the MBRT process, may release potential credits generated by the preservation of existing wetlands or aquatic resources after the minimum requirements specified in WAC 173-700-372 have been met.

**173-700-372 Credit release - pre-construction** (1) The department, through the MBRT process, must determine if it is appropriate to allow credits to be released from a wetland mitigation bank before a bank is constructed. The department must determine whether to allow pre-construction releases of credits on a case-by-case basis, which considers the particular ecological and economic circumstances of each bank.

(2) Initial physical and biological improvements must be completed within one year following the initial release of credits.

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

(a) The bank instrument is signed and approved;

(b) The permanent protection mechanism and financial assurances are established; and

(c) Ownership of the bank site is secured.

**173-700-373 Credit release – after construction** (1) Up to forty percent of the total potential credits may be released when the department, in consultation with signatory agencies, approves:

(a) The complete implementation of construction plans; and

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

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

(a) The bank sponsor must submit, to the department, the final as-built plans that reflect the final grading and planting of the bank site, and sufficient copies of the final as-built plans for the bank's signatories;

(b) The department must review the final as-built plans;

(b) The department, or its designee, must inspect the as-built condition of the bank. The department shall invite the bank's signatories and other interested members of the MBRT to inspect the as-built condition of the bank; and

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

**173-700-374 Credit release – Attainment of hydrologic performance standards**

(1) Up to fifty percent of total potential credits may be released when the department, in consultation with signatory agencies, determines that the hydrologic performance standard(s), at a minimum, has been attained.

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

**173-700-375 Credit release - Final release** (1) The department may not release all of the potential credits until the bank has fully attained all of the performance standards specified in the bank instrument.

(2) After a bank site has successfully attained all of its performance standards and the department concurs that all performance standards have been attained, the department must release all remaining potential credits.

**173-700-376 Additional credit releases** (1) Releases of credits earlier than those specified in the bank instrument may be approved by the department, in consultation with the signatories, as long as the maximum percentages for the release of potential credits specified in WAC 173-700-372 through WAC 173-700-375 are not exceeded.

(2) Earlier releases of credits may be warranted if the department, in consultation with the signatories, requests the sponsor to perform actions beyond those identified in the bank instrument in order to increase the projected functions of the site. Implementation of management activities that are necessary to attain the performance standards required in the bank instrument are not included.

(3) An addendum to the bank instrument shall document any deviation from the credit release schedule.

**173-700-380 Performance standards** (1) The bank sponsor must specify the bank's performance standards in the bank instrument.

(2) Performance standards must be based on the objectives and goals of the bank identified in the bank instrument and linked to a specific objective.

(3) Performance standards must identify measurable values for variables linked to specific objectives.

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

(5) A bank is considered fully successful when all of the performance standards specified in the bank instrument have been attained.

**173-700-390 Financial responsibility** (1) Certification of a wetland mitigation bank under this rule does not imply or guarantee the financial viability of the wetland mitigation bank.

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

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

**173-700-391 Financial assurances.** (1) The department, through the MBRT process, must require that financial assurances be posted to ensure that the potential risks to the environment from unsuccessful mitigation banks are minimized.

(2) The department must determine the amount of financial assurances required on a bank-specific basis.

(3) The amount of financial assurances required by the department must be commensurate with the degree of risk of bank failure and the nature and extent of site alteration and development.

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

(4) The bank 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.

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

**173-700-392 Levels of financial assurances** The department may require all of the following levels of financial assurances for mitigation banks:

(1) Financial assurances for construction of the bank site;

(2) Financial assurances for short-term management of the bank (see WAC 173-700-420); and

(3) Financial assurances for long-term management of the bank (see WAC 173-700-421).

**173-700-393 Financial assurances for construction.** (1) When credits are released prior to the construction of a wetland mitigation bank, a financial assurance sufficient to cover the anticipated costs of construction shall be required prior to any release of credits.

(2) The amount of the financial assurance must be sufficient to cover the estimated costs for construction plus the costs for contract administration and overhead.

(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 two written estimates from qualified contractors.



