

Section 3

Response to comments

3. *Response to Comments*

This section contains Ecology's responses to comments received during the formal public comment period. Ecology has summarized and edited some of the comments in this section for clarity. You can see the original content of the comments we received in Appendix A of this document.

The following pages contain comments on the rule, small business economic impact statement, and cost benefit analysis documents and Ecology's responses.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-100 Background and purpose			
de Yonge, John - Wise Use Movement	1	173-700-100 (2) does not specify that banks will provide mitigation in advance of 'unavoidable' impacts to wetlands.	Thank you for your comment. Rule language in 173-700-100 (2) was revised to include the word 'unavoidable'.
de Yonge, John - Wise Use Movement	2	173-700-100 (3) - banks do not prioritize restoration of wetland functions on site. Restoration of wetland functions should be a priority, but not at the expense, as these rules allow, of filling natural wetlands elsewhere.	This rule does not address permitting as it relates to the determination of whether wetland impacts are unavoidable and are authorized. The authorizations to affect wetlands are found under different laws such as the federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use regulations. For further information, the EIS Section 2.1.2 discusses wetland resource tradeoffs including moving mitigation off-site. No rule change needed.
de Yonge, John - Wise Use Movement	3	Subsection 173-700-100 (4) is also faulty because it fails to include any role for the public in bank certification.	Ecology disagrees. Sections 173-700-212, 173-700-230, 173-700-240, and 173-700-241 outline the public notice requirements and opportunities for public comment on wetland banks. The EIS Section 3.2.5 discusses role of the public in the wetland mitigation bank certification process in further detail. No rule change needed.
Gehret, Kathryn - Perkins Coie	4	WAC 173-700-100 (3) Rather than ensuring that a bank proposal is "complementary" to processes identified in a watershed management plan, the proposed rule should call for <i>integration</i> of the bank into the plan itself, in order to reflect and monitor accurately its impacts on the surrounding watershed. To accomplish this, the proposed rule should also require DOE to coordinate with the state or local agency responsible for developing and adapting the applicable watershed management plan to ensure effective integration of the bank site.	Thank you for your comment. The rule can't place requirements to update existing plans. State law (RCW 90.84) only authorizes Ecology to adopt certification rules for wetland mitigation banking and does not provide authorization to establish or adopt for rules on watershed plans or their approvals. The rule does not prohibit integration and we support the concept. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-100 Background and purpose continued			
Gleason, Eric - Skykomish Habitat	5	WAC 173-700-100 - Adoption by Reference of Federal Rules: In particular, 33 CFR Parts 325 and 332 40 CFR Part 230. Should be adopted by reference in the WAC.	Thank you for your comment. These rules and requirements are reflected in the state rule's intent to ensure consistency between the federal and state rule processes and set similar expectations for wetland banks. State law (RCW 90.84) only authorizes Ecology to adopt certification rules for wetland mitigation banking and does not provide authorization to establish or adopt rules on any other type of compensatory mitigation. No rule change needed.
Thomas, Jennifer - Parametrix	6	173-700-100 (3) - Good. Excellent part of background and purpose statement in setting the broader context.	Thank you for your comment. No rule change needed.
Thomas, Jennifer - Parametrix	7	173-700-100 (3) (c) - These are both good additions from the draft.	Thank you for your comment. No rule change needed.
173-700-101 Applicability			
Woodward, Victor - Habitat Bank	8	WAC 173-700-101: The new rule should clearly address that Bank proposals in the Departments pilot banking program get some relief so that there is not a question if they have to go through certain steps again: The Instrument as defined should be required after July 21, 2009 or whenever the rule is actually adopted. Site selection, content of prospectus, public notice, public hearings, service area, credit generation and release, these issues once agreed upon in the pilot banking program should not be reopened by the new rule as long as the final Instrument is consistent with the rule.	Thank you for your comment. The topic of 'grandfathering' is addressed in our rule language WAC 173-700-101. The timelines within this section have been updated appropriately.
173-700-102 Applicability to tribal banks			
Freimund, Jeremy - Lummi Natural Resources Dept.	9	Add to new section 173-700-102 (1). The suggested edit is shown - "For proposed tribal banks which are located exclusively in Indian Country (18 USC 1151), the following..."	Thank you for your comment. The term "Indian Country" has been added to the definitions section [173-700-104]. This new definition is consistent with the statutory definition in federal code (18 USC 1151.)

Commenter - Affiliation	Comment no.	Summary	Response
173-700-104 Definitions			
Freimund, Jeremy - Lummi Natural Resources Dept.	10	WAC 173-700-104: Add a reference to the statutory definition of "Indian Country" (i.e., 18 USC 1151)	Thank you for your comment. The definitions section WAC 173-700-104 has been updated to include the statutory definition of "Indian Country".
Gehret, Kathryn - Perkins Coie	11	WAC 173-700-104: The rule's goal of producing wetland banks that result in "ecological benefit" is inadequately defined, as are a number of similar terms used throughout the proposed rule. The proposed rule includes the goal of "provid[ing] incentives to encourage bank sponsors to locate and design banks that provide the <i>greatest ecological benefits</i> " 173-700-100(4)(d). The rule also provides more favorable credit conversion rates and larger service areas in exchange for banks that are sited and designed to "provide <i>significant ecological benefits</i> ..." WAC 173-700-300 (1). The proposed rule fails, however, to define bank characteristics that qualify as "ecological benefits" and further fails to quantify characteristics constituting "greatest" and "significant" benefits. In the absence of a more detailed and thorough definition of terms, the rule's emphasis on, and support of, "ecological benefits" has little meaning. Without providing more specific decision-making criteria that are scientifically based, exercise of agency discretion under the proposed rule has not scientifically based standard against which it can be measured and therefore risks the appearance of being arbitrary and capricious.	Sections 173-700-314, 173-700-315 and 173-700-317 identify criteria used by the department in determining the credit conversion rates. These criteria include considerations of the banks contributions to ecological conditions. These considerations include but are not limited to, watershed processes, threatened and endangered species, habitats, connectivity, etc. No rule change needed.
Gehret, Kathryn - Perkins Coie	12	173-700-104 (function assessment definition) The rule provides inadequate guidance for assessment of wetland functions and should not permit bank sponsors to use their "best professional judgement" as a substitute for scientific method. The rule does not provide any indication as to what these quantitative and qualitative methods are and should be amended to include specific function assessment methods or provide sponsors with other appropriate guidance documents.	Guidance is available on how to determine what functions are provided by a wetland. Since peer reviewed quantitative assessment methods are not available for all wetland types we do not require a specific method. The department has authority to decide whether or not to accept a proposed method for assessing functions on the proposed bank site. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-104 Definitions continued			
Gehret, Kathryn - Perkins Coie	13	173-700-104 (function assessment definition) The proposed rule should also be amended to indicate that "best professional judgement" is a last resort (Lackey 1997a, 1997b), and should not be equated with the use of tested scientific methods.	Comment noted. No rule change needed.
Gleason, Eric - Skykomish	14	WAC 173-700-104: "Debited credit:" means an available credit which has been withdrawn from the bank to meet specific regulatory requirements [for an approved permit requiring mitigation].	Thank you for your comment; however, there may be other requirements besides permits (for example violations, etc) when a bank credit is withdrawn. No rule change needed.
Gleason, Eric - Skykomish	15	WAC 173-700-104: ["Non-debited credit:" means an available credit that may be obtained by prospective credit users for a planned debit project, but that has not yet become a "debited" credit because final approved permits requiring mitigation have not yet been issued. Non-debited credits may be credits purchased in anticipation of the issuance of final permits at a user's sole risk, but are not yet recorded on the Master Ledger and are not officially "debited credits." (see 173-700-311,411)].	Ecology agrees with this concept. We used the term 'reserved credits' to refer to credits which are purchased prior to a regulatory requirement. Sections 173-700-104, 173-700-311 and 173-700-411 have been revised to include "reserved credits".
Graves, Gary - NW Indian Fisheries Commission	16	WAC 173-700-104: "Consensus" states: "while the primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible." This truism has no place in the definition. There is either a consensus or there isn't and conveying the impression that the term "consensus" equals "partial consensus" does not promote clarity or understanding.	Thank you for your comment. The definition for Consensus in section 173-700-104 has been revised. The text "while the primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible" has been deleted.
Graves, Gary - NW Indian Fisheries Commission	17	WAC 173-700-104: "Enhancement" definition needs work. The final sentence states: "Enhancement actions typically focus on structural improvements to a site and generally do not address environmental processes, either at the site scale or at a larger scale." This raises far more questions than it answers.	The definition for enhancement in section 173-700-104 has been revised to be consistent with the definition found in the federal rule (33 CFR Parts 325 and 332).

Commenter - Affiliation	Comment no.	Summary	Response
173-700-104 Definitions continued			
Graves, Gary - NW Indian Fisheries Commission	18	WAC 173-700-104: The term "unavoidable" refers to "adverse impacts that remain after all appropriate and practicable avoidance and minimization have been achieved." It would be helpful to cross-reference the mitigation sequencing requirement to assure that it is clear that a mitigation bank cannot shelter a permittee from the requirement to first avoid impacts. The Mitigation that Works Final Report (Recommendation 1.1) recognizes that additional guidance is necessary on how to implement the avoidance and minimization portions of the mitigation sequencing process. The bar for what constitutes "unavoidable" impacts needs to adequately reflect the value of the resources at risk. This will vary from watershed to watershed and should be done in consultation with affected tribes.	This definition is consistent with the Legislature's definition (Cht. 90.84 RCW). Existing guidance, training materials and information on wetland banking emphasize that the presence of a wetland bank does not alleviate the requirement to follow mitigation sequencing. No rule change needed.
Griffith, Gregory - Dept Archaeology and Historic Preservation	19	WAC 173-700-104: Recommended definition for Cultural resources. "Cultural resources are defined as lands, sites, and structures, that have historical, archeological and traditional cultural significance are the tangible and material evidence of the human past, aged 50 years or older, and include archeological sites, historic buildings, structures, districts, landscapes, and objects. Included in this definition are properties that are listed in the National Register of Historic Places, the Washington Heritage Register, properties listed in a local register of historic places, or properties determined to be eligible for listing in any one of these registers."	Thank you for your comment. Rule language in section 173-700-104 has been revised to include a definition for "Cultural resources".
Heinrich, Mary - Ag Prospects	20	WAC 173-700-104: The definitions vary in terminology and contain much less technical detail. We would suggest a closer tracking with the federal definitions, especially where interpretation can affect the ecology integrity of existing watersheds and ecosystems.	Thank you for your comment. Ecology revised the definitions section [173-700-104], as deemed appropriate, for consistency with the federal rules.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-104 Definitions continued			
Heinrich, Mary - Ag Prospects	21	WAC 173-700-104: The term "threshold value," reference in "performance standards," should be defined.	The phrase 'threshold value' has been deleted from the "Performance standards" definition, see revision in section 173-700-104.
Heinrich, Mary - Ag Prospects	22	WAC 173-700-104: Definition for "reestablishment" has errors implying a wetland can be "reestablished" when no hydric soils are present. The term "reestablishment" is defined incorrectly; as written it is the definition for "creation." We suggest the definition read, "means actions taken to return wetland are, function, and values to a site where wetlands previously existed, but are no longer present because of the lack of wetland hydrology or hydric vegetation. Reestablishment falls under the broader term of restoration."	The definition in WAC 173-700-104 for "re-establishment" has been changed to be consistent with the Federal Mitigation Rule.
Heinrich, Mary - Ag Prospects	23	WAC 173-700-104: DOE has not included a definition of "ecosystem services" in the WAC 173-700-104 Definitions. We suggest this be included as "the benefits that human populations receive from functions that occur in ecosystems." We also suggest that it be inserted as one of the decision-making factors in the review and permitting process. We note that the term "watershed-based approach to mitigation" references ecosystem processes and functions.	The state rule does not contain the term "ecosystem services" so a definition is not needed. The definition for watershed based approach to mitigation in section 173-700-104 has been revised to be consistent with the federal rule's definition of watershed approach. Additionally, the EIS Section 2.2.1 discusses the watershed approach and explains watershed processes.
Heinrich, Mary - Ag Prospects	24	WAC 173-700-104: The term " wetland(s) " is an incomplete definition lacking the necessary hydric soils parameter. A wetland is defined by the three parameters of hydrophytic vegetation, wetland hydrology and hydric soils.	Ecology disagrees that the definition is not complete. The definition currently in the rule is consistent with the definition of "wetlands" by the <i>Washington State Wetlands Delineation Manual</i> (Ecology 1997), The Corps of Engineers (Federal Register 1982), the Environmental Protection Agency (Federal Register 1985), Washington's Water Quality Standards, the Shoreline Management Act and the Growth Management Act. No rule change needed.
Lattyak, Nolan - Citizen	25	WAC 173-700-104: The term avoidable should be better defined. Term is ambiguous	Thank you for your comment. The rule uses a definition consistent with the definition in the federal wetland mitigation rule. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-104 Definitions continued			
Lattyak, Nolan - Citizen	26	WAC 173-700-104: Mitigation sequencing should be clearly defined	The rule uses a definition consistent with the definition in the federal wetland mitigation rule. No rule change needed.
Murphy, Michael - King County, Dept of Nat Resources and Parks	27	WAC 173-700-104: Define "Landscape position". I would suggest landscape position is related to landuse (e.g. zoning, residential density, road density, etc.) and "watershed position" would be related to stream order, elevation, watershed strata, etc.	Thank you for your comment. We chose to use one term related to landscape (watershed position) rather than have two terms which could be easily confused (landscape position/watershed position.) Landscape position can include the relationship of the site to surficial geology, for instance, located on a terrace, floodplain, slope, etc. Landscape position also involves the spatial relationship of the site to the entire watershed (i.e., located in the mouth or delta, upper extent of the watershed, mid watershed.) The relationship of existing land use and a bank site is addressed separately. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	28	WAC 173-700-104: The term "significant modification" is not described yet it is used in many sections of the rule. Please clarify and/or define.	Thank you for your comment. The department makes the determination of whether a modification is significant. The determination of significance will depend upon what the action is, what its immediate effects and anticipated effects are and whether the department thinks that the change could affect the goals and objectives of the site, conditions in the certification or operation of the site, etc. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	29	WAC 173-700-104: The term "Creation" is no longer used by the US Army Corps of Engineers (Corps). Instead they use "Establishment". This revision should be made throughout the entire document.	Ecology feels the term "creation" provides more clarity for the reader. Many local ordinances still use the term creation. The definition in 173-700-104 has been revised to clarify that the terms creation and establishment are interchangeable.
Risenhoover, Ken - Washington State Dept of Transportation	30	WAC 173-700-104: The definition of "Credit" states "a unit of trade representing the increase in the ecological value of the bank site as measured by acreage, functions, or by some other assessment method". If credits are established for other resource types, the unit used to measure that credit should be consistent with the Federal Rule on Compensatory Mitigation.	This definition is consistent with Legislature's definition contained within Cht. 90.84 RCW. We did not see any defined unit for "other resource types" within the federal rule. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-104 Definitions continued			
Risenhoover, Ken - Washington State Dept of Transportation	31	WAC 173-700-104: The distinction between remedial actions and contingency actions should be clarified.	Changes have been made to section 173-700-104. The definition for "remedial actions" specifies these are activities that are required by the department to correct any deficiencies. The term "contingency actions" has been changed to "adaptive management activities". This definition now clarifies that these activities are taken by the bank sponsor on their own to correct any deficiencies.
Risenhoover, Ken - Washington State Dept of Transportation	32	WAC 173-700-104: The term, "Watershed-based Approach to Mitigation" is not clearly defined. The definition used in the Federal Rule on Compensatory Mitigation is more complete and inclusive. We recommend using the language stated in the Federal Rule on Compensatory Mitigation "Watershed Approach" in Definition, section 332.2 and Considerations, section 323.3 (c) (2).	The definition for watershed based approach to mitigation in section 173-700-104 has been revised to be consistent with the federal rule's definition of watershed approach. In addition, the EIS Section 2.2.1 discusses what the watershed approach and watershed processes are in further detail.
Risenhoover, Ken - Washington State Dept. of Transportation	33	WAC 173-700-104: The watershed approach is an important concept. The definition and use of this concept in the state rule should be consistent with the definition and considerations of the watershed approach in the federal rule Part 332 Compensatory Mitigation for Losses of Aquatic Resources. We recommend that the definition quoted (332.2) and the description of considerations in applying the watershed approach (332.3(c)(i)) be incorporated into the state rule. The state rule should mirror the definition of watershed approach found in the federal rule and the considerations of how the watershed approach is applied that are listed in detail in section 332.3 (c)(2)(i). Where possible the State rule should use the same language to provide clarity.	The definition for watershed-based approach to mitigation in section 173-700-104 has been revised to be consistent with the federal rule's definition of watershed approach. Considerations in applying the watershed approach will be addressed in guidance.
Thomas, Jennifer - Parametrix	34	WAC 173-700-104: Watershed-based approach to mitigation - excellent to have this here, but differs from federal definition and is very subjective as written.	The definition for watershed-based approach to mitigation in section 173-700-104 has been revised to be consistent with the federal rule's definition of watershed approach. The EIS Section 2.2.1 discusses watershed approach and watershed processes in further detail.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-200 How do other laws and rules relate to banks?			
Gleason, Eric - Skykomish	35	173-700-200: Reiterate that the Federal Rule is adopted by reference and that all sections of WAC 173-700 are intended to clarify the Department's role as a co-chair of the IRT and offer additional clarification to state requirements under the IRT review, approval, and implementation process for mitigation banks approved under this Chapter.	Ecology wrote the state rule language to ensure that the federal and state processes are as consistent as possible and set similar expectations. State Legislature (RCW 90.84) only authorizes Ecology to adopt certification rules for wetland mitigation banking and does not provide authorization for rules on any other type of compensatory mitigation. No rule change needed.
Heinrich, Mary - Ag Prospects	36	173-700-200: We suggest that it be required of the sponsor to coordinate with the local jurisdiction(s) early in the process: <i>"The sponsor is <u>required</u> to coordinate with the local jurisdiction(s) early in the development of their proposal."</i>	Comment noted. No rule change needed.
Thomas, Jennifer - Parametrix	37	173-700-200: Good to add more info here.	No specific information provided within this comment. Ecology feels this section contains appropriate information. No rule change needed.
173-700-201 Decision making procedure			
de Yonge, John - Wise Use Movement	38	173-700-201: Ecology need only 'consider' IRT, tribal, or public comments submitted to Ecology as part of the certification. Ecology should be required to respond in writing to all substantive comments received.	Ecology considers all comments received during the public comment period and IRT process and determines if additional mitigation banking instrument revisions are needed. No rule change needed.
173-700-211 Content of prospectus			
de Yonge, John - Wise Use Movement	39	This section [173-700-211] fails to include a requirement disclosing how the bank will alert the public when a credit has been "debited".	The prospectus is a preliminary proposal for a bank. It does not address any reporting requirements. No rule change needed.
Griffith, Gregory - Dept Archaeology and Historic Preservation	40	173-700-211: The prospectus should include a preliminary indication of the presence of cultural resources in the project area	WAC 173-700-211(4), Content of the prospectus, specifies the bank sponsor must submit the rationale for site selection addressing the considerations listed in Section 173-700-303. This section (173-700-303) includes a consideration of whether cultural resources are on the site. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-211 Content of prospectus continued			
Murphy, Michael - King County, Dept of Nat Resources and Parks	41	173-700-211: Page 9, (7)e: also include watershed position - e.g. headwaters/1st order, middle watershed strata, lower watershed (mainstem), etc.	173-700-211(7)(e) requires that the prospectus contain information about the landscape position of the site. This includes where the site is located within the watershed. No rule change needed.
Murphy, Michael - King County, Dept of Nat Resources and Parks	42	173-700-211: Page 9, (7)j: change from "adjacent land uses" to "land uses in the contributing basin" (or maybe catchment or sub-basin).	Ecology feels that identifying the adjacent land uses, as specified in WAC 173-700-211 is sufficient to solicit public input and make a preliminary determination of whether the project should go forward to the instrument stage. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	43	WAC 173-700-211 (6), include legal description for the property.	The legal description for a site is included in the bank instrument, see WAC 173-700-222. The prospectus is a conceptual proposal. Ecology feels that a vicinity map for the site with proximity to existing roads and other landmarks provides sufficient information and that a full legal description is not needed at this early stage. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	44	WAC 173-700-211 (8) (a), revise to state, "Proposed types, classifications, ratings, and approximate sizes of wetlands."	The prospectus is a conceptual proposal. Ecology feels that the classifications and ratings is not necessary for the conceptual site design at this point in the process. No rule change needed.
Thomas, Jennifer - Parametrix	45	Page 9, [173-700-211] (7)(e) The landscape position of the site...Language should add 'basin' following WRIA and prior to sub-basin	Thank you for your comment. Section 173-700-211 (7)(e) has been revised to include the word 'basin'.
173-700-212 Submittal of the prospectus			
de Yonge, John - Wise Use Movement	46	173-700-212: Subsection (8) should be amended to require that Ecology respond in writing to all substantive comments submitted on the prospectus.	Ecology considers all comments received during the public comment period and IRT process and determines if additional mitigation banking instrument revisions are needed. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-212 Submittal of the prospectus continued			
Graves, Gary - NW Indian Fisheries Commission	47	It would be helpful if revised prospectuses were sent to affected tribes 173-700-212(8)(b)(ii)	Text within section 173-700-212 (8)(b)(ii) has been revised to now reference sections 173-700-240, Public notices, and 173-700-241, Notification on the prospectus and proposed certification. If the department determines it will go back out on public notice with a revised prospectus, the affected tribes would be notified consistent with 173-700-241(2).
Risenhoover, Ken - Washington State Dept of Transportation	48	173-700-212 (3). Is there a timeline for the notification to the affected tribes and the local jurisdiction planning department?	Ecology wants to ensure that tribes and local governments are made aware of proposals for wetland banks as early as possible. When we receive a prospectus and are evaluating it for completeness, we will contact the tribes and local jurisdiction to alert them of the proposal. If the prospectus is complete, when the department distributes the public notice, we will send the prospectus to the tribes and local jurisdiction, as specified in WAC 173-700-241. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	49	173-700-212 (3). Include the tribes and local jurisdictions within the service area not just the bank location.	We contact affected tribes and the local jurisdiction where the bank site is located when a prospectus is received. Other local jurisdictions within the service area will be notified through the public notice issued for the prospectus. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	50	173-700-212 (7). Is the comment period mentioned that same comment period mentioned in 173-700-212 (4)? What is the length of this comment period?	Section 173-700-212 (4) refers to the department's determination of whether the prospectus is complete and does not contain text regarding comment periods. The comment period mentioned in 173-700-212 (7) is referring to the public notice mentioned in the prior sub-section. 173-700-212 (6) has been revised to now reference sections 173-700-240, Public notices, and 173-700-241, Notification on the prospectus and proposed certification to provide further clarity. The public comment period must be at least 30 days.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-212 Submittal of the prospectus continued			
Risenhoover, Ken - Washington State Dept of Transportation	51	173-700-212 (8)(b)(i). If the sponsor submits a revised prospectus when does the process re-start? This should be clarified. We suggest that the rule language mirror the Federal Rule on Compensatory Mitigation language 332.8 (d) (5) (iii). We suggest the following language: "If the sponsor submits a revised prospectus, the department will provide a revised public notice in accordance with 173-700-212 (6)."	The rule language states that if a revised prospectus is submitted the department may issue a revised public notice. The department will determine whether to reissue a public notice based on the significance of the revisions. Text within section 173-700-212 (8)(b)(ii) has been revised to now reference sections 173-700-240, Public notices, and 173-700-241, Notification on the prospectus and proposed certification.
Thomas, Jennifer - Parametrix	52	173-700-212: Submittal of Prospectus (8) in re: "The department makes an initial evaluation on the ecological appropriateness..." In re: siting or design or both? There is very little detail at this stage, except for landscape setting. This seems to create a very subjective determination. Could it be strengthened by tying it more closely to the statutory goals? See also (b) "If the department determines that the proposed bank is not ecologically appropriate...."	The language is consistent with federal rule. No rule change needed.
173-700-220 Convening the IRT			
de Yonge, John - Wise Use Movement	53	173-700-220: Section should be amended to include public notice of all IRT meetings.	Comment noted. No rule change needed.
Gleason, Eric - Skykomish Habitat	54	173-700-220: The concept of an interagency review team is vital to ensuring the program is successful in providing a clear and efficient process for all parties to follow, and for giving Sponsors a fair opportunity to succeed. In order for these efficiencies to thrive, a regulatory program must be constructed that is, first and foremost, consistent with other regulatory programs and easy to follow.	Ecology agrees. We believe the rule language is consistent with other rules and regulations. We also believe the rule text provides easy to follow procedures, requirements and steps for the bank sponsor. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-220 Convening the IRT continued			
Gleason, Eric - Skykomish Habitat	55	173-700-220: By establishing an interagency review team (IRT) and clearly defining the roles of member agencies, a clear and predictable process is outlined for all to understand and follow. To create an additional regulatory program that is consistent, yet not fully integrated with the Federal Rule leads to uncertainty for all parties concerned and results in several ill-defined “gray areas” that will consequently subject the banking process to potentially inconsistent interpretation and application.	The certification process was designed to mirror and integrate with the federal wetland bank review process. The key differences with the state process are: the involvement and decision-making authority of local governments; the opportunity for the public to review and comment on the proposed terms of certification; and, Ecology and the local jurisdiction as decision-makers for state certification rather than the US Army Corps of Engineers. No rule change needed.
Griffith, Gregory - Dept Archaeology and Historic Preservation	56	173-700-220: DAHP should be on IRT if cultural resources are present	If cultural resources are found at the prospectus stage, the Dept of Archaeology and Histori Preservation will be invited to participate on the IRT. We will add this recommendation to our operating procedures for the certification process and contacting the IRT. The EIS section 3.2.3 discusses the role of other state agencies in more detail. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	57	173-700-220 (1). The local jurisdictions and tribes within the service area should be included in the IRT not just those where the bank is located.	Affected tribes are invited to participate on the IRT. While jurisdictions within the service area may have an interest in a bank proposal, Ecology does not believe that all local jurisdictions within the proposed service area need to participate on the IRT. No rule change needed.
173-700-221 Purpose of the instrument			
de Yonge, John - Wise Use Movement	58	173-700-221: Subsection (1) should be amended to include public participation as a purpose of the instrument.	While public participation is an important element in the certification process it is not the purpose of the instrument. Sections 173-700-212, 173-700-230, 173-700-240, and 173-700-241 discuss public notices for banks. These are required elements of the project's review and are opportunities for the public to become involved in the project. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-222 Content of the instrument			
de Yonge, John - Wise Use Movement	59	173-700-222: This section should be amended to include public participation as an element in the instrument.	While public participation is an important element in the certification process, it is not the purpose of the instrument. A public notice is provided on the final MBI, as specified in section 173-700-230 (3). For further information, the EIS Section 3.2.5 discusses the role of the public in the wetland mitigation bank certification process. No rule change needed.
Gehret, Kathryn - Perkins Coie	60	173-700-222: The rule should require quantitative hydrological assessments of the wetland mitigation bank site both before and after construction. The proposed rule should require a detailed quantitative assessment of the pre- and post- construction hydrological conditions of the wetland mitigation bank site.	Detailed hydrological information is required by the IRT and submitted by the sponsor. This information is contained within the resource documents included with the mitigation banking instrument. No rule change needed.
Griffith, Gregory - Dept Archaeology and Historic Preservation	61	Section 173-700-222(13) recommend "An evaluation of historic, cultural, and archaeological resources on the bank site" be conducted by cultural resource professionals meeting accepted professional standards and with expertise appropriate to the affected resources.	We will include this information as part of our guidance document. No rule change needed.
Kelly, Carolyn - Skagit Conservation District	62	173-700-222: "invite representatives from appropriate federal and state regulatory and resource agencies" It should specify which agencies will be included.	Thank you for your comment. We did not include a list of specific agencies because the appropriate regulatory agencies may differ on each bank depending on what is proposed. Not all regulatory agencies will be affected on each bank. No rule change needed.
Murphy, Michael - King County, Dept of Nat Resources and Parks	63	173-700-222 (3)(d): also include watershed position	The revised information requested in Section 173-700-222(3)(d) [submittal of the WRIA (Water Resource Inventory Area), basin, and sub-basin location] will provide the watershed position.
Risenhoover, Ken - Washington State Dept of Transportation	64	WAC 173-700-222 (2), include legal description for the property.	The legal description of the bank site is requested in 173-700-222 (7). No rule change needed.
Thomas, Jennifer - Parametrix	65	173-700-222 (3)(d) - add Basin?	Thank you for your comment. We revised section 173-700-222 (3)(d) to include basin.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-222 Content of the instrument continued			
Thomas, Jennifer - Parametrix	66	173-700-222 (3) In re: (e) and (g) seems as though wetland delineation should be specified at this stage.	Section 173-700-222 (3) (g) was revised to include delineated boundaries.
Thomas, Jennifer - Parametrix	67	173-700-222 (3) In re: (l)[m](ii) location, size and # of existing wetlands based on wetland delineation in accordance with state standard.	Section 173-700-222 (3) (m)(ii) was revised to include delineated boundaries.
Thomas, Jennifer - Parametrix	68	173-700-222 (6)(e) in re: 'the functions to be provided [on site and within the landscape?] by the bank....	Ecology feels the addition of this text is not necessary. No rule change needed.
173-700-223 Preliminary review of the technical elements of the draft instrument			
de Yonge, John - Wise Use Movement	69	173-700-223: This section should be amended to clarify that sponsor meetings with the IRT are open to the public.	The Open Public Meetings Act (OPMA), Cht 42.30 RCW, requires that meetings held by a 'governing body' must be open to the public. The IRT is not considered a 'governing body', as specified within Cht 42.30 RCW. The OPMA does not apply to agencies like Ecology that are governed by a single person, in this case, the director. Accordingly, IRT meetings with the sponsor are not required to be open to the public. The department provides public meetings on proposals when warranted. No rule change needed.
173-700-224 Submittal of the draft instrument			
Risenhoover, Ken - Washington State Dept of Transportation	70	173-700-224 (4) states "Once a modified draft instrument is submitted, the department must notify the sponsor as soon as it determines that the draft instrument is complete." This language is consistent with language in the federal rule but does not specify timelines. There should be a timeline associated with the response from department after the submittal of a modified draft instrument per section 173-700-224 (4). We suggest the following language: "...department must notify the sponsor within 30 days of modified draft instrument submittal.	Correct, the federal rule does not include a timeframe for this step, and Ecology will remain consistent with this. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-225 Review of the draft instrument			
Murphy, Michael - King County, Dept of Nat Resources and Parks	71	173-700-225: How will unresolved disputes about the content of an instrument be resolved? Reference 173-700-232.	The language in 173-700-225 (7) has been revised to clarify that the department will notify the sponsor of potential disputes that may arise at the final instrument stage. The dispute resolution process (WAC 173-700-232) may be used for any unresolved disputes throughout the state certification process. The dispute resolution process specifies that the program manager for the Shorelands and Environmental Assistance Program makes the final decision on the resolution.
173-700-230 Submittal of the final instrument			
de Yonge, John - Wise Use Movement	72	173-700-230: Subsection (4) should be amended to require that the sponsor respond in writing to all substantive public comments.	Ecology works with the sponsor(s) to address substantive concerns provided during the public comment period. No rule change needed.
Gleason, Eric - Skykomish Habitat	73	173-700-230: A state-regulated rule should be implemented to allow a rebuttable presumption of approval whereby, if a bank Sponsor successfully follows the process, the result will be that a bank project will be approved.	Ecology disagrees. In our permit processes, we cannot and do not guarantee an approval or predetermine the outcome of a regulatory process. Simply following the steps of a regulatory process does not guarantee approval. The IRT sets standards with which the bank sponsor may or may not agree. If the sponsor does not agree to the conditions specified by the department and IRT, the project will not receive certification. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	74	Tribes should be accorded at least the same courtesy as that given to local jurisdictions - if an affected tribe does not concur with certification of a proposed mitigation bank, then Ecology shall not certify the bank (see proposed WAC 173-700-230 (6)(a-b).	Section 90.84.040(1) RCW states that the department may not certify a bank without local approval of the bank. The legislature did not specify any other entities that must concur with certification for Ecology to certify. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-230 Submittal of the final instrument continued			
Heinrich, Mary - Ag Prospects	75	173-700-230: I would like Ecology to listen to the March 17 hearing that the Skagit Board of County Commissioners had when they approved the permit for the Nookachamps Bank. The commissioners said they felt they had no choice, but to approve that, that the only reason they could vote 'no' was if something illegal had been done. I think you need to look at your rules since you have made it less able for them to say no.	Certification of a wetlands mitigation bank by Ecology does not legally obligate a county to issue required permits for the bank. Counties retain the authority to require consistency with comprehensive plans and development regulations. Cited: AGO 2008 1. The local government where a bank is located is notified of conceptual bank proposals and invited to participate on the IRT. Local governments have the opportunity at the prospectus stage to notify the department that they do not support a bank proposal. Under the certification program, local governments can deny a proposed certification in which case, Ecology will not issue a state certification [WAC 173-700-230]. No rule change needed.
Jackson , Barbara - Citizen	76	173-700-230: I'm hoping we will call a moratorium on mitigation banks here in this county [Skagit].	Comment noted. No rule change needed.
Murphy, Michael - King County, Dept of Nat Resources and Parks	77	173-700-230: Page 15, (6) & (7) What if the local jurisdiction is also the bank sponsor? Does this review still occur?	Yes, under state law, the local jurisdiction where the bank is located must approve the bank certification before Ecology can finalize certification. The law does not distinguish between whether the local government is a sponsor or not. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	78	173-700-230 (6) states that local jurisdiction(s) notify the department in writing of whether it concurs with certification. We recommend there be a timeline identified for this written notification to the department.	Local jurisdictions decide who in their local government structure decides whether or not they concur with the department's decision. Decisions made at the level of the planning director are most likely made on a different schedule than those made by the local elected body. The department believes that there needs to remain flexibility in the rule to accommodate different local decision-making timeframes. Since the local jurisdiction is made aware of the bank proposal early in the process and they are part of the IRT; the department anticipates a reasonable turn-around time. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-230 Submittal of the final instrument continued			
Sutton, Carolyn - Citizen	79	173-700-230: Skagit County should say "NO" to wetland mitigation banks.	Thank you for your comment. A local jurisdiction may elect to not certify a wetland mitigation bank proposed within their jurisdiction. This rule does not require approval of a certification if the local jurisdiction does not support it. If the local jurisdiction does not approve certification of a bank, Ecology cannot certify the bank. See section 173-700-230 (6). No rule change needed.
173-700-232 Dispute resolution process			
de Yonge, John - Wise Use Movement	80	173-700-232: Ecology can't function as both a signer and a dispute resolution decider. Any dispute must go through an independent dispute resolution process.	We disagree. Ecology's dispute resolution process is consistent with the federal process, but is specific to Ecology. As with any regulatory decision making, the agency responsible for implementing the law or rule must make the final decision on requests for regulatory authorizations. No rule change needed.
Gleason, Eric - Skykomish	81	173-700-232: Creating a dispute resolution process for IRT (group) issues by granting sole authority to a single party is not a well conceived process. The state is not in a position to resolve disputes involving federal policy.	Ecology's dispute resolution process is consistent with the federal process, but is specific to Ecology. This rule is not attempting to subvert their federal authority. As with any regulatory decision making, the agency responsible for implementing the law or rule must make the final decision on requests for regulatory authorizations. In this case, the request is for state certification and the rule is implemented by Ecology. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-232 Dispute resolution process continued			
Gleason, Eric - Skykomish	82	173-700-232: We propose an IRT-based dispute resolution process whereby a collective of senior co-lead agency personnel would respond to dispute resolution claims and provide a single decision reflective of both federal and state concerns.	If the IRT co-chairs cannot resolve a dispute at the IRT level, the issue may be elevated to management for resolution. Due to the dual nature of the approvals for banks, Ecology will work closely with the federal agencies to come to an acceptable resolution. If the state and the federal agency management cannot reach agreement, the program manager for the Shorelands and Environmental Assistance program will make a final decision regarding state certification. The US Army Corps of Engineers makes the final decision(s) for federal mitigation bank approvals. The text in the state rule is consistent with the federal process, but is specific to the state department of Ecology. No rule change needed.
Gleason, Eric - Skykomish	83	173-700-232: The bank Sponsor should have the ability to participate in the dispute resolution process for elevating bank Sponsor concerns in the event of a disagreement with decisions made by IRT staff. There needs to be a similar dispute resolution process for Sponsor to seek clarification and/or relief from decisions or delays resulting by action of the IRT and the Department. Further, the deciding authority needs to be comprised of co-chair authorities that are able to weigh, interpret and prioritize often competing program requirements from among the IRT agency(s) constituents.	The dispute resolution process is consistent with the process outlined in the federal rule, but is specific to Ecology. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-240 Public notices			
de Yonge, John - Wise Use Movement	84	173-700-240: The public will not have adequate opportunity to provide input on the design and requirements for banks.	Ecology disagrees. Section 173-700-230, 173-700-240 and 173-700-241 address public notices for banks and specifically require that the department issue a public notice on the final mitigation bank instrument. The purpose of the public notice is to solicit public comments on the proposed certification. The bank instrument contains design and technical requirements of the bank. No rule change needed.
de Yonge, John - Wise Use Movement	85	173-700-240: Banks shut out the public from notice and comment on release of credits from such banks.	Ecology disagrees. The requirements for obtaining credit releases are outlined in each bank's Mitigation Bank Instrument. The mitigation bank instrument receives public review prior to a final certification decision. No rule change needed.
173-700-241 Notification on the prospectus and proposed certification			
Graves, Gary - NW Indian Fisheries Commission	86	173-700-241: Affected tribes include more than just a tribe within a bank's proposed service area; affected tribes include at least those tribes with ceded interests with the WRIA in which a bank would be sited. (See proposed WAC 173-700-241(2)). We recommend replacing the term "tribal governments" in this section with the term "affected tribes." (It would likely be helpful to include a definition of "affected tribes" It would be appropriate to use the same definition as that used in the SEPA regulations (WAC 197-11-710).	The term tribal governments has been replaced with "affected tribes" within section WAC 173-700-241(2)
Risenhoover, Ken - Washington State Dept of Transportation	87	173-700-241 (1) states that local jurisdictions where the bank site is located will be notified of the prospectus and proposed certification. This should be changed to include all local jurisdictions within the bank service area.	Cht 90.84 RCW requires Ecology to notify the local jurisdiction where the bank site is located, not all local jurisdictions within a proposed bank service area. However, 173-700-241 specifies who will be notified by the public notice. Those parties to be notified includes those jurisdictions within the service area. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-241 Notification on the prospectus and proposed certification continued			
Thomas, Jennifer - Parametrix	88	173-700-241(3)(b) Isn't this duplicative of local notice requirements? Why would the department duplicate an existing requirement? Please clarify.	This language ensures that if local regulations require notice of land owners beyond 300 feet of the project boundary, those owners will also be notified of the proposal. Text regarding avoiding duplicative public notices is contained within section 173-700-240 (1) and specifies that when an existing public notice process is available to solicit public comment, the department shall strive to provide a joint public notice. EIS Section 3.2.5 discusses the role of the public and that Ecology should not duplicate existing processes with this rule in further detail. No rule change needed.
173-700-242 Public hearings			
Graves, Gary - NW Indian Fisheries Commission	89	Section 173-700-242(2) refers to written requests for a public hearing prior to the end of the comment period. It is not clear which comment period is being referred to.	Section 173-700-242 (2) has been revised to reflect that it applies to both the prospectus and proposed certification comment periods.
173-700-300 Ecological design incentives			
Gleason, Eric - Skykomish	90	173-700-300: Additional incentives need to be applied to projects that contain multi-resource based mitigation plans. Rather than retrofitting these projects into wetland-centric regulatory framework and in some cases penalizing Sponsors with decreased credit ratios for not increasing total wetland area, additional consideration should be given to increasing the total number of credits these sites generate. By limiting the award of credit to wetland-only activities, there is a significant disincentive for Sponsors to take on restoring higher-quality environmental systems that create maximum benefits in a watershed.	Any credits beyond wetland credits would need to be addressed under other regulatory authorities. RCW 90.84.005 states: The legislature finds that wetlands mitigation banks are an important tool for providing compensatory mitigation for unavoidable impacts to wetlands. The rule provides for, and Ecology supports, the integration of credits for other types of resources with a wetland bank. See WAC 173-700-310(3) for further information on different resource currencies. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-300 Ecological design incentives continued			
Gleason, Eric - Skykomish	91	173-700-300: In cases where full ecological values simply cannot be realized in increased credit generation ratios due to limitations in department policy, the department should allow Sponsors to develop alternative currencies to attempt to capture these values without additional involvement required by the department. When such alternative currencies are developed to meet the requirements of other non-department requirements, such currencies should be developed free from interference by the department and governed by the primary agency with jurisdiction over the resource in question.	The rule allows for development of alternative currencies on a wetland bank site. We disagree that the department not be involved with determining how those credits relate to wetland credits generated by the bank. Ecology needs to ensure currencies are compatible and tracking of credits is coordinated in order to avoid over allocation or double-dipping. Text within section 173-700-310 has been revised to clarify the requirements for when other resource currencies are developed for an existing wetland bank.
Risenhoover, Ken - Washington State Dept of Transportation	92	173-700-300 (2) states that more favorable credit conversion rates and larger service areas may be allowed as incentives for banks that provide significant ecological benefits and are sustainable. Does this mean conversion rates better than those defined in 173-700-313 to 173-700-319? And does this mean larger service areas than those identified in 173-700-302? This section needs to be clarified.	Ecology anticipates that most credit conversion rates will fall within the ranges in the rule. The department does have discretion to provide conversion rates outside of the ranges based on ecological considerations. Service area boundaries must be able to meet the requirements of Section 173-700-302. No rule change needed.
Thomas, Jennifer - Parametrix	93	173-700-300: Ecological design incentives. Good to have this section.	Thank you for your comment. No rule change needed.
173-700-301 Service area			
Barns, Ross - Rosario Geo Science Assoc and Evergree Islands	94	173-700-301: The WRIA is far too large an area for considering mitigation credits. That means that the very important wetland systems associated with individual streams - watersheds within that whole area can be destroyed in return for creating some kind of a wetland in one concentrated area within that area.	Thank you for your comment. While the rule language allows for service area boundaries up to the WRIA boundary, service areas of existing banks have not included entire WRIsAs. The language in section 173-700-301 (3) was developed to be consistent with the language in RCW 90.84.030(2) as amended by the legislature in 2008. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-301 Service area continued			
de Yonge, John - Wise Use Movement	95	173-700-301: The proposed rule fails to protect existing wetland because there is no ecological or biological basis for the establishment of banks with a service area in an adjacent WRIA. This option should be deleted.	Ecology disagrees. The existing WRIA boundaries do not accurately reflect biological linkages along large rivers and estuarine areas. The language in section 173-700-301 (3) was developed to be consistent with the language in RCW 90.84.030(2) as amended by the legislature in 2008. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	96	173-700-301. There are very few situations where it is appropriate to allow impacts in one watershed and mitigate them in another. Consequently, it is difficult to foresee when it would be appropriate to allow the service area of a mitigation bank to go beyond the WRIA in which the bank is located. See proposed WAC 173-700-301 (3) - The proposed rule would allow such an expansion when to do so is "ecologically appropriate and defensible." The term "defensible" may not be the best choice for rule language. A better approach would probably be to allow such a service area expansion when it is ecologically appropriate, consistent with watershed restoration objectives, and affected state, federal, local, and tribal governments agree.	The language was specifically crafted to address situations where WRIA boundaries don't make ecological sense. One example would include a bank that is located in an intertidal zone that provides functions for areas in the lower ends of adjacent WRIsAs. If it is ecologically appropriate service areas can include portions of multiple WRIsAs. The language in section 173-700-301 (3) was developed to be consistent with the language in RCW 90.84.030(2) as revised by the legislature in 2008. No rule change needed.
Murphy, Michael - King County, Dept of Nat Resources and Parks	97	173-700-301. Page 19: Consider whether paragraph (3) is flexible enough to accommodate an estuary or nearshore system bank. Could there be cases when it would make ecological sense to sell credits to offset impacts in non-adjacent WRIsAs? 173-700-502 might allow this flexibility. Might be good to reference this section in 173-700-301.	Yes, the language was specifically crafted to address situations where WRIA boundaries don't make ecological sense. One example would include a bank that is located in an intertidal zone that provides functions for areas in the lower ends of adjacent WRIsAs. If it's ecologically appropriate service areas can include portions of multiple WRIsAs. No rule change needed.
173-700-302 Considerations for determining service area size			
de Yonge, John - Wise Use Movement	98	173-700-302. This section fails to account for historical wetland filling in the service area.	Comment noted. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-302 Considerations for determining service area size continued			
Thomas, Jennifer - Parametrix	99	WAC 173-700-302 (10) - What about considering sustainability and ability of the site to meet the goals of the Clean Water Act by restoring and protecting our nations waters (or maybe more appropriately the state's growth management act) by improving on the success and quality of mitigation.	The ecological sustainability of the bank site is considered during the initial review of the prospectus and site selection rationale. No rule change needed.
173-700-303 Site selection			
Bynum, Ellen - Friends of Skagit County	100	173-700-303. I would like to request that the Department of Ecology remove agricultural lands from possible consideration for a wetlands mitigation siting across the state.	Thank you for your comment. Some areas within agricultural zone may be well suited for restoration to wetlands. Such restored areas can contribute significantly to watershed functioning and regional ecological goals such as salmon recovery. For this reason, the department does not prohibit banks in these locations. Ecology believes that prime agricultural lands are important resources and discourages the conversion of prime farmland soils designated as agricultural lands of long term commercial significance. No rule change needed.
de Yonge, John - Wise Use Movement	101	173-700-303. Banks will result in the loss of wetlands in urban areas and their replacement in rural agricultural areas resulting in a redistribution of wetlands on the landscape and a loss of productive agricultural lands.	Decisions on whether bank credits provide adequate compensation for authorized impacts to wetlands are made during the permitting process. Use of bank credits can result in shifts of wetland area and function from one subbasin to another. The concerns raised in this comment are addressed in further detail within Section 2.1 of the final EIS. No rule change needed.
de Yonge, John - Wise Use Movement	102	173-700-303. This section fails to address how allowing the filling of wetlands that may be thousands of years old can be mitigated by banks which can not be guaranteed to be self-sustaining.	This rule does not address permitting as it relates to the determination of whether wetland impacts are unavoidable and are authorized. The authorizations to affect wetlands are found under different laws at the federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use regulations. Regulatory agencies allow use of wetland banks as one option for offsetting unavoidable impacts to wetlands. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Elliot, Crystal - Herrera Environmental Consultants	103	173-700-303. In WAC 365-190-050, it is provided that local jurisdictions utilize the NRCS definition of "prime farmland" soils and associate geographic extent from soil surveys to establish ALLCS.	Thank you for your comment. Text within section 173-700-303 (2) has been revised to focus on prime farmland soils and not solely on land designations of agricultural lands of long-term commercial significance. We also added a definition for prime farmland soils to section 173-700-104.
Elliot, Ian - Citizen	104	173-700-303. My advice to you would be to rethink the stand point of soil types and how they relate to agricultural lands of significance.	Thank you for your comment. Text within section 173-700-303 (2) has been revised to focus on prime farmland soils and not solely on land designations of agricultural lands of long-term commercial significance.
Elliot, Ian - Citizen	105	173-700-303. We need a rule that says this is the soil that's there naturally, that soil is the one that is a prime farmland and other soils aren't and therefore are open for use in mitigation banking.	The site selection information in section 173-700-303 has been revised to reflect an emphasis on prime farmland soil type.
Elliot, Ian - citizen	106	173-700-303. Not all areas in ALLCS meet criteria for prime farmland; no common definition on local level for what constitutes prime farmland.	The language on agricultural lands (173-700-303) was revised to address prime farmland soils. The language focuses the distinctions in soil types that may be contained within larger areas identified as agricultural lands of long-term commercial significance. A definition for prime farmland soils has been added in 173-700-104.