(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) Banks may be developed in phases as specified in the bank instrument. If any credits are released prior to the construction of the bank or a phase of the bank, the department must require a financial assurance sufficient to cover the costs of construction of that phase plus administrative costs incurred by the department.

(6) The department may not require a financial assurance for construction if the first release of credits for a bank after the bank has been constructed and the department has approved the as-builts.

**173-700-394 Financial assurances for short-term management.** (1) The department must require a financial assurance for short-term management (See WAC 173-700-420) for all banks that have credit releases prior to full attainment of all performance standards.

(2) The amount of the financial assurance must be sufficient to cover all short-term maintenance activities under WAC 173-700-420 for the operational life of the bank.

(3) The cost estimates for short-term management must be based on the costs to have the applicable work in subsection (5) of this section performed by an independent contractor.

(4) The sponsor shall provide the department with two written estimates from qualified contractors.

(5) Monitoring and maintenance expenses used to determine the amount of the short-term management financial assurance may include, but are not limited to:

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

b) Estimated costs of all monitoring activities required in the monitoring plan for the bank as specified in the bank instrument;

(c) Costs to implement the site plan, such as irrigation, control of invasive species, or phased planting; and

(d) Estimated costs for management activities required during the operational life of the bank as specified in the bank instrument (e.g. control of invasive vegetation or phased plantings), plus department costs for contract administration and overhead.

**173-700-395 Financial assurances for long-term management** (1) The department must require a financial assurance for the long-term management (see WAC 173-700-421) of a wetland bank site.

(2) The bank sponsor must secure sufficient funds for the anticipated long-term management costs as required by the department.

(3) The purpose of the long-term financial assurance is to ensure that the long-term manager or owner of a bank site has the financial resources available to perform the

minimum responsibilities of any real property owner and ensure that the bank site remains in its natural condition.

(4) These responsibilities may include but are not limited to:

- (a) Payment of property taxes;
- (b) Control of noxious weeds;
- (c) Maintenance of structures such as water control structures, fences, trails or signs; and
- (d) Other long-term management activities required in the bank instrument.

(5) The bank sponsor must provide department with two estimates for the costs of annual maintenance of the bank site.

(6) 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.

## **PART V**

### ***Operation Of Banks***

**173-700-400 Monitoring** The goals of monitoring bank sites are to:

- (1) Document the post-construction baseline conditions at the bank site;
- (2) Document the condition of the bank site as it develops over time;
- (3) Document the attainment of performance standards; and
- (4) Provide early identification of problems in the site's development to trigger potential contingency actions.

**173-700-401 Monitoring plan** (1) The bank sponsor must develop a monitoring plan for each bank site and include it in the bank instrument.

(2) The monitoring plan must include:

- (a) A list of the bank's performance standards;
- (b) A description of the variables that will be monitored and how they will be evaluated;
- (c) A description of the methods or protocols used to monitor the identified variables;
- (d) A schedule of monitoring including details regarding the time of year, frequency, and duration;
- (e) A description of proposed photo documentation of the site; and
- (f) A detailed contingency plan as outlined in WAC 173-700-402.

**173-700-402 Contingency plan** (1) Each bank instrument must include a contingency plan in case the bank fails to attain any performance standards.

- (2) The contingency plan for a bank site must include the following elements:
- (a) Identification of potential causes for site failure;
  - (b) Alternatives for contingency actions that may be required if the monitoring indicates that the site will not achieve specific performance standards; and
  - (c) The bank sponsor's responsibilities in reporting and implementing contingency actions.

**173-700-403 Duration of monitoring** (1) The bank sponsor must monitor the wetland bank for at least five years.

(2) The department, through the MBRT process, shall determine a monitoring schedule for the bank that is of sufficient duration to show that the bank is progressing toward ecological success and sustainability. For example, longer monitoring periods may be required for banks that contain wetland systems that require more time to reach a stable condition (e.g. forested wetlands and estuarine restoration).

(3) The department may require additional monitoring at bank sites where contingency actions have been undertaken.

**173-700-404 Monitoring reports** (1) The bank sponsor must submit to the department monitoring reports that document the conditions and progress of the bank's development. Those reports must be submitted according to the schedule documented in the bank instrument.