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Elliot, Ian - citizen	107	<p>Clarify section WAC 173-700-303(2) as follows:(2) Compatibility of banks and agricultural lands of long-term commercial significance (ALLCS) (a) The department discourages the location of banks in active agricultural areas (exhibiting crop production within the last 5 years) on “prime farmland” soils, as defined by the Natural Resources Conservation Service and mapped by local soil surveys (Note: prime farmland soils do not include those classified as prime farmland if drained” or “prime farmland if irrigated”, or other classifications characterized by stipulations on the agricultural suitability of the soil), due to the important resource and societal values of those resource lands. (b) If a bank is proposed to be located within an active agricultural area with “prime farmland” soils: (i) Impacts to active agricultural areas with “prime farmland” soils both on-site and off-site shall be avoided to the maximum extent possible; (ii) The bank must be compatible with the purpose of designated ALLCS, to conserve and maintain agricultural production, food sources, and “prime farmland” soils; (iii) Placement of banks on active agricultural areas with “prime farmland” soils must be consistent with the local agricultural strategy; (iv) The bank shall be located on nonprime soils to the greatest extent possible; and (v) The bank shall be compatible with and minimize effects to adjacent and nearby agricultural operations. This includes, but is not limited to: adverse effects on water flows to neighboring farms, shading effects on adjacent farms.</p>	<p>The language on agricultural lands (173-700-303) was revised to address prime farmland soils. The language focuses on minimizing impacts to prime farmland soils that may be contained within larger areas identified as agricultural lands of long-term commercial significance. A definition for prime farmland soils has been added in 173-700-104. The ability of a site to provide benefits for endangered species is addressed in section 173-700-303.</p>

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Elliot, Ian - citizen (comment continued from line above)	107 continued	(c) The department shall consult with the local conservation district, the conservation commission, and other agencies and groups to ensure that bank siting is consistent with both local and statewide goals for agricultural land preservation, while balancing these with statewide goals for ESA-listed species habitat restoration, and advances local priorities and goals.	(Response provided in line above.)
Elliot, Ian - citizen	108	173-700-303. Salmon restoration projects should be given the same consideration as agricultural land preservation.	A bank's compatibility with and the level that it contributes to salmon recovery are two of the things that the department considers when evaluating site location and functional performance. [173-700-303(1)(a)(vii)]. No rule change needed due to this comment.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Elliott, Crystal - Herrera Environmental Consultants	109	<p>Pertaining to section WAC 173-700-303, Section 2, Compatibility of banks and agricultural lands of long-term commercial significance (ALLCS): I completely agree with the need to include protection for our local farm base in State laws regarding land use, including mitigation banking. However, as currently written, the rule's use of ALLCS designations to define prime farmland potentially threatens the ability for mitigation bank siting in areas where they are the most ecologically appropriate – river floodplain areas. Puget Sound river floodplains have historically been converted from floodplain wetlands complexes and riparian habitat to agricultural land, and now most large tracts of undeveloped land in these areas fall under ALLCS land use designations. These are the areas where large-scale restoration projects would provide the most benefit to ESA-listed fish recovery, regional water quality improvement, wildlife corridor enhancement, and flood abatement through increased floodwater storage capacity. Since we all value local farmland and simultaneously understand the need for river floodplain restoration to achieve restoration of these critical ecological functions, a balance needs to be achieved between these two objectives.</p>	<p>Ecology agrees. There needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. We revised section 173-700-303(2) to focus more on the soil suitability for agriculture (NRCS prime farmland soils) and the proposed bank's ability to not conflict with regional or local ecological goals.</p>

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Elliott, Crystal - Herrera Environmental Consultants	110	<p>173-700-303. While there are “prime” farmland areas within ALLCS, this designation also encompasses sub-prime areas with soils described by the NRCS as “prime farmland if drained” – areas often exhibiting flooding during the growing season and requiring modification to support conventional crops. These are areas that often provide optimal conditions for wetland restoration projects. Unfortunately, ALLCS designations do not make this distinction – and it is this over-inclusive and nebulous definition that provides substantial grounds for caution in using it as a restriction for mitigation bank siting. I strongly recommend using scientifically-based definitions, as in WAC 173-700-30, such as the “prime farmland” NRCS soil classifications (excluding “prime farmland if drained” and other modifiers of “prime”) and requirements for documented current and on-going crop production.</p>	<p>We revised section 173-700-303(2) to focus more on the soil suitability for agriculture (NRCS prime farmland soils) and the proposed bank's ability to not conflict with regional or local ecological goals.</p>

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Gehret, Kathryn - Perkins Coie	111	<p>The rule ignores possible negative impacts of bank construction on endangered species and their habitat. 173-700-303 (1)(a)(vii) DOE has deemed it necessary to consider "[w]hether the process of establishing the bank at the site will <i>protect or enhance</i>... habitat for threatened, endangered, or candidate species, "in determining whether the proposed bank is "ecologically suitable" for certification.</p> <p>The rule does not conversely require DOE to consider the risk that construction of a proposed bank will negatively impact a species or its habitat. If the proposed rule considers benefits to listed species and their habitat in determining site selection, the rule should be amended to recognize the fact that the creation of a wetland mitigation bank could harm listed species and their habitat, and further inquiry into the nature and scope of the impacts of the bank should be required.</p>	Ecology agrees. The rule text in section 173-700-303 (1)(a)(vii) has been revised to include 'negatively affect'.
Gleason, Eric - Skykomish Habitat	112	173-700-303(2)(c). Add [the department shall not approve projects that have been found to be inconsistent with both local and statewide goals for agricultural land preservation and where local priorities and goals are not able to be advanced through the establishment of a mitigation bank on Agricultural lands of long Term Commercial Significance].	If the local jurisdiction deems a bank to be inconsistent with their regulations and ordinances, and it does not approve certification - the state will not approve certification of the bank, as specified in 173-700-230 . No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Gleason, Eric - Skykomish Habitat	113	<p>173-700-303. Add 3) The department requires that all mitigation banks must meet the following set of minimum criteria: -Mitigation banks should be implemented in accordance with landscape-scale and watershed planning to promote the maximum possible benefit to identified needs to sustain proper ecological function with the basin. - Mitigation projects must not negatively or adversely affect water quality, or contribute to degradation of water quality in any way. Mitigation projects should be designed, constructed and maintained and monitored to provide improvements to water quality whenever possible. -Mitigation projects should not negatively affect floodplain storage or conveyance function, and should provide net-gain in floodplain function whenever possible as floodplain areas are known to have direct benefits (or effects) to listed fish species. -Mitigation projects must be selected, designed, constructed, maintained and monitored with an appropriate level of scientific review, engineering, regulatory review and be secured with adequate financial assurances to secure the risk of failure in constructed wetlands, streams and associated habitats. The implementation of mitigation plans must be constructed and implemented only by qualified firms with proven success in the delivery of successful mitigation projects.</p>	<p>The rule includes language that emphasizes selecting sites that contribute to watershed functioning, endangered species, and are sustainable on the landscape. Bank projects are also required to comply with applicable laws such as local land use regulations and state water quality certifications. Applicants for bank certification are required to identify their qualifications and any past projects they have completed which are similar to the proposed bank. The EIS Section 2.2.1 discusses what the watershed approach and watershed processes are and how the rule includes them in the bank review process. No rule change needed due to this comment.</p>

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Gleason, Eric - Skykomish Habitat	114	173-700-303. Add 4) The department requires that all mitigation banks located in watersheds containing threatened and endangered fish species and associated habitat must meet the following set of criteria: -Mitigation banks must be able to demonstrate a direct benefit to listed fish species and associated habitat. -Mitigation banks should address identified limiting factors affecting the recovery of listed fish species. In most cases this requires including key elements for the proper function of essential fish habitat commonly found in riverine, riparian and floodplain areas to reduce barriers to fish passage and to promote the maximum possible benefits to fish habitat usage including, but not limited to spawning, rearing, foraging and overwintering activities. -Mitigation projects should be sited along key salmon passage and spawning areas and reduce barriers to fish passage whenever possible. In most watersheds, this means that mitigation projects should establish and maintain a direct hydrologic and hydraulic connection to river systems and tributaries to promote the re-establishment of riparian areas containing high quality habitat for listed fish species.	Ecology agrees that where appropriate banks should be designed and managed to support threatened and endangered species, as well as restore watershed processes. However, Ecology does not agree that all banks located in watersheds with listed species should be required to provide habitat for endangered species. Not all sites within watersheds containing endangered species support habitats for those species. The text in section 173-700-303(1)(a)(vii) has been revised to highlight that banks should not adversely affect endangered species.
Good, Randy - Cattleman's Association	115	173-700-303. Proposed banks are not compatible with working farms. Proposed banks will remove thousands of acres of prime farmland from production.	Thank you for your comment. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Graves, Gary - NW Indian Fisheries Commission	116	173-700-303. As currently drafted, the proposed rule constitutes a significant hindrance to voluntary actions between willing buyers and sellers who seek to reconnect or return lands slated for agriculture to a more salmon-friendly use. The rule essentially places any lands zoned for commercial agriculture as being off-limits for mitigation banks. If the Department believes that the proposed rule does provide an important watershed restoration function (if a bank located on former ag land was used to provide credits for out-of-kind [non-agricultural] impacts, arguably the bank may serve a restoration function by erasing the impacts caused by the previous agricultural use) then it needs to recognize that banking should be allowed on ag lands of importance to salmon. As currently drafted, the proposed rule fails to reach any accomodation between protecting commercial agriculture lands and recover ESA-listed salmon. Instead, the proposed rule may create a significant obstacle to salmon recovery.	Ecology acknowledges that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. We revised section 173-700-303(2) to focus on prime farmland soils designated as agricultural lands of long-term commercial significance and the proposed bank's ability to meet regional and local ecological goals, such as recovery of listed species.
Graves, Gary - NW Indian Fisheries Commission	117	173-700-303. It is not clear how WDOE site selection decisions will be communicated to affected tribes or other agencies.	The bank sponsor must include their rationale for site selection in the prospectus and bank instrument. The IRT reviews the site selection rationale during the review of the prospectus. Tribes and the appropriate local jurisdiction are also notified when the department receives a complete prospectus. Tribes and other agencies are invited to participate on the IRT. No rule change needed.
Heinrich, Mary - Ag Prospects	118	173-700-303. Soil is the basis for all terrestrial ecosystems. Soils is to some extent a "renewing" resource as it slowly forms over centuries through the erosion of bedrock. But it is not replaceable once removed from a site. The Department of Ecology has chosen to ignore this.	Comment noted. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Heinrich, Mary - Ag Prospects	119	173-700-303. Based upon the location of at least two of the pilot banks within river courses, we suggest that language be inserted in this section regarding endangering public safety. We believe these facilities should be " <u>prohibited from river courses that flood on a frequent basis.</u> "	Ecology disagrees. Banks located in active floodplains can help with desynchronization of flood flows and can provide benefits by increasing floodplain capacity. Additionally, because of potential adverse effects of construction activities, the department and IRT agencies require detailed studies on existing conditions and likely effect of activities proposed on the bank site. Bank sponsors are required to monitor the development of the site and report to the department. The department and other IRT members perform ongoing site reviews during the life of the bank. No rule change needed.
Heinrich, Mary - Ag Prospects	120	173-700-303. We do not believe that excavation within a waterway improves flood storage; we believe excavation within a waterway can potentially cause structural changes in the configuration of the waterway that can increase the frequency of flood events and their magnitude, endangering life and property. We believe that allowing structural changes within a waterway can cause instability of the river structure, both up and downstream, and create the potential for bank erosion, sedimentation and other faults.	Because construction activities can have adverse effects, the department and IRT agencies require detailed technical studies on existing conditions and likely effects of activities proposed on the bank site. Bank sponsors are required to monitor the development of the site and report to the department. The department and other IRT members perform ongoing site reviews during the life of the bank. No rule change needed.
Heinrich, Mary - Ag Prospects	121	173-700-303(2)(a) Revise text to read "the department <u>prohibits</u> the location of banks on ALLCS due to the important resource and societal values of those resource lands." Strike (2)(b). In (2)(c) move and insert (2)(b) (iv) and (v).	Ecology disagrees that banks shall be prohibited from ALLCS. Text within 173-700-303 (2) has been revised to focus on prime farmland soils designated as ALLCS.

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Heinricht, Mary - Ag Prospects	122	173-700-303. Farmers and agricultural interests have responded each time Ecology asked for input and comments on the banking program and rule stressing the importance of reserving agricultural soils for farming - but these comments have been ignored.	Ecology disagrees that comments have been ignored. Ecology met with and worked extensively over the last three years with the agricultural community, the Department of Community Trade and Economic Development (now Department of Commerce), state agencies, and other interested stakeholders to try to address concerns raised by these groups. You participated in many of those meetings and discussions yourself, as the representative for the agricultural community. Ecology provided language in the draft rule to discourage the conversion of prime agricultural lands because of their important values [173-700-303 (2)]. Additional revisions have been made to this section to focus further on prime farmland soils and to address concerns raised during the extensive outreach we did regarding this issue.
Heinricht, Mary - Ag Prospects	123	173-700-303. Engrossed HB 1967 which will prohibit expansions of urban growth areas into 100 year floodplains. Use it as a template to prohibit urban development in the form of banks on ALLCS.	ESHB 1967 relates to amendments to the Growth Management Act. This rule does not regulate urban development. Ecology disagrees that wetland banks should be prohibited on all lands that may be used for agriculture. No rule change needed.
Heinricht, Mary - Ag Prospects	124	173-700-303. Do not allow wetland or any other kind of mitigation banks on land set aside - as mandated in the Washington GMA - to provide food in the future. Ban all mitigation banks from prime agricultural soils - permanent.	Ecology disagrees. We acknowledge that there needs to be a balance between preservation of agricultural lands and restoration of ecological resources and watershed processes. Ecology did not find any conflict between the rule language and the GMA. "The GMA provisions relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply." AGO 2008 No. 1. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Hulbert, Mike - Citizen	125	173-700-303. I guess my comments would be to your wording, your language, on these locations - locating these on agricultural lands of long-term commercial significance. "The department discourages the location of banks..." I think it just needs to - just be stronger wording.	Thank you for your comment. No rule change needed due to this comment.
Kelly, Carolyn - Skagit Conservation District	126	173-700-303. How will Ecology discourage the siting of banks on ALLCS, there are no means identified.	The rule identifies considerations that Ecology uses when evaluating a bank proposed on agricultural lands. Ecology also recommends that bank sponsors consult with the local conservation district and the conservation commission prior to submitting an application to identify potential conflicts with local and statewide agricultural strategies. No rule change needed due to this comment.
Kelly, Carolyn - Skagit Conservation District	127	173-700-303. It is still unclear who makes and what are the criteria for final decision on whether banks can be sited on ALLCS.	The local government, where the bank is located, has the authority for determining whether a bank is an allowable land use on agricultural lands. No rule change needed due to this comment.
Lattyak, Nolan - Citizen	128	173-700-303. Market forces and Economics should not drive site selection.	The rule emphasizes using a watershed or landscape approach for locating a bank. [173-700-300] Since bankers choose and propose bank sites, the market and economics will be part of their considerations. The department uses a range of considerations when evaluating the suitability of a wetland bank site [173-700-303]. While the anticipated need for mitigation in the area is one consideration, the cost of land is not part of the department's considerations. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
McRae, Janet - Citizen	129	173-700-303. I don't think wetlands should be allowed on agricultural ground.	Thank you for your comment. Some areas within agricultural zone may be well suited for restoration to wetlands and can contribute significantly to watershed functioning and regional ecological goals such as salmon recovery. For this reason, the department does not prohibit banks in these locations. Ecology agrees that prime agricultural lands are important resources and discourages the conversion of prime farmland soils designated as agricultural lands of long term commercial significance. No rule change needed.
Miller, Darcey - Herrera Environmental Consultants	130	173-700-303. ALLCS are established by local jurisdictions (per WAC 365-190-050), and consequently there is not a standardized, state-wide working definition for this land use designation. In WAC 365-190-050, it is stated that local jurisdictions should utilize the NRCS definition of "prime farmland" soils and associated geographic extent from soil surveys to establish ALLCS. Unfortunately, local jurisdictions do not always use this criterion for establishing ALLCS areas, as evidenced by overlaying this soils type with these land use designations in GIS.	Thank you for your comment. The language on agricultural lands (173-700-303) was revised to address prime farmland soils. And, a definition for prime farmland soils has been added in section 173-700-104.
Miller, Darcey - Herrera Environmental Consultants	131	Pertaining to section WAC 173-700-303, Section 2, Compatibility of banks and agricultural lands of long-term commercial significance (ALLCS): Protecting land for our local farms is very important. However, as currently written, the proposed rule's use of ALLCS designations to define prime farmland potentially threatens the ability for mitigation banks to be located where they are the most ecologically appropriate: river floodplain areas.	Text within section 173-700-303 (2) has been revised to focus on prime farmland soils and not only land designations of agricultural lands of long-term commercial significance. The language also includes considerations of whether a bank proposed on ag lands supports larger natural resource goals such as salmon recovery or restoration of watershed processes.