(2) The monitoring report must identify by name and qualification the persons and organizations conducting the monitoring and must contain all data necessary to document compliance with performance standards and the bank instrument.

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

- (a) Photo points or referenced locations where photographs of the site are taken periodically to document site progress;
- (b) Data collected during the monitoring;
- (c) A narrative summary of the results of the monitoring;
- (d) Discussion of whether applicable performance standards were attained;
- (e) Discussion of recommended management activities to improve attainment of performance standards or performance of functions at the site;
- (f) Identification of any probable causes for failure of the bank to attain any performance standards; and
- (g) Recommendations for contingency actions, if applicable.

**173-700-405 As-built reporting** (1) Within sixty days after the completion of grading or planting, or both, the bank sponsor must submit to the department a post-construction report documenting the "as-built" conditions of the site.

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

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

(2) The bank sponsor must send the department the petition and must include supporting documentation that the required performance standards have been met.

(3) The department must respond to the petition within thirty days of receipt of the written petition and supporting documents.

(4) The department, or its designee, may conduct an on-site inspection to verify that performance standards have been met. Bank signatories and members of the MBRT are encouraged to participate in the on-site visits.

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

(6) The department must grant the release of credits upon its approval of the attainment of the required performance standards.

**173-700-411 Recording credit transactions** (1) When an available credit is debited from a bank, the bank sponsor must record each credit withdrawal transaction at the auditor's office of the county in which the bank is located.

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

(3) Each credit withdrawal transaction must include the following:

(a) The wetland mitigation bank application number assigned by the department;

(b) Name of the person or entity purchasing credits;

(c) Location of the debit project that is approved to use bank credits as compensation;

(d) Debit project permit numbers and types;

(e) Debit project impact acreage and wetland types; and

(f) Date and number of credits sold or used.

(4) The bank sponsor must submit a copy of the recorded transaction to the department within thirty days of the auditor's office recording of each withdrawal transaction.

**173-700-412 Accounting and tracking of credit transactions** (1) The bank sponsor must maintain a separate credit -tracking ledger for each wetland mitigation bank that the sponsor develops.

(2) The bank sponsor must document all credit transactions in the credit-tracking ledger and maintain copies of all credit withdrawal transactions.

**173-700-413 Credit-tracking ledger** The credit-tracking ledger must include the following information:

- (1) Bank sponsor or owner name and contact information;
- (2) Wetland mitigation bank application number assigned by the department;
- (3) Legal description of the bank location;
- (4) Construction date of the bank;
- (5) Wetland types and target functions of the bank;
- (6) Dates and amounts of all petitions for release of credits;
- (7) A balance of all potential credits;
- (8) A balance of all available credits; and
- (9) Dates, amounts, and supporting information as listed in WAC 173-700-411 for all withdrawal transactions.

**173-700-414 Annual account reporting** (1) By the end of February of each year, the bank sponsor must submit to the department an annual transaction report.

(2) The annual transaction report must include a complete copy of the credit-tracking ledger and, if requested by the department, copies of all credit transactions from the previous calendar year.

**173-700-415 Master ledger** (1) The department shall maintain a master ledger for each bank and must cross check the bank sponsor's annual transaction report against the master ledger.

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

(3) The bank sponsor is responsible for reconciling any discrepancies between the bank sponsor's credit-tracking ledger and the department's master ledger. If the bank sponsor fails to resolve any discrepancies, the department may suspend the further use of available credits under WAC 173-700-630.

**173-700-416 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 credit-tracking ledger.

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

(4) Unexplainable discrepancies between the public records and the bank's credit tracking ledger may result in the department initiating compliance actions under WAC 173-700-600 through WAC 173-700-630.

**173-700-420 Short-term management** (1) Short-term management includes all activities and actions necessary to ensure the successful development of a wetland bank.

(2) The period of short-term maintenance includes the entire operational life of the bank.

(3) Short-term management includes, but is not limited to, the following activities:

(a) Actions necessary to implement the site plan such as, but not limited to, irrigation, control of invasive species, and phased plantings;

(b) Regular monitoring of the site as described in the monitoring plan for the bank under WAC 173-700-401;

(c) Ongoing maintenance activities required during the operational life of the bank as specified in the bank instrument. For example, a bank may require regular control of invasive species or maintenance of a water control structure; and

(d) Implementation of contingency actions, if required.

**173-700-421 Long-term management** (1) The bank sponsor must provide long-term management of the bank in order to maintain the wetland bank in its natural state.

(2) The bank sponsor must describe in the bank instrument any anticipated management and maintenance activities.

(3) The long-term maintenance and management activities may include, but are not limited to:

(a) Noxious weed control and removal of invasive species as needed;

(b) Repair and maintenance of any structures on the site;

(c) Repair due to vandalism; and

(d) Tax assessments, utility fees, or other costs for the property on which the wetland bank is located.

(4) The sponsor must identify the long-term manager of the wetland bank either in the bank instrument or the conservation easement, or both.

(5) The department shall require a signed contract or agreement between the department and the long-term manager for the bank. That contract must specify the role and responsibilities of the long-term manager of the site(s).

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

**173-700-422 Permanent protection** (1) Wetland bank sites must be permanently protected and preserved in their natural state. The department shall require that the bank sponsor use institutional controls to ensure the long-term protection and preservation of the bank site.

(2) Institution controls include:

(a) Legal and administrative mechanisms to limit site activities that are incompatible with the goals and purposes of the site. Examples include, but are not

limited to, placing a conservation easement on the bank site and designating a long-term manager or steward for the bank;

(b) Physical measures to minimize adverse impacts to the wetland and its biotic community such as erecting signs, fencing, vehicle barriers, and designated trails; and

(c) Establishment of an endowment or trust for the long-term management of the site.

(3) Real estate arrangements must be approved by the department and secured prior to any release of credits. The real estate arrangements must transfer with the property.

**173-700-423 Conservation easements for wetland banks** The conservation easement for a wetland bank must:

(1) Prohibit alterations to the wetland bank that may interfere with the ecological functioning of the bank;

(2) Require the long-term manager of the wetland bank to notify the department if the owner conveys any interest in the wetland bank;

(3) Require the long-term manager of the wetland bank to notify the department and receive approval from the department for any proposal to use the wetland bank in a manner that is inconsistent with the conservation easement;

(4) Grant the department and its designated representatives the right to enter the wetland bank at reasonable times for the purpose of evaluating compliance with the terms of the bank instrument and the conservation easement; and

(5) Require the owner to include in any instrument conveying any interest in any portion of the wetland bank, notice of the conservation easement under this section.

## **PART VI**

### ***Use Of Wetland Bank Credits***

**173-700-500 Available credits** (1) Potential credits at a bank site that have been released by the department are referred to as “available credits”.

(2) An available credit may be used to provide compensation for unavoidable wetland impacts authorized under a federal, state, or local permit in accordance with the conditions of the bank certification and approved bank instrument.

(3) Permitting agencies for debit projects are responsible for determining if the use of available credits from a bank provides appropriate compensation for the debit project’s unavoidable impacts.

**173-700-501 Projects eligible to use a bank** (1) Projects located within the bank’s service area are eligible to apply to use credits from that bank for compensation.



**173-700-502 Replacement ratios for debit projects** (1) Replacement ratios used to determine compensation requirements for debit projects that use bank credits should generally be lower than those required for project-specific concurrent mitigation.

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

(3) Replacement ratios for debit projects should reflect:

- (a) The existing risk of failure at the time credits are debited;
- (b) Any temporal losses;
- (c) Out-of-kind considerations; and
- (d) Compensation for the distance from the affected wetland to the bank site.

(4) Recommended replacement ratios for debit projects may be specified in a bank instrument.

**173-700-503 Use of credits for fish habitat and hydrologic functions** (1) Impacts to hydrologic functions and fish habitat may not be mitigated with credits from a bank that is located in a different WRIA from the impact site, unless the permitting agency(ies) determines that the use of credits from a bank is appropriate, and consistent with all other applicable laws, including but not limited to the Endangered Species Act and local recovery plans.