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Miller, Darcey - Herrera Environmental Consultants	132	173-700-303. Because we all value local farmland and simultaneously understand the need for river floodplain restoration to achieve restoration of these critical ecological functions, a balance needs to be achieved between these two objectives.	Ecology agrees that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. The language in 173-700-303(2) includes considerations of whether a bank proposed on agricultural lands supports larger natural resource goals such as salmon recovery or restoration of watershed processes.
Mitzel, Dan - Bank Sponsor	133	173-700-303. Skagit County hasn't classified ag lands into different kinds of ag lands. It would be a better planning tool if we could actually take a look at our ag lands and determine those that are commercially significant and those that are secondary significant.	Thank you for your comment. Chapter 90.84 does not provide authorization for Ecology to revise local land use designations. No rule change needed due to this comment.
Mitzel, Dan - Bank Sponsor	134	173-700-303. Take a look at watershed analysis study of those areas within a county that are undiked and are hydrologic connected to our major stream resources where enhancement of habitat, in particular wildlife and salmon, could be feasibly restored and enhanced.	Section 173-700-303 discusses what the department considers when determining appropriateness of proposed bank site selection. Review of whether the site will allow for the protection and restoration of ecological processes within the basin or watershed is in 173-700-303(1) (a)(ii). Review of watershed studies would be part of this process. For further information, the EIS Section 2.2.1 discusses the watershed approach and describes watershed processes. No rule change needed due to this comment.
Mitzel, Dan - Bank Sponsor	135	173-700-303. Ag use is a very important resource in this [Skagit] county, but I think there has to be a recognition that there are some areas - that some watersheds - particularly in the upper part of the Skagit area and on those undiked portions of tributaries to the Skagit and the Skagit itself that lend themselves very well to returning just a fraction of that habitat that was taken.	Ecology agrees that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. Rule language in 173-700-303(2) was revised to include considerations of whether a bank proposed on agricultural lands supports larger natural resource goals such as salmon recovery or restoration of watershed processes.

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Mower, Tarn - Citizen	136	173-700-303 (c) (2) I think that the draft rule needs to address in even stronger terms this need to work with the growth management act instead of possibly being an end run around the growth management aspects that we have under state law.	Thank you for your comment. The state Attorney General provided an opinion on the relationship between wetland banks and the Growth Management Act. AG Opinion 2008 No. 1: "The GMA does not apply directly to a site-specific decision such as siting a wetlands mitigation bank, although the GMA applies to the development regulations and comprehensive plans." The local jurisdiction determines whether a proposed wetland bank complies with the applicable land use regulations. No rule change needed due to this comment.
Mower, Tarn - Citizen	137	173-700-303. There could be a lot stronger protections for resource lands under this draft rule. I think that ag lands should be specifically exempt from having wetland mitigation banks put on them due to the growth management act.	Ecology disagrees. The Growth Management Act does not prohibit wetland banks. Ecology acknowledges that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. Ecology believes that some locations in agricultural areas may be well suited to restoration to meet local and regional goals and priorities. No rule change needed due to this comment.
Risenhoover, Ken - Washington State Dept of Transportation	138	173-700-303 (2) (a) includes the term "prime soils" yet does not provide a definition. Please include a definition of this term in 173-700-104 or provide references to where this term is defined.	Text in 173-700-303 (2) has been revised to "prime farmland soils" and a definition for this term has been added to Section 173-700-104.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Rockefeller, Sen. Phil - 23rd Legislative District	139	173-700-303. I believe it is essential that our wetland banks be capable of fully supporting State efforts at species restoration, specifically including endangered salmon. Certain banks are likely to be situated within Watershed Resource Inventory Areas, and those areas may be home, in turn, to species that have been identified as endangered. Hope the Department will include in its rules provisions to require that such wetland banks be designed and engineered to support the habitat needs of such species, not only at the time of the creation of the bank, but in the years to come. Achieving this goal will clearly require high standards both of water management and of habitat monitoring.	Thank you for your comment. Ecology agrees that where appropriate banks should be designed and managed to support threatened and endangered species as well as restore watershed processes. However, Ecology does not agree that all banks should be required to provide habitat for endangered species. Not all sites within watersheds containing endangered species support habitats for those species. The text in section 173-700-303(1)(a)(vii) has been revised to highlight that banks should not adversely affect endangered species.
Shelby, Mike - Western Washington Agricultural Association	140	173-700-303. Aren't we fixing one problem...the loss of important wetlands, by adding to another...the loss of prime farmlands.	Thank you for your comment. Comment noted. No rule change needed.
Shelby, Mike - Western Washington Agricultural Association	141	173-700-303. We firmly believe that the proposed rule, in its present form clearly conflicts with the vision and mandate of the state's Growth Management Act (GMA) to protect and preserve farmlands. The GMA calls for the designation of agricultural lands of long-term commercial significance to assure the conservation of agricultural land for their continued use for agricultural purposes. The GMA clearly expresses its desire for the conservation of agricultural lands in order to maintain and enhance the agricultural industry and to discourage incompatible uses. The Wetland Mitigation Banking Program administrative rule must be constructed so as to not defeat the purpose or intent of the GMA or any other state statute that speaks to protecting prime agricultural lands for the long-term interest of growing food, fiber and alternative fuels.	"The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. Ecology acknowledges that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy, see revised text WAC 173-700-303(2). Decisions on conversion of agricultural lands are made at the local level based on local codes and land use designations.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Shelby, Mike - Western Washington Agricultural Association	142	173-700-303. Our remaining farmland base cannot be asked to continue carrying the burden of accommodating these other land uses including developer's wetland mitigation banks. Our increasingly scarce farmland resources must be preserved, or otherwise protected through mitigation, to assure the sustainability of the few remaining viable local agricultural communities and their economies.	Ecology acknowledges that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. Decisions on conversion of agricultural lands whether for restoration or development are made at the local level based on local codes and land use designations. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Shelby, Mike - Western Washington Agricultural Association	143	<p>We have strongly advocated for the absolute avoidance of authorizing such non-agricultural uses as wetland mitigation banks on prime farmland soils. We would offer the following revisions to the proposed rule language in WAC 173-700-303: (2) Compatibility of banks and agricultural lands of long-term commercial significance (ALLCS). (a) The department <u>This program</u> discourages the location of banks on prime <u>agricultural</u> soils within <u>designated</u> ALLCS due to the important resource and societal values of those resource lands. (b) If a bank is proposed to be located within an area designated as ALLCS: (i) Impacts to ALLCS both on-site and off-site shall be avoided to the maximum extent possible; <u>The project applicant shall provide a showing of 1) extraordinary circumstance and need for the bank project; 2) that there is a local market demand for the bank services; 3) that it will provide significant ecological benefit for the area; and, 4) demonstrated steps for avoidance, minimization and mitigation of the project impacts to the agricultural lands.</u> (ii) The <u>A bank proposed to be located on designated ALLCS bank</u> must be compatible with the <u>intent and purpose of the</u> designated ALLCS, to conserve and maintain agricultural production, food sources, and prime agricultural soils; (iii) Placement of banks on ALLCS must be consistent with the local <u>government's agricultural strategy natural resource lands goals, comprehensive plan, and zoning and development code;</u></p>	<p>Ecology believes that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. We revised section 173-700-303(2) to focus more on the soil suitability for agriculture (NRCS prime soils) and the proposed bank's ability to meet regional and local ecological goals.</p>

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Shelby, Mike - Western Washington Agricultural Association (comment continued from line above.	143 continued	<p>(iv) The bank shall be located on nonprime soils to the greatest extent possibleThe applicant shall demonstrate that the project cannot be sited elsewhere, and will be located on marginal non-prime soils, not as suitable for agricultural purposes, within the designated ALLCS; and</p> <p>(v) The bank must <u>be sited, designed and constructed to be compatible with and not adversely affect adjacent and nearby agricultural operations. This includes, but is not limited to: Adverse effects on water flows to neighboring farms, and minimizing shading effects on adjacent farms or inflate agricultural land values in the area.</u></p> <p>(c) <u>It shall also be demonstrated by the applicant that the wetland mitigation bank, if located on agricultural lands, will not set a precedent for other similar projects that taken together could cumulatively create substantial adverse impact to the designated agricultural lands of long-term commercial significance.</u> (d)The department shall consult with the local conservation district and the conservation commission to ensure that bank siting is consistent with both local and statewide goals for agricultural land preservation and advances local <u>farmland protection and preservation</u> priorities and goals. We believe with the changes recommended, that the program can move forward in a manner consistent with the mandates of the state's Growth Management Act.</p>	(Response provided in line above)