(2) Generally, impacts to salmonid fish habitat and hydrologic functions should be mitigated in the same stream reach or sub-basin, respectively, as the impact site.

**173-700-504 Use of credits outside of the service area** (1) The department, in consultation with the bank's signatories, may authorize the use of mitigation bank credits to compensate for impacts outside of the bank's designated service area if the department deems that use to be practicable and environmentally desirable.

(2) When a debit project located outside of the bank's designated service area requests to use bank credits as compensation for an authorized wetland impact, the bank sponsor must:

- (a) Provide written notice of the proposed use of credits and a request for comments to the department and the bank's signatories;
- (b) Convene a meeting of the signatory agencies, if necessary;
- (c) Obtain written approval from the department and the bank's signatories on the proposed use of credits;
- (d) Send copies of the approvals to the department; and
- (e) Include the approval documents as an addendum to the bank instrument.

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

- (a) At least one impact from the project must lie within the bank's service area;
- (b) The bank must provide appropriate compensation for the impacts; and
- (c) The determination to allow use of bank 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 as listed in WAC 173-700-311.

**173-700-505 Use of credits for more than one permit** (1) A credit must only be used to compensate for one authorized impact to wetlands or aquatic resources. Once a credit has been used (debited), it may not be used as compensation for a different wetland impact authorized under a another regulatory program.

(2) 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). A credit can be used to compensate for one impact that requires multiple authorizations for the same impact.

## **PART VII**

### ***Compliance With Certification***

**173-700-600 Compliance with the terms of certification** (1) It is the department's goal to ensure that the establishment and operation of a mitigation bank is consistent with the terms and conditions of the certification as specified in the bank instrument. The department may use one or more of the methods provided for in WAC 173-700-610 through WAC 173-700-630 to gain compliance of certified banks.

**173-700-610 Contingency actions** (1) If a bank is unable to attain the required performance standards specified in the bank instrument, the department may require that the sponsor implement contingency actions necessary to correct any site deficiencies.

(2) Upon the bank sponsor's determination that the bank is not or will not attain performance standards, the bank sponsor shall notify the department and the bank's signatories that the bank site will not attain the required performance standards.

(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.

(4) The notification must include:

- (a) A clear statement of the problem;
- (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 contingency actions or other alternatives to address the problem.

(5) The department, with recommendations from the bank's signatories, shall evaluate and determine the appropriate contingency actions required for the site. The department's determination for contingency action(s) must include:

- (a) A description of the contingency action(s) that must be undertaken;
- (b) A schedule for the sponsor to implement the required contingency action(s);
- (c) Any additional monitoring and reporting requirements for the bank, if applicable ; and
- (d) Any adjustments to the credits in the wetland bank and the credit release schedule.

(6) Interested signatories of the bank shall notify the department if they have comments on the proposed contingency actions as specified in WAC 173-700-740.

**173-700-611 Notice of required contingency actions** (1) The department must submit, in writing, its determination on required contingency actions to the bank sponsor and the bank's signatories.

(2) This determination must be attached as an addendum to the bank instrument.

**173-700-612 Compliance with required contingency actions** (1) If the bank sponsor does not complete the required contingency actions within the schedule specified in the department's determination for contingency actions, the department must notify the bank sponsor that it is out of compliance with the contingency requirements.

(2) The department must send the notification of non-compliance by certified mail with return receipt requested and must require a written response from the sponsor.

(3) The sponsor must respond in writing to the department within fifteen days of receipt of the non-compliance notification. The response shall include an explanation of why the sponsor has not implemented the required contingency actions and a schedule for when the sponsor will complete the required contingency actions.

(4) 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 instituting contingency actions.

(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 either:

- (a) Use the posted financial assurances to have the required contingency actions completed; or
- (b) Adjust the total number of potential credits at the bank under WAC 173-700-620.

(6) The department shall send a copy of the non-compliance notification to the bank's signatories.

(7) Thirty days after the date of the bank sponsor's receipt of the department's notification in subsection (5) of this section, the department may initiate the actions specified in the notification.