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Shelby, Mike - Western Washington Agricultural Association	144	173-700-303. If the rules remain as proposed we fail to see how they have been reconciled with the intentions of the GMA. And, we are certain that the program will continue to undermine and damage the state's public interest and policy framework enunciated for the protection and conservation of our disappearing prime western Washington farmlands.	Ecology has not found any language in the rule that conflicts with the Growth Management Act. Ecology consulted with the department of Commerce and they confirmed that they did not find any conflicts between the rule language and the Growth Management Act. "The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. No rule change needed.
Sutton, Carolyn - Citizen	145	173-700-303. To create wetland mitigation banks on ANY piece of farmland is unacceptable. Any farmable land in Skagit County must be preserved. IT GROWS FOOD! Something the world needs. It is too rapidly being chipped away by developers.	Some areas within an agricultural zone may be well suited for restoration to wetlands. Such restored areas can contribute significantly to watershed functioning and regional ecological goals such as salmon recovery. For this reason, the department does not prohibit banks in these locations. Ecology agrees that prime agricultural lands are important resources and discourages the conversion of prime farmland soils designated as agricultural lands of long term commercial significance. No rule change needed.
Woodward, Victor - Habitat Bank	146	173-700-303. Farmers and landowners were not represented in the process. Activists' wanting to preserve what is left of the Skagit valley after much of it has been paved and turned into shopping malls and freeway sales yards high-jacked the process through their paid lobbyist, for their special interest. Farmers and landowners that don't want their options taken away when they have to sell their land will be shocked at the restrictions applied by these rules to land outside of urban areas by the adoption of the land zoning catch all designation "lands of long term commercial significance".	Thank you for your comment. Farmers and landowners were invited to participate in the process. The Western Washington Agriculture Association, The Agricultural Institute, the Washington State Conservation Commission, Mason and Whatcom County conservation districts all participated in the rule development process. Rule language in section 173-700-303(2) has been revised to focus on 'prime farmland soils' designated as agricultural lands of long-term commercial significance. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-303 Site selection continued			
Woodward, Victor - Habitat Bank	147	303-1.C.IV "Historical land" use is irrelevant if the site was historically wetland. How it was abused since then is not relevant if you are trying to restore functions to the watershed. If it was farmed or was a chemical plant is irrelevant if it can be returned to a high value wetland that has high value to the watershed. Once being a farm is not more significant than other previous uses.	Ecology disagrees that historic land uses are not important. The historic land use can significantly affect the development and performance of a wetland. Prior land use is important to flag any potential limits for restoration. No rule change needed.
Woodward, Victor - Habitat Bank	148	173-700-303-2.C. Compatible with the local agricultural strategy, who decides this and when is this issue resolved for a Sponsor and his proposal? This opens up one objection after another with no clear cut way to resolve the questions. This is just language to kill banking statewide, put in by the clever activists that Ecology should reject on the basis that it is not in the best interest of the public. This takes away farmers and other landowners property rights. Let the local jurisdictions decide these issues, if you put this type of language in the State rule you just make it more difficult.	The agricultural strategy and the land use and development regulations are developed locally. A statewide agricultural strategy is developed by the Washington State Conservation Commission. Ecology will consult with both the local government and the conservation commission to determine whether or not the proposal conflicts with those strategies. Ecology will also consider the net environmental benefits to the watershed when considering the proposed placement of banks on agricultural lands. See revised text in section 173-700-303(2).
Wozniak, Josh - Herrera Environmental Consultants	149	173-700-303. As currently written, the rule's use of ALLCS designations to define prime farmland potentially threatens the ability for mitigation bank siting in areas where they are the most ecologically appropriate - river floodplain areas. ALLCS are established by local jurisdictions (per WAC 365-190-050), and consequently there is not a standardized state-wide working definition for this land use designation. In WAC 365-190-050, it is provided that local jurisdictions utilize the NRCS definition of "prime farmland" soils and associated geographic extent from soil surveys to establish ALLCS. I strongly recommend using scientifically-based definitions, as in WAC 173-700-303, such as the "prime farmland" NRCS soil classifications (excluding "prime farmland if drained" and other modifiers of "prime") and requirements for documented current and on-going crop production.	Thank you for your comment. Ecology acknowledges that there needs to be a balancing act between restoration of important watershed processes and functions and the preservation of our agricultural economy. We agree that local jurisdictions do not use the term "agricultural lands of long-term commercial significance" consistently. We revised section 173-700-303(2) to focus on prime farmland soils within areas designated as agricultural lands of long-term commercial significance and the proposed bank's ability to meet regional and local ecological goals.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-304 Buffers			
Gehret, Kathryn - Perkins Coie	150	173-700-304. The proposed rule fails to emphasize adequately the importance of buffer areas by not sufficiently encouraging their creation or protection. The rule currently provides that buffers may generally contribute to DOE's determination of credit conversion rates for the wetlands they surround WAC 173-700-304. The rule should be amended to allow buffers themselves to generate credits directly on an area basis.	Buffers are critical to maintain the ability of the bank to provide sustained performance of it's targeted functions. The department and Interagency Review Team require a minimum buffer for the bank and this buffer does not directly generate credit. However, the quality and functions of the buffer are included in determining the overall wetland credit conversion rates on the bank site and are indirectly credited. The rule also addresses the development of credits for resources other than wetlands, see section 173-700-310. If a local jurisdiction wanted to authorize buffer credits on a bank site, that could be accomodated in the instrument. See EIS Section 4.3 for additional discussion of crediting buffers. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	151	Section 173-700-304 appears to give credit to existing buffers, including those already regulated under a CAO required by the GMA. It seems inappropriate to give credit at mitigation banks for these regulated buffers if they are forested. Credits should be for buffers that exceed critical area regulatory regulations.	The department and Interagency Review Team require a minimum buffer for the bank. This buffer does not generate credit directly; however, the quality and functions of the buffer are included in determining the overall wetland credit conversation rates on the bank site. See the EIS Section 4.3 for addiitional discussion of crediting buffers. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	152	173-700-304 (4) states that buffers do not generate credit on an area basis. Please clarify that buffer credits may be established to meet the requirements of local jurisdiction regulatory codes.	The rule addresses the development of credits for resources other than wetlands, see section 173-700-310. If a local jurisdiction wanted to authorize buffer credits on a bank site, that could be accomodated in the instrument. See EIS Section 4.3 for additional discussion of crediting buffers. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-311 Types of Credits			
Gleason, Eric - Skykomish Habitat	153	173-700-311 - Add: Non-debited credits are available credits that may be obtained by prospective credit users for a planned debit project, but that has not yet become a "debited" credit because final approved permits requiring mitigation have not yet been issued. Non-debited credits may be credits obtained in anticipation of the issuance of final permits at the user's sole risk, but are not yet recorded on the Master Ledger, and are not officially recognized by department (or IRT) as "debited credits."	Ecology has revised text in sections 173-700-311 and 173-700-411 to include the term 'reserved credits' instead of the proposed term 'non-debited credits'. This term addresses credits sold prior to issuance of permits or other regulatory requirements. A definition for 'Reserved Credits' was added in section 173-700-104.
173-700-312 Default method for determining credits			
de Yonge, John - Wise Use Movement	154	173-700-312. The proposed rule fails to protect existing wetland functions by allowing the area of a wetland to function as the default credit unit.	The degree of increase of wetland functions is part of the determination of credits. The EIS Section 4.3 further explains that credits are determined by area, increase in function and wetland rating. No rule change needed.
173-700-313 Wetland credit conversion rates			
de Yonge, John - Wise Use Movement	155	173-700-313. The proposed rule fails to protect existing wetlands by allowing a 1:1 ratio for wetland creation - the least likely mitigation technique to succeed.	When a wetland is successfully created or restored from a non-wetland site, the wetland provides a full increase in wetland functions since the site formerly did not provide those functions. The department and the IRT determine the amount of credit generated on what would be provided by a fully successful site. As stipulated in section 173-700-600 if the wetland creation as specified in the instrument is not achieved the department may use compliance measures to gain compliance of certified banks. The department may also change the number of credits generated on the site based on actual attainment of required performance standards. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-313 Wetland credit conversion rates continued			
de Yonge, John - Wise Use Movement	156	173-700-313. The proposed rule fails to protect existing wetlands by allowing preservation of other existing wetlands to substitute for wetland mitigation.	Ecology allows the preservation of wetlands to generate credits based on the considerations specified in WAC 173-700-315. Under existing regulations, high quality wetlands, particularly forested wetlands, can legally be degraded or otherwise adversely affected. Preserving these high quality sites can provide sustained benefits that would otherwise be lost. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. No rule change needed.
173-700-314 Considerations for determining credit conversion rates for wetland reestablishment, creation, rehabilitation, and enhancement			
Graves, Gary - NW Indian Fisheries Commission	157	Concerned that section 173-700-314 would allow for mitigation banks to receive credit for trails within them. This was a significant problem for a tribe involved in the Springbrook Creek wetland mitigation bank where Renton was authorized to put a 10' wide public trail within 25' of Springbrook Creek, a salmon-bearing water. The trail's location precluded any future opportunity to remove the existing berm and reconnect the stream to its adjacent floodplain and wetlands and create a fully functional riparian area.	Credit is not allowed for the area of trails and necessary buffers on those trails. In urban areas, an exterior trail may be an asset that increases public understanding and appreciation for wetland ecosystems. Members of the IRT, to which tribes are invited, have the opportunity to express concerns over any proposed bank elements during the certification process. No rule change needed.
Mower, Tarn - Citizen	158	173-700-314. I would like to see mitigation banking conversion rates take into effect like for like trades. If the mitigation banks that are being proposed are estuarine in nature or riverine in nature they may not be addressing those same habitat or species conservation needs [as forested and slope wetlands].	The determination of bank credits only quantifies net gains on the bank site. The number of credits required to offset an authorized wetland loss is determined during the appropriate regulatory process for the debit project. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-314 Considerations for determining credit conversion rates for wetland reestablishment, creation, rehabilitation, and enhancement continued			
Rawls, N. Bruce - Spokane County, Utilities Div.	159	173-700-314 (8) Please describe in the rule the criteria that will be used to determine if public access is viewed as a benefit or detriment during credit determination? Project developers might seek to include public access for education and recreation, especially projects developed by local governments. The rule is not clear how that access will be considered during review of the project and for determination of credits.	Thank you for your comment. Each bank project is different and we cannot encompass every scenario that may come up within the rule text. Access that could be approved on one bank project may not be approved on another bank project because of differing site conditions. The department and the IRT will make final decisions on whether or not public access is a compatible land use. Sponsors are strongly encouraged to discuss the potential for public access early in the project proposal. No rule change needed.
173-700-315 Considerations for determining credit conversion rates for wetland preservation			
de Yonge, John - Wise Use Movement	160	173-700-315. This section should be deleted, as preservation of existing wetlands does not mitigate for wetland filling elsewhere.	Ecology allows the preservation of wetlands to generate credits based on the considerations specified in WAC 173-700-315. No rule change needed.
173-700-316 Considerations for determining high quality wetland systems			
Thomas, Jennifer - Parametrix	161	WAC 173-700-316 Considerations for determining high quality wetland systems. This section seems to be out of place - can you please clarify why it is where it is in the proposed regulations?	WAC 173-700-315 references 173-700-316 as the criteria for determining a high-quality wetland system. A determination of whether a site meets this criteria helps establish whether credit can be given for wetland preservation on a bank site. The word 'wetland' has been added to section 173-700-315 (2)(c) to further clarify the link between these two sections of the rule.
173-700-317 Considerations for determining credit conversion rates for banks in urban areas			
de Yonge, John - Wise Use Movement	162	173-700-317. This section should be deleted because in urban areas, wetland restoration should take place without tradeoffs for other wetland filling.	Comment noted. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-317 Considerations for determining credit conversion rates for banks in urban areas continued			
Murphy, Michael - King County Dept of Nat Resources and Parks	163	173-700-317. Page 25: How are "urban areas" defined?	Section 173-700-104 has been revised to include a definition for urban areas.
Risenhoover, Ken - Washington State Dept of Transportation	164	173-700-317. If there is a significant benefit to aquatic resources, then a bank located in an urban area should be able to generate credit conversion ratios at the full range identified in WAC 173-700-313 and 173-700-319. It is not appropriate to make it more difficult to develop a mitigation bank solely because it is located in an urban area. There may be important aquatic resources in the local area that a bank could contribute to sustaining or providing.	Urban banks are eligible to generate credits at the full range of conversion rates specified in the rule. Additionally, the rule language allows urban banks to generate credits at the more favorable conversion rates due to the importance of those resources within the urban areas. The language in section 173-700-317 was revised for clarification. The EIS Section 3.3.6 discusses the incentives placed in the rule to promote urban bank proposals.
173-700-318 Credit conversion rates for uplands and other habitats			
de Yonge, John - Wise Use Movement	165	173-700-318. This section should be deleted because uplands cannot provide mitigation for filling wetlands elsewhere.	Comment noted. EIS Section 4.3 discusses why uplands are allowed to receive credit in this rule. No rule change needed.
Thomas, Jennifer - Parametrix	166	173-700-318. Excellent to provide conversion rates for associated upland habitat protected and restored via banks.	Thank you for your comment. No rule change needed.
173-700-319 Considerations for determining credit conversion rates for uplands and other habitats			
de Yonge, John - Wise Use Movement	167	173-700-319. This section should be deleted because uplands cannot provide mitigation for filling wetlands elsewhere.	Comment noted. EIS Section 4.3 discusses why uplands are allowed to receive credit in this rule. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-320 Exceptions to credit conversion rates			
de Yonge, John - Wise Use Movement	168	173-700-320. This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to set a conversion rate outside of the ranges previously specified. This section should be deleted.	Ecology feels that maintaining flexibility to address different situations is important. The department decides on a case-by-case basis whether an exception is appropriate. We evaluate the value and significance of the resource using ecological and social considerations. Things considered include: rarity and irreplaceability, degree of threat of loss, how imminent is the threat, and the significance of the site for restoring or maintaining of watershed processes. EIS Section 3.1 discusses why the rule allows for flexibility instead of being prescriptive. No rule change needed.
173-700-321 Using an alternative method to determine credits			
de Yonge, John - Wise Use Movement	169	173-700-321. This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to use alternative methods to determine credits. This section should be deleted.	Ecology feels that maintaining flexibility to address different situations and conditions is important. EIS Section 3.1 discusses why the rule allows for flexibility instead of being prescriptive. No rule change needed.
Gleason, Eric - Skykomish Habitat	170	173-700-321. Allowing the use of an alternative currency should be permitted generally by the instrument approved under WAC 173-700. In cases where a defined alternative currency exceeds the regulatory authority of the department, or in cases where the department is unable to award "full" credit for multi-resource based currencies, there is no need to document the alternative method in a department-approved instrument.	Ecology disagrees. The Instrument needs to define how different currencies interact to avoid the potential for one area in the bank being used for multiple projects. The department will work with the appropriate agency(ies) to set a conversion rate between the currencies and coordinate the tracking of credits for both resources. Section 173-700-310 has been modified to clarify this requirement and the rationale for including information on alternative credits in the instrument.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-321 Using an alternative method to determine credits continued			
Gleason, Eric - Skykomish Habitat	171	173-700-321. Unless additional bonuses are provided for within credit generation ratios to fully capture the potential value offered by a bank, the ability of a bank sponsor to separately negotiate a separate trading mechanism for the award and use of flood storage credits should occur outside the scope of a department-approved instrument, thus allowing a bank sponsor the ability to fully capture the values associated with increased flood storage.	The rule specifically allows for the generation of other resource credits at a bank site. When that occurs, Ecology will need to be involved to ensure there is no occurrence of double-use of credits (double-dipping). Section 173-700-310 has been modified to clarify this requirement and the reason for the requirement to include information on alternative credits in the instrument.
Gleason, Eric - Skykomish Habitat	172	173-700-321. Unless additional bonuses are provided for within credit generation ratios to fully capture the potential value offered by a bank, the ability of a bank sponsor to separately negotiate a separate trading mechanism for the development and use of "fish credits" in areas of banks that are not able to receive full credit generation bonuses from within a department-approved instrument. This should occur outside the scope of a department-approved instrument.	Neither agency policy nor the rule restricts the generation of credits for other resources on a bank site, see section 173-700-310. For example, we are currently working on a joint fish/wetland bank in Snohomish County. Ecology will need to be involved to ensure there is no occurrence of double-dipping of credits. Ecology does allow exceptions to credit conversion rates, as specified within WAC 173-700-320. No rule change needed.
Gleason, Eric - Skykomish Habitat	173	173-700-321. If only partial values are approved and traded under each regulatory program by agencies having jurisdiction to review and approve these values (i.e. percentages of sites having full wetland values are traded under department-approved instrument and percentages of sites having full values for other functions (flood benefits, fish credits) are traded under another program). The potential for "double-dipping" is eliminated under this approach.	The rule allows for banks to generate credits for other resource values on site. Crediting and tracking of those credits must be coordinated with the department, the bank signatories, and the regulatory agency governing the other resource currency, see revisions within WAC 173-700-310. No rule change needed.
Gleason, Eric - Skykomish Habitat	174	173-700-321. The state should step aside and allow for alternative crediting to occur through other regulatory programs.	Neither agency policy nor the rule restricts the generation of credits for other resources on a bank site. Ecology supports multi-resource mitigation banks. However, Ecology will need to be involved to ensure that double-dipping of credits doesn't occur. Ecology does allow exceptions to credit conversion rates as specified within WAC 173-700-320. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-330 Schedule for the release of credits			
de Yonge, John - Wise Use Movement	175	173-700-330. This section fails to protect existing wetlands because it allows for release of credits without any public notice of comment. Public comment on proposed release of credits should be provided.	Ecology provides a public notice on the final MBI [173-700-230 (3)], which includes the schedule for releases of credits. See sections 173-700-240 and 173-700-241 for further details on public notices. Also, the EIS Section 3.2.5 discusses role of the public in the wetland mitigation bank certification process. No rule change needed.
173-700-331 Credit release - pre-construction			
de Yonge, John - Wise Use Movement	176	173-700-331. This section fails to protect existing wetland by allowing credits to be released prior to construction of a bank and without public notice or comment. This section should be deleted.	Ecology disagrees. All bank sponsors are required to set up financial assurances. If the entity goes bankrupt or ceases to exist these financial assurances will be accessed and used to ensure the bank meets any and all mitigation needs that have already been authorized through the sale of this pre-construction credit release(s). See section 173-700-351 for financial assurance requirements. The EIS Section 4.4 discusses credit release including release for administrative credits. A public notice is provided on the final MBI [WAC 173-700-230 (3)] which includes the schedule for the release of credits. See section 173-700-241 for further details on the public notice process. The EIS Section 3.2.5 discusses role of the public in the wetland mitigation bank certification process. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-331 Credit release - pre-construction continued			
Heinrich, Mary - Ag Prospects	177	173-700-331. This section should be struck in its entirety. There is no rationale for pre-release of credits. The Department's website states, regarding wetland banks: "Ecological benefits include: Ensures greater likelihood of success, since banks must be up and running before a wetland can be affected." The Department has repeatedly touted, as one of the benefits of mitigation banking, the pre-construction of the replacement wetlands. Pre-construction release of credits would eliminate that "benefit." What occurs if credits are released pre-construction and then the entity owning the facility goes bankrupt or ceases to exist?	Ecology disagrees. Ecology believes that the public interest is protected through the use of financial assurances. If the bank sponsor does not complete construction of the bank or goes bankrupt, Ecology can access the financial assurances to complete construction. The amount of construction done using the financial assurances will be sufficient to meet any and all mitigation needs that have already been authorized through the sale of this pre-construction credit release(s). See section 173-700-351 for financial assurance requirements. The EIS Section 3.3.1 discusses financial assurances required of bank projects. The EIS Section 4.4 discusses credit release including release for administrative credits. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	178	Sections 173-700-331 (d), 172-700-351 and 173-700-351 all address mechanisms for providing financial assurances for banks including assurances related to the needs of long term management and maintenance. Please amend this text to include other approved mechanisms for providing long-term management and maintenance funding.	The financial assurances definition in WAC 173-700-104 already includes the allowance of other forms of financial instruments for public agencies. WAC 173-700-331 (d) has been revised to allow, upon approval by the department, the use of other options for financial assurances for public entities.
173-700-332 Credit release - post-construction			
de Yonge, John - Wise Use Movement	179	173-700-332. This section fails to protect existing wetland by allowing credits to be released without public notice or comment. Public notice and comment should be provided.	Ecology disagrees. A public notice is provided on the final MBI which includes the schedule for the release of credits and is addressed in sections 173-700-230 (3). Also, WACs 173-700-240 and 173-700-241 provide further details on the public notice process. The EIS Section 3.2.5 discusses the role of the public in the wetland mitigation bank certification process. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	180	173-700-332 (2) (a). By what time must the as-built plans be submitted following completion of construction?	Timing of as-built submittals will be handled on a case-by-case basis in the MBI and is not appropriate to include in the rule language. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-332 Credit release - post-construction continued			
Risenhoover, Ken - Washington State Dept of Transportation	181	173-700-332 (3). What is the timeline for approval of the as-built plans by the department?	The department strives to review documents in a timely manner. In order to approve some documents, a visit to the bank site may be required. Because a site visit may or may not be necessary, it is not appropriate to include a timeline in the rule language. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	182	173-700-332 (4). We suggest that this section be modified to allow the sponsor to propose changes to the bank design that will address difficulties they encounter during construction. The department, in consultation with the sponsor and signatory agencies, will determine if the proposed changes to the bank design will be approved. If the proposed changes are not approved the department may follow through with the remedial actions outlined in the remainder of section 173-700-332 (4). Provide clarification of the statement that "substantive changes to the bank design needs approval." Does this refer to changes in finish grade elevation, proposed resource type and area, and/or proposed function?	Language in section 173-700-332 (4) has been revised to reflect that any changes to design must be approved prior to implementation.
173-700-333 Credit release - Attainment of hydrologic performance standards			
de Yonge, John - Wise Use Movement	183	173-700-333. This section fails to protect existing wetland by allowing credits to be released without public notice or comment. Public notice and comment should be provided.	Ecology disagrees. A public notice is provided on the final MBI which includes the schedule for the release of credits and is addressed in section 173-700-230 (3). See WACs 173-700-240 and 173-700-241 for further details on the public notice process. The EIS Section 3.2.5 discusses role of the public in the wetland mitigation bank certification process. No rule change needed.
Gehret, Kathryn - Perkins Coie	184	173-700-333. The proposed rule also refers to attainment of "hydrologic performance standards" (see WAC 173-700-333, 334) without providing any guidance as to how these standards should be developed and achieved.	Performance standards are site specific and developed for each bank and documented in the instrument. The achievement of the standard is the responsibility of the bank sponsor. How they intend to achieve the performance standards is part of their design information in the instrument. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-334 Credit release - final release			
de Yonge, John - Wise Use Movement	185	173-700-334. This section fails to protect existing wetland by allowing credits to be released without public notice or comment. Public notice and comment should be provided.	Ecology disagrees. A public notice is provided on the final MBI which includes the schedule for the release of credits and is addressed in section 173-700-230 (3). See WACs 173-700-240 and 173-700-241 for further details on the public notice process. The EIS Section 3.2.5 discusses role of the public in the wetland mitigation bank certification process. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	186	173-700-334 (2) (c). Include the statement, "..., or in the case of banks developed by public agencies, a letter of commitment identifying a suitable long term funding mechanism has been approved by the department."	Language has been included in 173-700-334 (2) (c) to address financial assurance options for banks developed solely by public agencies.
173-700-335 Additional credit releases			
de Yonge, John - Wise Use Movement	187	173-700-335. This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to release credits early. This section should be deleted.	Ecology supports providing incentives for bank sponsors to actively enhance the development and performance of their bank. Allowing for the potential of additional releases of credits for a bank site that has provided a greater functional lift than originally anticipated provides such an incentive for the bank sponsor. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-335 Additional credit releases continued			
Risenhoover, Ken - Washington State Dept of Transportation	188	173-700-335 (2) indicates that a sponsor may perform approved actions not identified in the MBI to increase the functions of a bank and that the department may release credits earlier based on these actions. We suggest that earlier credit releases should be based on earlier attainment of performance standards associated with credit releases (i.e., structural development/biomass increases in natural vegetation). In a separate process, the bank sponsor should be able to propose that objectives and performance standards be revisited if information becomes available that suggests that the site design will not be achievable. This revisiting should look at the remaining credit releases, the best ecologically appropriate, sustainable and practicable alternative for design changes.	The department does not agree that earlier attainment of performance standards should always result in earlier credit releases. Credit releases are staged over time to ensure that the development of the bank is sustainable. The department will make decisions on whether an earlier release of credits is appropriate on a case-by-case basis. The rule currently allows for changes to the bank instrument including objectives and performance standards, if approved by the department. No rule change is needed.
173-700-340 Performance standards			
Gehret, Kathryn - Perkins Coie	189	173-700-340. DOE should clarify the language in the rule to require that these "measurable" standards are quantitatively-based to ensure that the proposed rule meets its own stated goal "to encourage banking by providing an efficient, predictable statewide framework for the certification and operation of environmentally sound banks." WAC 173-700-100 (4).	Section 173-700-104 provides a standard definition for performance standards. The definition states that the standards must be measurable. Specific standards are not listed as each bank will have different performance standards based on the site location, proposed activities, goals and objectives. The department, through the IRT process, determines what performance standards are appropriate for specific banks. And, the department approved performance standards are contained in the final MBI, as specified in WAC 173-700-222(15). Ecology does not believe that a one-size fits all approach is appropriate for performance standards. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-340 Performance standards continued			
Heinricht, Mary - Ag Prospects	190	<p>173-700-340. We find the rule lacking in technical or performance standards. There are references to performance, but no indication what that should be or who and how it will be measured or evaluated. The Department's own analysis of wetland mitigation reports a high failure rate, yet this rule makes no attempt to set forth standards to increase performance. Chapter 90.84 RCW, Wetlands Mitigation Banking, is the law requiring the preparation of this rule. It directs the DOE to adopt rules for: "...Performance standards;..." The DOE provides only seven (7) lines within the proposed rule regarding performance standards, stating that "performance standards must be based on the bank's objectives and goals as identified in the instrument," and adding that they must be measurable. As the performance of these facilities is the only thing that actually accomplishes the mitigation for other aquatic resources destroyed, there must be clear language setting forth the required performance to meet the criteria for selling credits. Given the record of failure in at least half the mitigation projects in state and nationally, the department must have some idea what has been going wrong. Quantification of those features would be a starting point for performance standards. For example, a density of plantings established and surviving for a specific period might be a measurable standard. Establishment of drainage and hydrology as designed might also be a measurable standard. The way this short section is written, there is no way for a third party to determine if a project meets any "standard" as none are set forth.</p>	<p>Section 173-700-104 provides a standard definition for performance standards. Specific standards are not listed in the rule as each bank will have different performance standards based on the site location, proposed activities, goals and objectives of the site. The department, through the IRT process, determines what performance standards are appropriate for specific banks. And, the department approved performance standards are contained in the final MBI, as specified in WAC 173-700-222(15). Ecology does not believe that a one-size fits all approach is appropriate for performance standards. No rule change needed.</p>

Committer - Affiliation	Comment no.	Summary	Response
173-700-340 Performance standards continued			
Gehret, Kathryn - Perkins Coie	191	173-700-340. The rule should require that performance standards are quantifiable. The proposed rule requires that "performance standards" be based on the goals and objectives identified in a bank instrument, but fails to provide further guidance to assist bank sponsors in developing and assessing what should be quantitative measures.	Section 173-700-104 provides a standard definition for performance standards. The definition states that the standards must be measurable. Specific standards are not listed as each bank will have different performance standards based on the site location, proposed activities, goals and objectives. The department, through the IRT process, determines what performance standards are appropriate for specific banks. And, the department approved performance standards are contained in the final MBI, as specified in WAC 173-700-222(15). Ecology does not believe that a one-size fits all approach is appropriate for performance standards. No rule change needed.
173-700-350 Financial viability			
Gleason, Eric - Skykomish Habitat	192	173-700-350. Consideration should be given to the hierarchy of mitigation alternatives under Federal Rules which specify a preference for the use of mitigation banks in large part due to the financial assurances offered by bank sponsors to secure the performance of mitigation banks. If the hierarchy of options contained in the Federal Rules is adopted by reference in WAC 173-700, and if standards are maintained to fully provide replacement for lost function, as compared to cost considerations, the language of 173-700-350(3) is otherwise acceptable.	Currently there exists a state law and federal rules regarding wetland mitigation banking. The state rule is consistent with the federal rules, as much as possible. The department developed the state rule to meet the legislative directive specified RCW 90.84). The RCW states "The department, through a collaborative process, shall adopt rules for: (1) certification, operation and monitoring of wetlands mitigation banks." and "This chapter does not create any new authority for regulating wetlands or wetlands banks beyond what is specifically provided for in this chapter." The legislature did not authorize the department under this chapter to adopt rules or guidance that apply to wetland projects other than banks. Accordingly, the legislature did not authorize the department to adopt a preferred mitigation hierarchy in rule. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-351 Financial assurances			
Bynum, Ellen - Friends of Skagit County	193	173-700-351. The construction and financial assurances section does not mention or address the risk management ratios of failed banks due to flooding, collapse of steep slopes or other catastrophic events which may be increased due to the banks activities.	Risks that may effect the bank are required to be identified in the bank instrument and are evaluated by the IRT during the certification process. Some risks are considered to be acts of nature and once a bank site is considered successful, changes caused by natural processes are not required to be "fixed". No rule change needed.
Gleason, Eric - Skykomish Habitat	194	173-700-351. Clarifications are needed to describe the process and criteria for accessing financial assurances maintained by the sponsor. We suggest a simple statement stating that the Instrument must contain clear provisions for when the department may direct disbursement from the sponsor's financial assurances, except as provided in the following sections. When defining in the instrument (as suggested above), financial assurances for construction should be accessed only when: a) All site work has ceased and sponsor has not completed construction, according to the approved construction schedule; and, b) no official amendment to the approved construction schedule has been sought by the Sponsor nor approved by IRT; and c) The department (and IRT) has provided a notice of default to sponsor indicating that construction must be completed; and, d) Sponsor does not remobilize to complete construction, or sufficiently respond to the notice of default.	WAC 173-700-602, specifies the steps that the department will use to bring a bank into compliance with the bank's instrument, including accessing financial assurances. Also, the instrument template currently contains language for when financial assurances may be accessed. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	195	173-700-351. Add a section that allows for public entities to provide financial assurances through a formal documented commitment as identified in 332.3 (n) of the Federal Rule on Compensatory Mitigation.	The definition of financial assurances (173-700-104) allows for the use of alternative financial assurances for public agencies. Language has been included in 173-700-334 (2)(c) to address financial assurance options for publicly developed banks.
Risenhoover, Ken - Washington State Dept of Transportation	196	173-700-351. Where Financial Assurances are provided through a mechanism for approved commitment, public agencies should not be required to pay for contract administration for the department.	173-700-351(8) provides flexibility for requiring administrative costs as needed. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-352 Financial assurances for construction			
Gleason, Eric - Skykomish Habitat	197	<p>Current language: 173-700-352(5) If the first release of credits will occur after construction is completed and the department has approved the as-built plans, the department may require a financial assurance that would be adequate to stabilize the bank site in the event of default by the sponsor. This statement is unnecessary and duplicative of other remedies available to approving agency(s) for violating permit conditions for failing to stabilize the bank site.</p> <p>Sponsor must comply with all permit conditions for the approved construction plan regardless of the terms of the instrument. If sponsor fails to complete work, it is still bound by permit conditions to stabilize the site to avoid any adverse environmental risk and to minimize any risk to public safety. Requiring an additional financial assurance to secure permit conditions when no other consideration has been given (i.e. credits awarded) to applicant is a duplicative, excessive and unfair financial burden on the Sponsor.</p>	<p>Ecology disagrees. Ecology does not have authority to enforce another agency's permit conditions. If credits have been released for a bank, the department must have available resources to implement necessary actions to stabilize the site and ensure that any mitigation obligations met through the use of bank credits are fulfilled. No rule change needed.</p>
173-700-353 Financial assurances for monitoring and maintenance			
Gleason, Eric - Skykomish Habitat	198	<p>173-700-353. When defining in the Instrument, financial assurances for monitoring and maintenance should be accessed only when: a) Monitoring has shown the site is not meeting performance standards; and, b) Adaptive Management has been implemented by sponsor and such activities have not brought the site into compliance; and, c) The department (and IRT) has provided a notice of default to the sponsor regarding the need for remedial action; and, d) The sponsor fails to conduct such remedial action, or otherwise bring the site into compliance.</p>	<p>WAC 173-700-602, specifies the steps that the department will use to bring a bank into compliance with the bank's instrument, including accessing financial assurances. Also, the instrument template currently contains language for when financial assurances may be accessed. No rule change needed.</p>