**173-700-620 Adjustments in total credits** (1) The department may adjust the final number of credits available at a bank based on actual conditions of the bank site at the time of the final release of credits.

(2) The department shall consult with a bank's signatories to determine whether the number of credits at a bank should be adjusted at the time of the final release of credits.

(3) The department may adjust the number of credits at a bank in the following ways:

(a) The department, in consultation with the bank signatories, may reduce total number of credits at a bank site if all of the required performance standards cannot be attained;

(b) The department, in consultation with the bank signatories, may increase the number of credits available at a bank site if:

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

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

(c) After the department concurs that all of the required performance standards have been met, the department may recalculate the remaining available restoration and creation credits to achieve a conversion rate of one to one. The revised conversion rates for restoration or creation credits should be based on the criteria listed in WAC173-700-355.

**173-700-630 Suspension of credit use** (1) The department may suspend a bank's use of credits to bring a bank into compliance. If the department suspends the use of credits, credits may not be debited until the department lifts the suspension.

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

(3) The department may suspend the use of available credits for the following reasons:

(a) If the department determines that a bank is out of compliance with the terms of its certification and the sponsor has not implemented the contingency actions required by the department;

(b) If the department determines that a bank is not in compliance with the terms of its certification and that the sponsor has not made reasonable efforts to bring the bank into compliance; or

(c) If the department determines that there is documented fraudulent use of the bank.

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

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

(6) The use of credits shall remain suspended until the department notifies the bank sponsor in writing that credit use may be resumed.

## **PART VIII**

### ***Roles And Responsibilities***

**173-700-700 Responsibilities of the bank sponsor** (1) The bank sponsor must meet the requirements of these rules.

(2) It is the responsibility of the bank sponsor to provide the wetland mitigation prospectus and bank instrument consistent with WAC 173-700-223 and 173-700-241, respectively.

(3) It is the bank sponsor's responsibility to incorporate specific elements required by the department and the MBRT into the final bank instrument.

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

(4) The bank sponsor is responsible for assuring the success of the restoration, creation, enhancement, or preservation activities, or a combination of these activities, at the mitigation bank.

(5) The bank sponsor is responsible for the construction, operation, maintenance, permanent protection, and all costs including contingency actions, if required, and financial assurances for the mitigation bank in accordance with the bank instrument and this rule.

(6) The bank sponsor must secure adequate funds for the operation and maintenance of the bank during its operational life and the long-term management and permanent protection of the bank sites.

(7) The bank sponsor must secure real estate arrangements that will permanently protect the property on which the bank is located.

(8) The bank sponsor is responsible for the evaluation and protection of historic, cultural, and archeological resources of the bank site.

(9) The bank sponsor must monitor the development of the bank site and report findings to the department under WAC 173-700-404.

(10) The bank sponsor is responsible for submitting written petitions for releases of credits under WAC 173-700-410.

(11) The bank sponsor is responsible for the accounting and maintenance of ledgers regarding the deposit and withdrawal of credits from the mitigation bank under WAC 173-700-412 and WAC 173-700-413.

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

(13) The bank sponsor may request the program manager of the Shorelands and Environmental Assistance Program to review actions taken to develop the bank instrument if the sponsor believes that a particular decision raises concern regarding the application of this rule, or that inadequate progress has been made by the MBRT on the bank instrument.

**173-700-710 Role of the department** (1) The department is responsible for making the final decision on bank certifications.

(2) The department must fully consider recommendations from the MBRT and public comments submitted as part of the certification process.

(3) The department is responsible for inviting members to and convening the MBRT. The department must serve as chair of the MBRT and shall invite the local jurisdiction to serve as co-chair.

(4) The department is responsible for maintaining master ledgers on certified banks and authorizing the release of credits as specified in bank instruments under WAC 173-700-415 and WAC 173-700-410, respectively.

(5) The department shall be responsible for approving financial assurances, and releasing financial assurances or cashing posted financial assurances to ensure compliance with the terms of a bank instrument.