Committer - Affiliation	Comment no.	Summary	Response
173-700-353 Financial Assurances for monitoring and maintenance continued			
Graves, Gary - NW Indian Fisheries Commission	199	173-700-353. A mitigation bank should have funding identified for accountable long-term maintenance and monitoring.	Ecology agrees. The rule requires that the financial mechanism for long term maintenance and monitoring must be established before an initial release of credits. The financial mechanism must be fully funded prior to the final release of credits. EIS Section 3.3.1 discusses the financial assurance requirements for long term management established in the rule for bank projects. No rule change needed.
173-700-402 Monitoring and maintenance			
Gleason, Eric - Skykomish Habitat	200	173-700-402. The department should review and approve, but not determine the monitoring schedule for mitigation banks. The "general ten year" requirement is excessive and unnecessary. The industry standard for monitoring and maintaining mitigation bank sites is typically five years. Problems that typically affect the long-term viability of a bank site are typically witnessed very early on post-construction. Problems with poor hydrology and plant survival will typically be seen within the first one to two years of a "typical" cycle. Longer periods may be warranted in exceptional circumstances when there is an increased risk of failure, in which case the bank site may not be a suitable site for banking purposes to begin with. However, "generally" requiring ten years of monitoring and maintenance, particularly when credits are also withheld during this period, is excessive.	Ecology disagrees. Ten years is the standard monitoring period for wetland mitigation sites in Washington. EIS Section 3.3.2 discusses site-specific monitoring and the rule language generally requiring 10 years of monitoring. No rule change needed.
Brevoort, Doris - Citizen	201	173-700-402. The actual change in Part IV of the bank operation - changing the monitoring period for a bank from a five to generally 10 years, just seems laughable. I think that they should be monitored 50 years, 100 years, or in perpetuity because changes are going to change.	Thank you for your comment. Ten years is the standard monitoring period for wetland mitigation sites in Washington. We do not believe that 50 years or in perpetuity are practicable timeframes. The EIS Section 3.3.2 discusses site-specific monitoring and the rule language generally requiring 10 years of monitoring. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-403 Adaptive management plan			
Brevoort, Doris - Citizen	202	173-700-403. [The rule] specifies the bank sponsor shall notify Ecology within 90 days if adaptive management activities are implemented at the bank site to address unforeseen problems with site conditions. I think it is a typo, didn't you mean 90 minutes? Require a manager to send an e-mail to someone. 90 days, there is so much damage, everything could be gone.	Thank you for your comment. The timeline in section 173-700-403 (3) has been changed to 30 days. We have added text in 173-700-403 (4) to specify that if the adaptive management activities are not effective, the department may require remedial actions.
Gehret, Kathryn - Perkins Coie	203	173-700-403. An adaptive management plan should state the expected outcomes of activities associated with the creation of a wetland mitigation bank, assess possible changes to the predicted condition of the site, and recommend alternatives if the activities do not achieve benchmarks that are themselves explicitly defined and quantified in the plan.	Text within section 173-700-403(2) has been revised to include expected outcomes of the bank site. The other aspects noted within this comment are already addressed in the current rule language.
Gehret, Kathryn - Perkins Coie	204	173-700-403 requires a sponsor to submit an adaptive management plan for a bank site, but fails to guide the sponsor's development of monitoring protocols or effective adaptive management solutions at an appropriate level of detail.	The adaptive management plan is separate from the monitoring plan. The monitoring plan includes the monitoring protocols. Revisions to section 173-700-403(2) have been made to address adaptive management. This section contains identifying the likely causes of failures and the potential management actions to address them as a required element of the adaptive management plan.
Gehret, Kathryn - Perkins Coie	205	173-700-403. The proposed rule should be revised to require that adaptive management plans establish quantitative benchmarks that represent desired site conditions and require monitoring plans to employ methods that can detect statistically valid changes in benchmarks and identify the cause of the change. The rule should more fully integrate the required monitoring and adaptive management plans to ensure that monitoring results effectively guide future management activities.	The quantitative benchmarks (a.k.a. performance standards) are outlined in the bank instrument not the adaptive management plan. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-403 Adaptive management plan continued			
Gleason, Eric - Skykomish Habitat	206	173-700-403. We suggest adding a fourth item generally stating that the failure to bring the site into compliance through adaptive management may constitute grounds for requests for specific remedial action by the department (IRT).	Ecology agrees. Revisions have been made to sections 173-700-403 and 173-700-601.
Rawls, N. Bruce - Spokane County, Utilities Div.	207	173-700-403. Can on-going management activities be altered following bank certification? The draft rule refers to a required "management strategy to address unforeseen changes," but does not describe how on-going management actions are defined and if they can be changed. For example, can new management actions be implemented in a certified bank if they are viewed as providing a "net environmental benefit" for the wetland system?	The rule does not prohibit altering the management strategy on the site provided that those actions do not compromise attainment of the bank's goals and objectives. However, changes in the management plan need to be approved by the department. No rule change needed.
Rawls, N. Bruce - Spokane County, Utilities Div.	208	173-700-403. If a wetland bank is certified with existing natural hydrology, can reclaimed water be added, as allowed for natural wetland enhancement under Water Reclamation and Reuse Standards, publication #97-23, Departments of Health and Ecology? It is understandable that wetland banks need to be sustainable with existing site hydrology. But following site certification, can reclaimed water be added to enhance the hydrology, even if that new water source might be diverted at some unknown later date?	Reclaimed water is not prohibited within the rule language. Ecology does not have a formal policy regarding the use of water sources such as reclaimed water for wetland banks or other mitigation sites. Alterations in site hydrology can affect the performance of the bank either positively or negatively. Decisions on whether addition of reclaimed water would be allowed must be made on a case-by-case basis. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	209	173-700-403. The Adaptive Management Plan text is too general and not specific. It needs more specificity to situations where potential for site failure requires changes in management strategies. Actions planned and implemented to address unforeseen site development problems that may affect success of the site should be called ' <i>Adaptive Management Plans</i> ' and ' <i>adaptive management actions</i> '. Delete the use of the word ' <i>contingency</i> '.	The term contingency actions has been changed to adaptive management activities throughout the rule. We added text in 173-700-403 (4) to specify that if the adaptive management activities are not effective, the department may require remedial actions.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-403 Adaptive management plan continued			
Risenhoover, Ken - Washington State Dept of Transportation	210	173-700-403 (b). We suggest the following language: "An adaptive management strategy that identifies actions to be taken if unforeseen site conditions or results of monitoring indicate that the site will not achieve performance standards. The adaptive management plan will identify the process for evaluating, reporting and implementing specific adaptive management actions that may be needed to address site conditions."	Language has been added to section 173-700-403(2) to include identifying the process for reporting and implementing adaptive management activities. The other items in your comment are already addressed in this section.
Risenhoover, Ken - Washington State Dept of Transportation	211	173-700-403 (c). We suggest the following language: "The sponsor's responsibility in reporting adaptive management plans and activities in annual monitoring reports and implementing adaptive management plans and actions."	Text within section 173-700-403 (2)(d) has been revised to address the sponsor's responsibility and process for reporting .
Risenhoover, Ken - Washington State Dept of Transportation	212	173-700-403 (3). We suggest the following language: "The sponsor shall, notify the department within 90 days if adaptive management actions not previously identified in annual monitoring reports are implemented to address additional unforeseen problems with site conditions."	Language has been added to section 173-700-403(2) to include identifying the process for reporting and implementing adaptive management activities. The other items in your comment are already addressed in this section.
173-700-410 Obtaining credit releases			
de Yonge, John - Wise Use Movement	213	173-700-410. This section fails to protect existing wetland by allowing credits to be released without public notice or comment. Public notice and comment should be provided.	A public notice is provided on the final Mitigation Bank Instrument. The MBI includes the schedule for the release of credits and is addressed in section 173-700-230 (3). See sections 173-700-240 and 173-700-241 for further details on the public notice process. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	214	173-700-410 (4). There should be a timeline for the department review of the bank's compliance of the performance standards and subsequent credit releases.	The timing for review and approval of submissions will vary based on existing workload, the level of review needed and whether a site visit is needed to confirm the information. Ecology strives to respond within 30 days to submittals. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
173-700-411 Ledger tracking and reporting			
Risenhoover, Ken - Washington State Dept. of Transportation	215	<p>173-700-411. Ledger entries are required for every credit release approved by the Department. Credits are debited from the ledger when they are approved to satisfy mitigation requirements for a permit. These debits are associated with the permit number authorizing the credit use. WSDOT has chosen to secure credits by purchasing them in advance of permits. This ensures that credits are available when needed. Under the current proposed rule, credits purchased from the bank sponsor in advance of permits would still be in the official ledger as part of the available balance of credits at the bank. This balance of available credits may be subject to suspension in circumstances where the bank sponsor is not in compliance with the bank instrument and the department chooses to implement suspension per WAC 173-700-603. If there is a suspension of credit use, no credits may be debited from the bank until the suspension has been lifted by the Department. This means that credits purchased in advance and belonging to WSDOT would not be available to be used to satisfy permit requirements until the suspension is lifted. This creates a significant risk to project planning and scheduling that may be an unacceptable risk from a business perspective. The effect of this risk could limit WSDOT's use of private mitigation banks. To resolve this issue we suggest the following adjustments be made to the relevant sections of the draft rule: 1) All credits released to bank sponsors will be given unique identifier numbers based on 0.01 credit units. 2) All entries in the official tracking ledger will reference the unique identifying numbers.</p>	<p>We revised the rule language on credits and ledgers to recognize credits that are purchased prior to a regulatory requirement. This type of credit is called a "reserved" credit, and has been defined in WAC 173-700-104. Reserved credits are recorded on the bank ledger and are not subject to suspension. Only available credits are subject to suspension. Sections 173-700-104, 173-700-311(3), and 173-700-603 have been revised. The language in these sections has been revised to reflect the existence and use of reserved credits, conditions for reporting and effect of suspensions on those credits. The department agrees that available credits purchased prior to a suspension should not be suspended. The department also clarified in section 173-700-311(3) that the purchase of credits (reserved credits) does not mean that any specific project or impact will be authorized, nor that the use of reserved credits will be authorized. The use of reserved credits will be evaluated during existing regulatory processes.</p>

Committer - Affiliation	Comment no.	Summary	Response
173-700-411 Ledger tracking and reporting continued			
Risenhoover, Ken - Washington State Dept. of Transportation (Comment continued from line above.)	215 continued	<p>3) Available credits that have been purchased from the bank sponsor and recorded with the County Auditor will be listed in the official ledger as 'reserve credits' and include as reference their unique identifying numbers. 4) Reserve credits will be subtracted from the ledger balance showing available credits at the bank. 5) Available credits or reserved credits may be used to satisfy mitigation requirements of permits. 6) The seller is required to record any sales of reserved credits with the County Auditor and report the sale to the Department. The report will reference the unique identifying numbers for those credits along with the name and contact information of the purchaser. 7) The total credits in reserve status will be noted in the reserve column in the official ledger. 8) If a regulatory agency approves use of 'reserve' credits to satisfy required mitigation for permit impacts, then an entry will be made in the official ledger noting the reserve credits as debited using their unique identifying numbers. 9) The purchase of bank credits and/or the recording and posting of 'reserve' credits to the ledger do not provide any assurance to purchaser that credits will be approved to meet mitigation requirements associated with any specific permit. 10) Reserve credits will not be subject to any suspension actions the Department may choose to take against the bank's sponsor in the case of non-compliance, per section 173-700-603.</p>	(Response provided in line above.)
Gleason, Eric - Skykomish Habitat	216	<p>173-700-411. Regarding the submission of a complete copy of the ledger at the following times: 3(b):..."This requirement also applies to other resources available at the bank." We suggest limiting ledger submissions only for department-approved credit currencies.</p>	<p>Ecology disagrees. All applicable regulatory agencies will use ledgers to coordinate bookkeeping and avoid double use of the same credits for different impacts. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
173-700-412 Master ledger			
Gleason, Eric - Skykomish Habitat	217	<p>173-700-412. We suggest adding an item reflecting when bank debits are officially recognized by the department (and IRT): Specifically, available credits, and non-debited credits shall not appear on the Master Ledger. Only transactions for debited projects that have permits issued that require mitigation shall be recognized by the department as official bank transfers. Clarifications must be provided such that “non-debited” credits (available or otherwise) are not officially recognized as bank transfers. This is critical to protect the integrity of the banking program and to avoid circumstances in which a user assumes a right to the use of credits simply because credits have been obtained prior to permit issuance.</p>	<p>The department has determined that all credit transactions must be recorded on the master ledger of the bank. Language has been revised to reflect that "reserved" credits must be recorded on the ledger, WAC 173-700-411. The definition for reserved credits [WAC 173-700-104] clarifies that credits are purchased at the buyer's risk and the purchase of reserved credits does not provide any guarantee that a project will be authorized under existing regulatory programs.</p>

Committer - Affiliation	Comment no.	Summary	Response
173-700-420 Long-term management plan			
Belston, Jessi - Port of Vancouver	218	<p>The language in section 173-700-420 should be amended to specify that development of a long-term management plan (LTMP) is not needed prior to bank certification. As a condition of the instrument, submittal of an LTMP would be required later in the bank establishment period, at a year defined by the IRT. Section 420 states "the instrument must identify the party responsible for the ownership and long-term management of the bank." This includes development of a LTMP that "should include a description of long-term management needs, annual cost estimates of these needs, and identify the funding mechanism that will be used to meet these needs". It is unclear from this language if a final LTMP is required prior to the bank being certified. Given that the establishment period of a mitigation bank extends a minimum of ten years, it is not reasonable to require a specific LTMP be developed prior to bank certification. The instrument serves to outline the standards that must be met for establishment of a successful bank, but there may be very different site conditions between certification of the bank at Year 0 and transfer to a long-term steward at Year 10. Natural site conditions may not closely follow those contained in the instrument, and it's impractical to predict at Year 0 what should be included in a successful LTMP. A general outline of an LTMP would be a more logical requirement for the instrument. Development of a specific LTMP later in the establishment process would ensure the plan fits the needs of the completed bank.</p>	<p>Thank you for your comment. The requirement for a long term management plan within the instrument is consistent with the federal requirements outlined in the federal mitigation rule [CFR 332.4(c)(2)(11) and CFR 332.7(d)]. Prior to closure of the bank and upon approval by the Department and the IRT, the long term management plan can be revised, to address specific conditions of the site. The long term management plan provides information that is used to determine the amount of financial assurances necessary for the site's long term management. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
173-700-420 Long-term management plan continued			
Rawls, N. Bruce - Spokane County, Utilities Div.	219	173-700-420 (4) The owner of a bank may not complete any conveyance of title...without adequate and complete provision for the continued management of the bank in a natural state. The phrase "natural state" may not be appropriate in what may be highly modified systems, which are no longer what would have occurred naturally. The phrase could be replaced with reference to the agreed upon site conditions outlined in the banking instrument.	Ecology agrees. 173-700-420(4) and 173-700-421(1) have been revised and now states 'as specified in the instrument' instead of 'natural state'.
Woodward, Victor - Habitat Bank	220	173-700-420. Long Term Management Plan – The instrument must identify potential long term stewards – What responsible organization is going to commit 10-15 years in advance, before a project is even built and matures that they will commit to long term stewardship?	Ecology's rule language is consistent with the federal mitigation rule and specifies the potential long term steward should be identified. No rule change needed.
Woodward, Victor - Habitat Bank	221	173-700-420. Limit what is required in the Long Term Management Plan to what is required by the State for other mitigation sites. The IRT cannot add additional requirements at their own will to the third party Steward like performance standards and annual reports.	The requirements within the Long Term Management Plan will depend on the specific conditions of each site and its stated goals and objectives. No rule change needed.
Woodward, Victor - Habitat Bank	222	173-700-420. Once the Bank operational period is over the long term stewardship must be limited by the rules to what is reasonable not what IRT staff comes up with on a bank by bank basis.	The specific long term management requirements for a bank will vary based on the site's goals, objectives and requirements outlined in the bank's Conservation Easement conditions. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-421 Permanent protection			
Gleason, Eric - Skykomish Habitat	223	173-700-421. Transfer of title issues or the establishment of other legal claims to the bank site should not require notice to the department. In most cases, title transfers and other lien rights that may be granted are subordinate to the permanent protection of the bank site. Notice to the department should only be required in the exceptional case(s) where the potential for transfer or legal claim would subordinate the permanent protection provisions of the conservation easement to any new claim.	The department needs to maintain information on the current owner of the site for any future follow-up actions. The department's recent work and prior studies on mitigation showed that transfers of mitigation sites without notice to the department of the new owner impedes our ability to follow-up on problems with sites. We feel that it is important for follow up to ensure that conditions of the conservation easement are met. No rule change needed.
Heinrich, Mary - Ag Prospects	224	173-700-421. In section (1) we suggest striking the word "generally." The last line should read, " <i>The department shall require a <u>perpetual conservation easement.</u></i> "	The department uses the word "generally" since other legal or administrative mechanisms may be appropriate to provide perpetual protection for a site. Specific protection mechanisms for a bank must be approved by the department. No rule change needed.
Heinrich, Mary - Ag Prospects	225	173-700-421. Strike section (2) in its entirety. Move (a) through (f) to under (1), except strike the word "void" in (d) to read, "Contain a provision requiring a 60-day advance notification to the department before any action is taken to modify the mechanism, including transfer of title, or establishment of any other legal claims over the bank site." We would strongly suggest that either the Department of Ecology or another state agency co-hold the perpetual conservation easement on the bank. This would give the state the advantage of having direct oversight of the long-term management and maintenance of the site and authority to enforce against any violations of the easement.	Since there are legal or administrative mechanisms other than a conservation easement that can also provide perpetual protection for a site, we allow for the use of those mechanisms upon the department's approval. The department must be notified in advance if there is a proposal to void the protective mechanism. The rule does not prohibit state agencies, such as Ecology, from holding a conservation easement. The decision on whether to hold a conservation easement would be made by individual agencies. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-421 Permanent protection continued			
Rawls, N. Bruce - Spokane County, Utilities Div.	226	173-700-421 (1) Bank sites must be permanently protected and preserved in their natural state. The phrase "natural state" may not be appropriate in what may be highly modified systems, which are no longer what would have occurred naturally. The phrase could be replaced with reference to the agreed upon site conditions outlined in the banking instrument.	Ecology agrees. 173-700-420(4) and 173-700-421(1) have been revised and now states 'as specified in the instrument' instead of 'natural state'.
173-700-500 Use of bank credits			
de Yonge, John - Wise Use Movement	227	173-700-500. This section fails to protect wetlands by failing to limit wetland filling to "unavoidable" impacts.	The text in section 173-700-500(2) has been revised to include "unavoidable". It now reads "Projects located within the bank's service area are eligible to apply to use credits from that bank to compensate for authorized unavoidable impacts."
Gleason, Eric - Skykomish Habitat	228	173-700-500. 5) Concerning double dipping: [new language] "Under no circumstances may the same credits be debited for a different impact authorized under [the same] regulatory program [where different credit currency values are otherwise maintained separately under different regulatory programs]." This statement is intended to strengthen the protection to avoid double dipping, while also allowing for the trading of other currencies outside the framework of a department-approved instrument. This comment also is reflected below. 6) "Some debit projects may require authorization under more than one regulatory program...banks may be designed to holistically address requirements under multiple programs and authorities for the same activity." Add [In cases where department-approved credits cannot be used to satisfy all of these requirements, alternative credit currencies which may be developed under a separate regulatory program may be used to satisfy these requirements, as subject to approval by the approving agency(s)"]	WAC 173-700-500 (5) stipulates that credits can not be used for more than one impact project (double-dipping). The language in section 173-700-310 has been revised to clarify our requirements regarding currencies or alternative types of credits developed at a wetland bank.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-500 Use of bank credits continued			
Gleason, Eric - Skykomish Habitat	229	173-700-500. Adopt the Federal Rules by reference, and in particular, in modifying the language of this section to accurately reflect the hierarchy of preference for the use of bank credits as a first option. (See 33 CFR 332(b)(2)--(6) [§ 230.93(b)(2)--(6)]).	The department has included language and requirements from the federal rule on the process and standards for wetland banks, as appropriate. The Legislature did not give Ecology authority to adopt by rule a hierarchy of preference for the use of bank credits as a first option for compensating for wetland losses [90.84 RCW]. No rule change needed.
Risenhoover, Ken - Washington State Dept of Transportation	230	173-700-500 (1) states that the bank attain performance standards before credits can be used. This is not consistent with release of administrative credits for signed MBI, FA and CE. This language should be adjusted to incorporate administrative credit releases.	Each of the administrative requirements are performance standards in and of themselves. For additional information, the EIS Section 4.4 discusses credit releases and why credits are released with administrative credits. No rule change needed.
173-700-501 Mitigation ratios for debit projects			
Gleason, Eric - Skykomish Habitat	231	173-700-501. We suggest language that contains an acknowledgement that mitigation ratios determined by the department (and IRT) for debit projects should serve as the primary mitigation ratio for projects receiving a department (or IRT member agency) permit, and that the use of these ratios is consistent with the points in the subsections below (1-3). We suggest adding a fourth item that acknowledges that the replacement mitigation ratios also considers the reduction in risk of temporal loss of function associated with the use of mitigation credits that are established in advance of permitted impacts.	WAC 173-700-501(1) has been revised to include rationale for reduced replacement ratios. WAC 173-700-501 (4) has been added to clarify that recommended replacement ratios are usually included in a bank's instrument.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-502 Use of bank credits outside of the service area			
de Yonge, John - Wise Use Movement	232	173-700-502. This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to approve credits outside of the service area. This section should be deleted.	Ecology disagrees. There are circumstances where allowing the use of the bank for impacts lying outside of the service area makes sense. One example includes transportation projects where part, but not all, of a project's impacts occur outside of the bank's service area. The rule cannot foresee all circumstances that may arise in the future. This is why flexibility is needed within the rule text. The department makes these decisions on a case-by-case basis. This language is consistent with recent legislative amendments to RCW 90.84, (2008 c 80 § 1; 1998 c 248 § 4.) For further information, the EIS Section 3.1 discusses why Ecology allows for flexibility in the rule. The EIS Section 4.1 discusses the service area and why there is flexibility in determining size and when projects can be approved to use credits outside of the service area. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-502 Use of bank credits outside of the service area continued			
Graves, Gary - NW Indian Fisheries Commission	233	173-700-502. The use of bank credits outside of the bank's service area. A better approach would probably be to allow such a service area expansion when it is ecologically appropriate, consistent with watershed restoration objectives, and affected state, federal, local, and tribal governments agree. The question of whether impacts in one drainage can be mitigated by commensurate restoration activities in another drainage can become complicated quickly and the answer varies based upon local conditions and restoration objectives. This underscores the importance of assuring that the siting of mitigation banks and the use of mitigation bank credits must be consistent with watershed restoration objectives and agreed to by affected tribes.	The department agrees that permit decisions and requirements for compensatory mitigation must be made on a case-by-case basis. The rule contains information and guidance that banks should be sited and designed to be consistent with and support watershed priorities and restoration objectives. No rule change needed.
Heinrich, Mary - Ag Prospects	234	173-700-502. There is a great deal of concern that utilization of wetland banks will create deficits of ecosystem services in some areas. Allowing credits to be used outside the approved service area will guarantee this effect. If the Department feels there is a rationale to consider the use of credits outside of the approved service area, the process should hold public hearings in the affected localities to determine public support for this option. "(1) The department shall consult with the signatories, and after public hearings to gather input and a consensus of the signatories, may authorize the use of credits to compensate for impacts ..."	There are circumstances where allowing the use of the bank for impacts lying outside of the service area makes sense. One example includes transportation projects where part, but not all, of a project's impacts occur outside of the bank's service area. The rule cannot foresee all circumstances that may be seen arise in the future. This is why flexibility is needed within the rule text. The department makes these decisions on a case-by-case basis. This language is consistent with recent legislative amendments to RCW 90.84, (2008 c 80 § 1; 1998 c 248 § 4.) For further information, the EIS Section 3.1 discusses why Ecology allows for flexibility in the rule. The EIS Section 4.1 discusses the service area and why there is flexibility in determining size and when projects can be approved to use credits outside of the service area. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-600 Compliance with the terms of certification			
Freethy, Diane - Skagit Citizen's Alliance for Rural Preservation	235	173-700-600. If a WMB is located on private property and a violation were reported, what recourse exists?	Thank you for your comment. Each bank certification (Mitigation Bank Instrument) contains language requiring bank sponsors to provide access to the bank site at any time when requested by Ecology. Private ownership of a bank site does not change that requirement. If a violation were reported, Ecology (and the IRT co-chairs) would conduct a site inspection of the bank to determine whether or not a violation has occurred. If a violation has occurred specific compliance measures or remedial actions would be set into motion as specified in sections 173-700-601 through 173-700-603. No rule change needed.
Woodward, Victor - Habitat Bank	236	173-700-600. Bankers should be able to sell available credits to customers without a specific permit number yet issued if that customer wants to insure that they have access to mitigation credits for a planned project. (Refusal could be considered an illegal restraint of trade). Credits sold to a customer and reported as sold by the Sponsor to the IRT cannot be suspended. The State will very likely get sued if they try to control commerce this way. How can you release a credit for sale by a banker and then deny it's use by a customer that has legitimately purchased it? If a credit is released to a sponsor for sale how can you say it cannot be sold to whoever wants to buy it?	Rule language was revised to show that credits that have been sold to customers regardless of permit issuance will not be subject to credit suspension. A new definition of "reserved" credits has been added to identify credits sold but not associated with a permit. 173-700-104, 173-700-311(3), and 173-700-411(3)(b)