(6) The department shall implement the compliance procedures as described in WAC 173-700-600 through WAC 173-700-630 if a bank is determined to be out of compliance with the terms of its certification.

(7) The department must determine the requirements for implementation of contingency actions when a bank is unable to attain its performance standards.

(8) If the sponsor does not achieve compliance with the terms of the bank instrument within the timeframe specified by the department, the department may suspend the use of credits as described in WAC 173-700-630.

**173-700-720 Role of local jurisdiction(s)** (1) For the purposes of this section, local jurisdiction(s) means the local jurisdiction(s) where the wetland bank site is located.

(2) The local jurisdiction(s) shall be invited by the department to participate on the MBRT.

(3) The local jurisdiction(s) may participate as co-chair of the MBRT with the department.

(4) After receipt of the department's decision to approve certification, the local jurisdiction(s) must review the certification and if it concurs with the decision, the local jurisdiction(s) must sign the bank instrument to indicate its concurrence with the bank certification.



**173-700-730 Role of the mitigation bank review team** (1) The purposes of a Mitigation Bank Review Team (MBRT) are to:

- (a) Assist in the development of bank instruments;
- (b) Facilitate the review of wetland mitigation bank proposals; and
- (c) Avoid duplicative processes for bank certification and approval.

(2) It is the role of the MBRT to help ensure that certified wetland banks are technically feasible and ecologically desirable.

**173-700-731 Mitigation bank review team responsibilities** (1) The MBRT shall participate in negotiations with a bank sponsor on the terms of a bank instrument.

(2) The MBRT shall review certification applications, and propose recommendations to the department, and the local jurisdiction(s) where the bank is located, on the certification of individual mitigation banks.

(3) MBRT representatives are responsible for notifying the department if they have comments for the department to consider on the requirements for contingency actions or on the release of credits.

**173-700-732 Mitigation bank review team membership** (1) The MBRT is composed of a maximum of 15 members representing agencies with an interest in the bank, including the department, the local jurisdiction(s), and appropriate representatives from federal, state, and local regulatory and resource agencies and tribes.

(2) Entities typically invited include, but are not limited to, the US Army Corps of Engineers, the Environmental Protection Agency, US Fish and Wildlife Service, National Marine Fisheries Service, Natural Resource Conservation Service, Washington Department of Fish and Wildlife, Washington Department of Natural Resources, tribes, and local jurisdictions within the proposed bank's service area.

(3) The department may invite interested members of the public or non-governmental organizations to participate on the MBRT as advisory members.

(4) The department shall serve as chair of the MBRT and shall invite the local jurisdiction(s) where the bank is located to serve as co-chair. For bank proposals seeking federal approvals in addition to state certification, the U.S. Army Corps of Engineers representative may also co-chair the MBRT.

**173-700-740 Role of the banks' signatories** (1) Signatory agencies for a bank are responsible for providing assistance to the department in overseeing the establishment and operations of that bank.

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

(3) Signatory agencies are encouraged to participate in field reviews of the bank site for determining:



(a) Whether the as-built condition of the bank is correct;

(b) Whether contingency actions need to be initiated on a bank site and what those actions should include; and

(c) Whether a credit release petition should be granted.

(4) Signatory agencies shall notify the department if they have any comments regarding the department's proposed contingency actions required under WAC 173-700-610.

(5) Signatory agencies should review and provide comments to the department on any proposed uses of bank credits that are inconsistent with the terms of the certification.

**173-700-750 Role of permitting agencies authorizing use of credits** (1) Permitting agencies should document that mitigation sequencing has occurred before approving the use of banking credits to compensate for unavoidable impacts.

(2) The purpose of the documentation is to ensure that the intent of the authorizing statute is met. The authorizing statute states that bank credits should only be used for remaining "unavoidable" impacts after all practicable avoidance and minimization has been implemented.

(3) The rationale used to conclude that the actions are unavoidable should be included in the permit file for the debit project using bank credits for compensation.

## **PART IX**

### *Appeals*

**173-700-800 Appeals process** (1) A decision to issue, deny, or modify a final certification may be appealed to the pollution control hearings board under RCW Chapter 43.21B.