Commenter - Affiliation	Comment no.	Summary	Response
173-700-601 Remedial actions			
Bynum, Ellen - Friends of Skagit County	237	173-700-601. Voluntary compliance does not ensure that the enforcement of the rule will ever happen.	The rule does not state that compliance with certification is voluntary. The voluntary nature of the rule means that setting up a wetland bank is a voluntary activity. Any certified banks are required to comply with their bank instrument conditions. If there is non-compliance, the department has a variety of compliance measures available including use of posted financial assurances; stopping additional credit releases and suspension of available credits which have previously been released as specified in WAC 173-700-601 through 173-700-603. No rule change needed.
Gleason, Eric - Skykomish Habitat	238	173-700-601. WAC 173-700-602 through 604. Default provisions should be contained under a new heading (currently Subsections 4-6). Default should occur after adaptive management has failed to result in the attainment of performance standards, the Sponsor has been given a notice of noncompliance, and Sponsor fails to remedy the situation by implementing the requested remedial action. Rather than relating this to approving a schedule (as currently contemplated in subsections 4 and 5), this should be related to either action or inaction by the Sponsor. If Sponsor responds to remedial action requests, there is no need for default proceedings. If however, Sponsor fails to conduct remedial action (for any reason, including, but not limited to schedule), Sponsor should be found in default, and the remedies contemplated by subsections 5 and 6, and WAC 173-700-603 suspension of credits would take effect.	Section 173-700-601 has been revised to reflect that sponsors may first implement adaptive management actions prior to the department requiring remedial actions. No change was made to section 173-700-602 regarding the department setting a schedule for implementation of remedial actions. The department needs to have a way to determine whether or not there is a lack of response by the sponsor and not specifying a time frame leaves open the question of whether the sponsor is going to comply with the department's requirements.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-601 Remedial actions continued			
Gleason, Eric - Skykomish Habitat	239	173-700-601. This section needs to have references included that relate to when remedial action provisions take effect. Specifically, Remedial Actions should take effect after adaptive management activities have been implemented as described in WAC 173-700-402 and there is still "a persistent failure to achieve performance standards." The intent of remedial action should be for the department (in cooperation with the IRT) to direct action after the Sponsor has had an opportunity to address failures under adaptive management and has still been unable to meet performance standards. Items 5 and 6 appear to occur out of order and may lead to confusing requirements to Sponsor. The department should first coordinate with the IRT signatories and gain concurrence on the remedial action request prior to sending notice to the Sponsor, rather than sending a request for remedial action to the Sponsor and then giving IRT signatories an opportunity to provide comments/objections.	Section 173-700-601(1) has been revised to reflect that sponsors are given the option to perform adaptive management actions before the department moves to requiring remedial actions. Language has also been added to clarify that the department shall work with the bank signatories on recommended remedial actions.
Risenhoover, Ken - Washington State Dept of Transportation	240	173-700-601 (2). Add the following, "The sponsor may propose changes to the bank design that will address the difficulties in achieving performance standards. The department in consultation with the sponsor and signatory agencies will determine if the proposed changes to the bank design will be approved. If the proposed changes are not approved the department may follow with remedial actions per section 173-700-601(4)."	Section 173-700-601(1) has been revised to reflect that sponsors are given the option to perform adaptive management actions before the department moves to requiring remedial actions. A partial redesign of the site can be proposed under adaptive management activities. Language was added to section 173-700-403 to clarify that if adaptive management actions are not successful the department may require remedial actions.
173-700-602 Compliance with required remedial actions			
Risenhoover, Ken - Washington State Dept of Transportation	241	173-700-602 (6) should reference subsection (5), not subsection (4).	Agreed. Section 173-700-602(6) has been revised.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-603 Suspension of credit use			
Gleason, Eric - Skykomish Habitat	242	173-700-603. [added language] 2) "The suspension shall include all available [and non-debited] credits at a bank." 4) "If credit use is suspended by the department, the department must notify the Sponsor by certified mail with return receipt requested that further sale [, use, or transfer of all available, and/or non-debited] credits has been suspended." [new section] 5) [Upon notice to Sponsor, the department shall publish a public notice containing the notice of suspension and identification of all remedial criteria]. [renumbered section, formerly 5] 6) "The department shall maintain the suspension until compliance with all remedial criteria has been achieved. [Upon cancelation of the suspension, the department shall publish a public notice containing the cancellation of suspension and providing a statement that all remedial criteria have been met or addressed to the satisfaction of the department.]	Ecology does not plan on issuing public notices for every credit suspension. However, the department does post notice on the agency website regarding the status and availability of bank credits. The rule language does not preclude the department from issuing a public notice if it determines that one is appropriate. No rule change needed.
Risenhoover, Ken - Washington State Dept. of Transportation	243	173-700-603 (1). The department may suspend the sale of credits to bring a bank into compliance. If the department suspends the sale of credits, available credits may not be debited until the department lifts the suspension and notifies the sponsor in writing that credit use may be resumed.	The language in sections 173-700-104, 173-700-311 and 173-700-411 has been changed to reflect the existence and use of reserved credits, conditions for reporting and effect of suspensions on those credits. The language in section 173-700-603 reflects that only "available" credits are suspended. Once a credit becomes a "reserved" credit, it is no longer an "available" credit.
Risenhoover, Ken - Washington State Dept. of Transportation	244	173-700-603 (1a). A review of the monitoring reports as well as an on-site inspection by the IRT shall be conducted to determine the level of success prior to a suspension of credit use.	Comment noted. Credits may be suspended for reasons other than lack of meeting performance standards. No rule change is needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-603 Suspension of credit use continued			
Risenhoover, Ken - Washington State Dept. of Transportation	245	173-700-603 (2). The suspension shall include all available credits held by the bank. Credits that have been previously purchased and transferred to a customer will remain eligible for approval as compensation for authorized impacts.	The language in sections 173-700-104, 173-700-311 and 173-700-411 has been changed to reflect the existence and use of reserved credits, conditions for reporting and effect of suspensions on those credits. The language in section 173-700-603 reflects that only "available" credits are suspended. Once a credit becomes a "reserved" credit, it is no longer an "available" credit.
173-700-800 Appeals process			
de Yonge, John - Wise Use Movement	246	173-700-800. This section should make clear that any citizen may appeal a final certification to the Pollution Control Hearings Board.	RCW chapter 43.21B specifies who can appeal an agency decision including decisions on bank certifications. No rule change needed.
de Yonge, John - Wise Use Movement	247	173-700-800. This section should make clear that any citizen may appeal approval of a bank credit to the Pollution Control Hearings Board.	This rule doesn't address other permit processes. Appeals on projects authorized to use bank credits need to be appealed through the appropriate appeals processes. The appeal process in section 173-700-800 applies only to the wetland mitigation bank certification process. It does not apply to post-certification issues. No rule change needed.
Elliot, Crystal - Herrera Environmental Consultants	248	WAC 173-700-800 provides an open-ended avenue for any opposition, whether founded on scientifically- or policy-based grounds or not, to a given mitigation bank to appeal the certification process and indefinitely obstruct an otherwise approved project from moving forward.	The appeal process specified in Section 173-700-800 applies to bank certification decisions. The appeal process allows for an appeal to the pollution control hearings board of the department's decision. The procedures for appeals are outlined in Chapter 43.21B RCW. No rule change needed.
Elliot, Crystal - Herrera Environmental Consultants	249	There should be some sort of language in WAC 173-700-800 that provides assurance to a mitigation bank developer that appeals for final certification will only be entertained if they are based on non-compliance with the terms and conditions of the certification as specified in the banking instrument and in WAC 173-700-600.	The appeal process specified in Section 173-700-800 only applies to bank certification decisions. It does not apply to any post-certification compliance issues. Issues with compliance with the terms of a certification are addressed by the department. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
173-700-800 Appeals process continued			
Miller, Darcey - Herrera Environmental Consultants	250	WAC 173-700-800, Appeals Process: As currently written, this section provides an open-ended avenue for any opposition, whether founded on scientifically- or policy-based grounds or not, to a given mitigation bank to appeal the certification process and indefinitely obstruct an otherwise approved project from moving forward.	The appeal process specified in Section 173-700-800 only applies to bank certification decisions. The appeal process allows for an appeal of the departments decision to the pollution control hearings board. The procedures for appeals are outlined in Chapter 43.21B RCW. No rule change needed.
Miller, Darcey - Herrera Environmental Consultants	251	I would recommend that there be language included in WAC 173-700-800 that provides a level of assurance to a mitigation bank developer that appeals for final certification will be entertained only if those appeals are justified. The appeals should be based on a clear argument that there is non-compliance with the terms and conditions of the certification as specified in the mitigation banking instrument (MBI) and in WAC 173-700-600.	The appeal process specified in Section 173-700-800 only applies to bank certification decisions. It does not apply to any post-certification compliance issues. Issues with compliance with the terms of a certification are addressed by the department. No rule change needed.
Wozniak, Josh - Herrera Environmental Consultants	252	173-700-800. As currently written, this section provides an open-ended avenue for any opposition, whether founded on scientifically- or policy-based grounds or not, to a given mitigation bank to appeal the certification process and indefinitely obstruct an otherwise approved project from moving forward. There should be some sort of language in WAC 173-700-800 that provides assurance to a mitigation bank developer that appeals for final certification will only be entertained if they are based on non-compliance with the terms and conditions of the certification as specified in the banking instrument and in WAC 173-700-600.	The appeal process specified in Section 173-700-800 only applies to bank certification decisions. It does not apply to any post-certification compliance issues. Issues with compliance with the terms of a certification are addressed by the department. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Administrative procedure act (APA)			
Bynum, Ellen - Friends of Skagit County	253	RCW 34.05.328 (2) states: In making its determinations pursuant to subsection (1)(b) through (h) of this section, the agency shall place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified. Reasonable people are not persuaded that the rule has addressed the benefits vs. the costs to public health and safety that it is the least burdensome alternative for the public and local government and that existing land use planning and rules would not provide better outcomes.	In accordance with the Administrative Procedures act (Cht. 34.05 RCW), the rule making file will be submitted after the final rule adoption. Ecology completed a cost benefit analysis and determined that the benefits of the rule outweighed the cost. The final cost benefit analysis will be available at Ecology's wetland banking rule-making website at http://www.ecy.wa.gov/laws-rules/activity/wac173700.html . The documentation, developed during the rule making process, of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified will be included within this file. No rule change needed.
Bynum, Ellen - Friends of Skagit County	254	The Legislature's creation of a program does not bind the Legislature to appropriate funds for the program.	Comment noted. No rule change needed.
Bynum, Ellen - Friends of Skagit County	255	Pilot projects are pilots. They are tests, they were supposed to have ends, in the beginning that was applied for the pilot program ended in one year. The agency has the discretion to extend that. They have now extended it for 8 years. How long do you have a pilot that is still a pilot?	The pilot program has been in existence 5 years, not 8 years. The pilot program was extended to ensure we had sufficient information on how the pilot rule worked and where changes were needed prior to adopting a final rule. No rule change needed.
Bynum, Ellen - Friends of Skagit County	256	The agency cannot rely solely on the section of the law stating a statute's intent or Purpose	Ecology did not rely solely on legislative intent. Ecology developed the wetland bank certification rule to meet legislative directive. Section 90.84.005(2)(b) of the wetland banking law chapter 90.84 RCW specifically directs the department to adopt a rule for wetland bank certification. No rule change needed.
Bynum, Ellen - Friends of Skagit County	257	Ecology has not complied with sections 34.05.322 RCW and 34.05.328 RCW; it has not addressed how the GMA and local comprehensive plan requirements to identify and protect resource lands (farms, forests and mineral) can be met if agricultural lands are converted for banks.	Local governments, not Ecology, are the implementing entities for the Growth Management Act (GMA). "The GMA provisions relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Administrative procedure act (APA) continued			
Bynum, Ellen - Friends of Skagit County	258	RCW 34.05.328 Section (1)(f) states "...Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law..."	The rule does not require applicants to violate the requirements of another state or a federal law. The state rule is consistent with the U.S. Corps of Engineers and EPA's rule that governs wetland mitigation banks. No rule change needed.
Bynum, Ellen - Friends of Skagit County	259	RCW 34.05.328 Section (1)(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity...and determine that the difference is justified by... (i) A state statute that explicitly allows the agency to differ from federal standards; or (ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives (of the rule); and (j) Coordinate the rule, to the maximum extent practicable, with other federal, state and local laws applicable to the same activity or subject matter..."	Ecology's wetland mitigation banking rule is consistent with the federal rule on compensatory mitigation regarding banking. There are two major differences between the two rules. 1) Ecology only has authorization to adopt rules for wetland banking and not other forms of compensatory mitigation, see Cht 90.84.020 RCW. 2) Local governments have an important role in the certification process and can deny state certification if they do not approve the bank instrument. See Cht 90.84.040 RCW. Ecology and the Corps will continue to work together as co-chairs on the IRT for all banks where the applicant is seeking both state certification and federal approval. No rule change needed.
Bynum, Ellen - Friends of Skagit County	260	One of the options under the rule making process is that Department of Ecology decides that it might be too expensive, not in the public interest, or a violation of a law to continue developing and promoting wetlands mitigation banks across the state.	Ecology completed a cost benefit analysis and determined that the benefits of the rule outweighed the cost. The final cost benefit analysis will be available at Ecology's wetland banking rule-making website at http://www.ecy.wa.gov/laws-rules/activity/wac173700.html . Ecology believes that wetland mitigation banking is in the public interest. Wetlands and the functions that they provide are essential to our environment and Ecology believes that wetland mitigation banking is a good tool for mitigation. We did not find that this rule violates any laws. No rule change needed.
Bynum, Ellen - Friends of Skagit County	261	Friends of Skagit County urges the Department to not adopt the rule as proposed, follow the APA requirements for including new and corrected information, public comments and full budgetary and economic assessments and appropriate revisions of the rule before adoption.	The department developed this rule to meet legislative directive in Cht. 90.84 RCW. The department followed the required Administrative Procedures Act procedures. The documentation specified is contained within the CR-103 packet. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Administrative procedure act (APA) continued			
Bynum, Ellen - Friends of Skagit County	262	Do the seven banks developed under DOE's draft rule have no obligation to comply with the rule and are not subject to any sanction for the failure of the projects? What I am hearing from you is that we have the ability to make these bankers comply and what I am reading in this law is that the bankers don't have to comply because it's a draft rule. I don't want to call upon the farmers to pay for something that was done because somebody didn't read the law correctly.	All of the banks that have been approved under the program (5) have binding legal contracts (Mitigation Bank Instrument) on how the banks will be established and operated. The instruments outline what sanctions may be pursued if the bank is not in compliance with its Mitigation Bank Instrument. The rule does not contain any language allowing non-compliance. No rule change needed.
Bynum, Ellen - Friends of Skagit County	263	In 1995, the Legislature stated that one of its fundamental responsibilities is the protection of public health and safety and the "preservation of the extraordinary natural environment with which Washington is endowed;...essential to this mission is the delegation of authority to state agencies helps assure that these policies are clearly understood, fairly applied, and uniformly enforced..." And "...to ensure that citizens and environment of this state receive the highest level of protection..." And "...that state agencies not use their administrative authority to create or amend regulatory programs..." And when an agency is authorized to adopt rules...That the obligations imposed are truly in the public interest;...". DOE has not considered the public interest in its rule making process. No evaluation has been done of the cost of risk or failure to the public of wetland mitigation banks.	Ecology disagrees. Ecology believes that it is in the public interest to improve the success of wetland mitigation. In accordance with the Administrative Procedure Act, Ecology wrote a cost benefit analysis on the rule and published the draft report with the CR 102 filing on the draft rule. The final cost benefit analysis will be available at Ecology's wetland banking rule-making website at http://www.ecy.wa.gov/laws-rules/activity/wac173700.html . No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Administrative procedure act (APA) continued			
Bynum, Ellen - Friends of Skagit County	264	<p>RCW 34.05.328 Public Participation - Concise explanatory statement. (6)(a) Before filing an adopted rule with the Code Reviser, an agency shall prepare a concise explanatory statement of the rule:...(ii) Describing the differences between the text of the proposed rule as published in the register and the text of the rule as adopted, other than editing, stating the reasons for differences; and (iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments or why it fails to do so..." Friends has submitted many of the comments read today in previous letters and testimony. To our knowledge, the requirements of Section (6)(a) have not yet been addressed.</p>	<p>The APA requirements cited [RCW 34.05.328 Public Participation - Concise explanatory statement. (6)(a)] do not apply to the CR 102 stage of the rule adoption. The CR 102 stage is the publication of the draft rule for public comment. These requirements apply to the final stage of the rule development process, the CR 103 filing. The Concise Explanatory Statement (CES) is provided in the CR-103 packet which also includes the rule text as it will be adopted, and describes the differences between the proposed and final rule. To show the differences between the proposed and final rule, Ecology has provided the "track changes version" of the rule. This version of the rule text shows the changes which occurred between the CR-102 and the CR-103. No rule change needed.</p>
Derig, Gene - Friends of Skagit County	265	<p>We believe it [the banking rule] is weak and may violate other State and Federal regulations relating to wetland and critical areas protection, shorelines, SEPA, NEPA, GMA and local comp plans and dev codes.</p>	<p>Thank you for your comment. The rule language is designed to not conflict with other laws, rules, regulations, etc. We did not find contradictions in the rule with existing rules and regulations. The rule is consistent with the federal mitigation rule and its requirements for wetland banks. The department of Commerce (formerly Community, Trade and Economic Development) did not find any conflicts between the rule and the GMA. No rule change needed.</p>
Derig, Gene - Friends of Skagit County	266	<p>CR-102 asks whether the rule is necessary and being considered because of a Federal Law, Federal Court Decision or State Court Decision. The DOE answered "no".</p>	<p>That is correct. Ecology was directed by the legislature to develop the certification rule, not in response to federal law or court decisions. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
Administrative procedure act (APA) continued			
Derig, Gene - Friends of Skagit County	267	Why is DOE touting its public process record? Why does the rule making form state that "the purpose of this rule is to encourage wetland mitigation banking..." Why is DOE holding these public meetings when it appears DOE has already made up its mind on the issue?	The state Legislature determined that banks are a valuable option for compensating for wetland losses. 90.84.005 RCW states: "The legislature finds that wetlands mitigation banks are an important tool for providing compensatory mitigation for unavoidable impacts to wetlands." Ecology held seven public hearings and multiple workshops as part of the rule-making process. The public was invited to participate in meetings of the pilot advisory team during the rule development process to give their comments on the draft rule language. No rule change needed.
Cost benefit analysis (CBA)			
Bynum, Ellen - Friends of Skagit County	268	RCW 34.05.328 Significant legislative rules, other selected rules, lists actions which agencies must take before adopting a rule. Section (1)(d) states that an agency must "Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented..."	Ecology has made this determination in a separate document. It was presented for the proposed rule in the Preliminary Cost-Benefit Analysis (Ecology publication #09-06-002), and for the final adopted rule in the Final Cost-Benefit Analysis. No change needed.
Bynum, Ellen - Friends of Skagit County	269	While the media size may be accurate for the pilot projects, there is no calculation of the increased cost and risk with larger banks.	Costs and risks for larger banks are reflected in both the assumption of constant costs per acre for larger banks, and in the range of commercial bank construction and maintenance costs, as reflected in credit prices surveyed in the Northwestern Division region of the Army Corps of Engineers (including areas of Washington, Oregon, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, and Missouri). Ecology believes the underlying sizes of existing commercial banks across this area is representative of the sizes of banks that may be created in the future in Washington. No change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Cost benefit analysis (CBA) continued			
Heinricht, Mary - Ag Prospects	270	<p>There is an absence of examination of the long term effects of reducing the wetland diversity within a watershed and the resulting increased burdens that may place upon others to meet regulatory requirements within the same watershed. This is especially important in agricultural settings in Western Washington where farming operations are under extraordinary regulatory burden and examination because of endangered species issues. The effects of this program may be to increase the regulatory burden upon agricultural interests.</p>	<p>This rule does not address permitting as it relates to the determination of whether wetland impacts are unavoidable and are authorized. The authorizations to affect wetlands are found under different laws such as the federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use regulations. For further information, the EIS Section 2.1.2 discusses wetland resource tradeoffs including moving mitigation off-site. No rule change needed. Agricultural businesses and other businesses are required to comply with all other governing laws and statutes regardless of the existence of the rule. Ecology does not believe the rule will reduce wetland diversity more than the current wetland impacts and mitigation options available under the baseline. No change needed.</p>
Shelby, Mike - Western Washington Agricultural Association	271	<p>Both the economic impact analysis and cost benefit analysis document fail to analyze and quantify loss of farming opportunity or adverse economic impacts related to the agricultural industry affected by the incremental loss of available production farmlands that will result from projects authorized by this program. We were especially discouraged to see a specific statement in the cost benefit analysis which recognizes that “development happens in areas that are being developed, driving up land prices.” “While WMB does not allow the mitigation bank to be too far from the impact location, it is likely to be in a significantly more rural area where land is cheaper.”</p>	<p>As reflected in the statements quoted in your comment, Ecology acknowledges many likely underlying cost, financial, and logistical incentives that may drive the prospective private profitability of a wetland bank versus other land use. These are the incentives faced by land owners in the choice to become a wetland bank. The conversion to another land use, however, is separate from the rule's requirements -- the rule does not necessitate it, and, in fact, includes avoiding or reducing impacts to significant agricultural land as a component in siting mitigation banks. If a landowner chooses to convert his land (or sell it for conversion) from an existing use to a more profitable use, he may also do so in the absence of the rule, based on the expected profitability over time of various land uses. Language in the Final Cost-Benefit Analysis has been revised to clarify this issue.</p>

Commenter - Affiliation	Comment no.	Summary	Response
Consistency with federal rule			
Gleason, Eric - Skykomish Habitat	272	The intent of the state rulemaking process should be to simply provide additional clarification on state requirements beyond what is fundamentally required by the Federal process and define that the intent of the state rule is to provide a process for the state to co-administer the IRT process. It should not be used to construe or create a separate and potentially inconsistent process that may not agree with the Federal process.	The intent of the rulemaking process is to meet a legislative directive [90.84 RCW] to develop a state rule for a certification process for wetland banks. The state law and rule articulate that Ecology and the local governments are decision-makers for state certifications. The federal rule <i>allows</i> the state to participate as a co-chair, but it does not require the District Engineer of the US Army Corps of Engineers to concur with or defer to state decisions on whether a wetland bank should be certified. No rule change needed.
Thomas, Jennifer - Parametrix	273	The proposed rules somewhat mirror the new federal rules on compensatory mitigation in that they are intended to provide greater efficiency and predictability in the process.	The department designed the rule to be consistent with the new federal rules. No rule change needed.
Credits			
de Yonge, John - Wise Use Movement	274	If the bank approval process is not reasonable (i.e., it takes too long) then the environmental benefits of banking will be decreased due to the shorter time frame between bank construction and use of credits.	Bank credits are not released for use until after a bank is certified. The length of the certification process is not related to the timing of credit releases. No rule change needed.
Gehret, Kathryn - Perkins Coie	275	The rule grants an inappropriate level of agency discretion to provide exceptions. For example section 173-700-320 exceptions to credit conversion rates, 321 allows an alternative credit determination, 300 application of specific incentives on a case-by-case basis.	We provided specific detail throughout the rule on how credits and incentives will be determined. Each bank has different conditions and due to the variability of banks Ecology needs to retain the ability to tailor bank requirements to each bank's circumstances. While the approach in the rule may apply to most banks, this rule must be applicable to banks across the state and must be applicable over time. By allowing for exceptions, we are able to accommodate those circumstances that do not fit into these normal case scenarios. EIS Section 3.1 also discusses the approach used in the rule of being flexible versus prescriptive. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Credits continued			
Gleason, Eric - Skykomish Habitat	276	Sections 173-700-313 through 320 credit conversion rates (generally). We suggest adding a bonus table for either compounding or increasing credit generation ratios that provide multiple benefits to other resources. Statements should be included that limit the application of the most favorable credit generation ratios to projects that provide multiple environmental benefits, not just based on total wetland area.	This rule pertains only to wetland mitigation banking and wetland credits - not to other environmental benefits. The draft rule has provided credit ratios which should be appropriate for wetland mitigation banks proposed. The rule allows for exceptions to the credit ratios if determined appropriate by the department. If the bank does supply multiple benefits, the rule does not preclude a bank from applying for other credit generation from other regulatory or resource agencies. A determination on the generation of other resource credits would be determined by the appropriate resource agency. The relationship of these other resource credits to wetland credits must be approved by the department and included the instrument to avoid multiple uses of the same credit. [WAC 173-700-310]. No rule change needed.
Gleason, Eric - Skykomish Habitat	277	State's rule is that it does not allow for the full value of restored ecosystems to be realized in mitigation credit values. By limiting credit currencies to a "wetland centric" regulatory framework, Sponsors are not properly incented to take on projects that truly create multiple environmental benefits in a landscape context.	The state rule only addresses wetland mitigation banks and wetland credits as authorized under Cht 90.84 RCW. The rule does not prohibit other crediting systems where markets are available, see section 173-700-310 (3) for further details on different resource currencies. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Credits continued			
Gleason, Eric - Skykomish Habitat	278	<p>Additional consideration must be given to multiplying or compounding mitigation ratios to account for these other necessary ecological values; or, if full values cannot be realized in this rule, the credit ratios applied to projects that do not offer a full suite of environmental benefits, as suggested above, should not be eligible for the most favorable credit generation ratios in order to encourage the development of projects that address multiple environmental goals – not just related to wetland functions alone. Given the limitation of other state rules, we recognize that this may not always be possible. We request that where possible, however, these bonuses or compounded benefits should be quantified and included within the rule.</p>	<p>This rule pertains only to wetland mitigation banking and wetland credits. The draft rule provides credit ratios which should be appropriate for wetland mitigation banks proposed. The rule allows for exceptions to the credit ratios if determined appropriate by the department. If the bank does supply multiple benefits, the rule does not preclude a bank from applying for credit generation from other regulatory or resource agencies. A determination on the generation of other resource credits would be determined by the appropriate resource agency. The relationship of these other resource credits to wetland credits must be approved by the department and included in the instrument to avoid multiple uses of the same credit. See section 173-700-310 (3). No rule change needed.</p>
Murphy, Michael - King County, Dept of Nat Resources and Parks	279	<p>WAC 173-700-312 through 173-700-315. Begin on page 23: Clarify that all areas related to credits are measured in acres.</p>	<p>Not all crediting systems that could be used for a bank are based on acreage. Section 173-700-312, outlines the default method for determining credits. In this method, credits are defined as representing the level of wetland functions performed by one acre of high quality wetland. The type of wetland represented by the credits will vary based on the specifics of the bank. The department determines the number of potential credits using a credit conversion rate which uses a ratio of area of activity to credits. The area of activity means what type of activity is proposed on the bank site (re-establishment, creation, rehabilitation, enhancement, or preservation) and then the size of the area for that activity. Section 173-700-321 allows for credits to be assessed and quantified using methods other than by acreage if the method meets the requirements of that section. No rule change needed.</p>

Committer - Affiliation	Comment no.	Summary	Response
Cultural resources			
Griffith, Gregory - Dept Archaeology and Historic Preservation	280	Supports inclusion of cultural resources in sections 222 and 303.	Thank you for your comment. No rule change needed.
Griffith, Gregory - Dept of Archaeology and Historic Preservation	281	Identify process for determining and implementing mitigation measures when significant cultural resources are negatively impacted by a bank. Possible sections 212 and 222.	If cultural resources are found during the prospectus stage, the Dept of Archaeology and Historic Preservation will be invited to participate on the IRT. We recommend that the Dept of Archaeology and Historic Preservation identify appropriate mitigation measures during the site evaluation. The necessary mitigation measures can be required and specified in the bank instrument. No rule change needed.
General			
Barns, Ross - Rosario Geo Science Assoc and Evergreen Islands	282	In terms of the effect of the wetland mitigation banking, I am very concerned that this will facilitate the loss of the systems of distributed wetlands and their associated open spaces and buffers that currently occur in developed areas. Wetland mitigation banking will facilitate the total destruction of that system. That impact, I do not believe, has been adequately considered by those people who are attempting to develop appropriate regulations for wetland mitigation banks.	Several laws and rules exist for protecting wetlands. Existing laws for wetland protection include, but are not limited to: the Federal Clean Water Act, the state Water Pollution Control Act, and local land use regulations and critical areas ordinances. These have regulatory processes for reviewing and denying or approving requests that will affect wetlands. This rule does not address these other rules or regulatory processes for authorizing impacts to wetlands. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Barns, Ross - Rosario Geo Science Assoc and Evergreen Islands	283	I discovered that the same failures are present in the one regarding permitting and regulating wetland mitigation banks, because nothing has changed - the same development pressures, the same bias's that have been edited in terms and technical problems, in terms of designing and developing site by site wetland mitigation are present just on a larger scale with wetland mitigation banks.	Ecology disagrees. The rule includes several safeguards against the failure of bank sites which are not available for individual permittee-responsible mitigation sites. This rule does not address other rules and processes regulating impacts to wetlands. No rule change needed.
Belston, Jessi - Port of Vancouver	284	The port requests there be an established timeline for <u>all</u> review processes necessary for certification of a mitigation banking instrument. As the port has moved through the bank certification process, there has been significant uncertainty regarding review timelines of the participating IRT agencies. Review timelines have been proposed in the draft rule, however, there are some rule sections that do not clearly define these timelines. For example, 230(6) there is no timeline imposed by the department to ensure local jurisdictions respond to the department's intent to certify.	Ecology strives to review most documents within 30 days, which is consistent with the timelines specified within the rule text. We researched Ecology's timeliness for reviewing the documents submitted for the project mentioned in your comment; and, we found the majority of the documents submitted were reviewed within 30 days of receipt (12 out of 14 submittals). Two financial assurance documents took longer than 30 days because they required additional legal review. This rule does not affect other review processes for permits or authorizations that may be necessary to construct and operate a wetland bank. Timelines for those processes are outlined in other rules and outside of the scope of this rule. Since local jurisdictions set up their own processes for issuing a decision on approval of a wetland bank, we determined that a time requirement here would not be appropriate. In some jurisdictions, these decisions may be made at the Planning Director level or they may need to be made by the jurisdiction's elected body. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Brevoort, Doris - Citizen	285	I would urge the state to try to be - have a more holistic point of view towards development because a wetland is way down the feeding chain.	Several laws and rules exist for protecting wetlands. Regulatory processes exist for reviewing and denying or approving requests that will affect wetlands. This rule does not address these other rules or regulatory processes for authorizing impacts to wetlands. Existing laws for wetland protection include, but are not limited to: the federal Clean Water Act, the state Water Pollution Control Act, and local land use regulations and critical areas ordinances. No rule change needed.
Brevoort, Doris - Citizen	286	The oversight needs to be much more stringent for the public good and that there is real consequences for the mismanagement, and I don't know what those consequences should be. But that should be very well documented and people should know in the first place when they start to speculate their money on something like a mitigation bank what they are getting into and what it is really going to cost.	Ecology agrees with the need for oversight. Oversight is conducted at the construction stage with submittal and review of the as-built reports, we conduct site visits for monitoring and credit release requests. Ecology also has enforcement procedures in the rule [WACs 173-700-600 through 173-700-603] and in the bank instruments to make clear what enforcement actions may be taken. Bank sponsors are advised of the risks and requirements for developing wetland banks. No rule change needed.
Bynum, Ellen - Friends of Skagit County	287	We ask that the attached CD of the 8 days of public hearings in the Clear Valley v. FOSC appeal to the Hearings Examiner be included as part of this record and that the agency staff review the information covered in the hearing and consider the issues raised in the review and revision of the draft rule. The concerns brought by both sides have not been included in the draft rule documents to date.	Ecology reviewed the CD provided. Ecology feels the current rule language covers the issues brought forth in the hearings. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Bynum, Ellen - Friends of Skagit County	288	The wetland mitigation banking program is not a requirement of any existing program, rule or law of WA state or the federal agencies. It is inappropriate for DOE to advocate, promote and encourage this program if it is only an option. As an option, DOE must make the case that existing laws and administrative rules do not work to protect wetlands. The proposed rule does not do this.	Ecology disagrees. Currently there is a state law as well as a federal rule addressing wetland banking. The legislature directed Ecology to develop this rule in the wetland banking law. See RCW 90.84.030 - "The department, through a collaborative process, shall adopt rules for: (1) certification, operation and monitoring of wetlands mitigation banks." The US Army Corps of Engineers and the EPA promulgated rules for wetland mitigation includes banking. The state rule is consistent with the federal rules on banking. No rule change needed.
Bynum, Ellen - Friends of Skagit County	289	Bank operators could abandon their projects and leave local governments with the remedy for the failed sites. The public has not been adequately informed about these costs.	The rule contains several safeguards against bank failures including gradual release of credits based on performance, financial assurances, suspension of credits for non-compliance and perpetual protection of the bank site. Ecology has held multiple workshops, trainings, outreach, hearings and provided web materials to inform the public of all aspects of banking. Additionally, anyone interested in receiving information pertaining to wetland mitigation banking can sign up for our listserv at: http://listserv.wa.gov/cgi-bin/wa?A0=WETLAND-MITIGATION-BANKING . No rule change needed.
Bynum, Ellen - Friends of Skagit County	290	RCW 34.05.313 (2) allows the agency to waive one or more provisions of agency rules during a pilot project, "...if the agency first determines that such a waiver is in the public interest and necessary to conduct the project. Such a waiver may be only for a stated period of time, not to exceed the duration of the project.	The department did not waive compliance with any agency rules during the pilot project. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Bynum, Ellen - Friends of Skagit County	291	Ecology has the option of saying that the rule for this particular program is too expensive, is not in the public interest, or conflicts with another state law. An agency can't rely upon a section of the law that just says we want to do this program as a reason to do it.	Ecology has completed a cost benefit analysis for the rule. The final cost benefit analysis will be available at Ecology's wetland banking rule-making website at http://www.ecy.wa.gov/laws-rules/activity/wac173700.html . Ecology also performed a legal review of the rule and determined that it does not conflict with other state laws. Ecology considers improving the success of mitigation to be in the public interest. No rule change needed.
Bynum, Ellen - Friends of Skagit County	292	There is no process to decertify banks, we suggest that you look at that - putting that into the rule.	Section 173-700-212(8) stipulates that if Ecology determines the bank is not ecologically appropriate or does not have potential for providing appropriate compensatory mitigation they will inform the sponsor that the current proposal cannot move forward in the certification process. In addition, if a bank is found to not be in compliance with the instrument, sections 173-700-600 through 173-700-603 specify measures that Ecology may enforce, depending on the condition of the bank. Each bank instrument contains a section that allows the department to cease bank operations if needed. If this occurs, the bank is no longer eligible for use for state permits. No rule change needed.
Dannhauer, Ann - Citizen	293	I have concerns about the effectiveness of mitigation.	Thank you for your comment. Ecology believes that banks are one good option for mitigating authorized unavoidable wetland impacts. Numerous safeguards and have been stipulated throughout the rule to ensure banks are successful. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
de Yonge, John - Wise Use Movement	294	Centralized wetland mitigation at a distant bank site may doom wildlife at existing wetlands proposed for filling, such as amphibious species that rely on shallow wetlands to avoid fish predation.	This rule does not address permitting as it relates to the determination of whether wetland impacts are unavoidable and are authorized. The authorizations to affect wetlands are found under different laws such as the federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use regulations. Decisions on whether the use of bank credits adequately compensates for the unavoidable impacts are made during the applicable permitting processes. No rule change needed.
Derig, Gene - Friends of Skagit County	295	Where is evidence that any market analysis was done by the DOE to determine the actual number of acres of wetlands which may require wetland banking as mitigation. If there was no market study why has DOE plowed ahead with the banks?	Market analyses for wetland banks are conducted by the bank sponsors not Ecology. Ecology supports state policy that wetland banks are an important tool for wetland mitigation, as written by the Legislature. Approvals of the current banks were conducted under the pilot program which was authorized by the state legislature. No rule change needed.
Derig, Gene - Friends of Skagit County	296	Why is DOE encouraging this program if the program is only optional?	The rules are required under RCW 90.84. The decision to set up a bank is voluntary. Permit applicants have the option to propose using a bank as compensatory mitigation, but are not required to use mitigation banks. Ecology believes that wetland mitigation banks are an appropriate tool for providing compensatory mitigation for unavoidable impacts to wetlands. No rule change needed.
Derig, Gene - Friends of Skagit County	297	Draft rule changes are not easily tracked: new language that was added was labeled "New Section" with no pages that have strikethroughs - a reader friendly version to compare the old and new.	We will provide a 'track changes' version of the rule text within the Concise Explanatory Statement to describe the differences between the proposed rule and the final rule. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Derig, Gene - Friends of Skagit County	298	It appears the MBRT members were selected to advocate for the program. What was the level of scientific ability or experience in Wetland Mitigation Banks which was required of the members? Why aren't scientific credentials listed? Without qualifications listed, a shadow is cast on the unbiased nature of the process. How can the public have confidence in the quality of oversight that is supposed to be provided?	Comment noted. No rule change needed.
Derig, Gene - Friends of Skagit County	299	Doesn't the promotion of WMBs for agency mitigation purposes negate the very intention of public input policy? Isn't this more of a signal by DOE that the fix is in; that the final decision is a foregone conclusion? And that this is a promise from DOE to the developer that he/she can sell bank credits? How can anyone, looking at the process, come to any conclusion other than that the DOE definitely appears to be promoting WMBs?	The authorizing statute outlines public policy as determined by the Legislature. See section RCW 90.84.005 which articulates the State's policy supporting wetland mitigation banking as an appropriate tool for providing compensatory mitigation. The rule contains extensive safeguards to reduce the risk of bank failure. The rule does not provide any guarantees that a mitigation bank sponsor will be able to sell all of their credits. No rule change needed.
Derig, Gene - Friends of Skagit County	300	What credible studies regarding outcomes, not predictions, has DOE staff enlisted in their efforts to work through this rule? Where is the data to convince the public taking part in these proceedings that WMBs have a success rate superior to that of a flip of a coin?	We assembled a citation list that identifies the resources the department used during the development of the rule. The Final Citation List can be requested through the Shorelands and Environmental Assistance Program for the rule. In addition, a citation list is contained within the Final EIS. No rule change needed.
Elliot, Ian - Citizen	301	I think that the department needs to carefully assess the rules that they put out for developers of wetland mitigation banking. So, they can be done certainly and it can be done so that people aren't out there spinning their wheels and spending money and can ultimately come up with some success.	Ecology agrees. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Freethy, Diane - Skagit Citizen's Alliance for Rural Preservation	302	<i>Environmental Protection Agency</i> is working to study mitigation deficiencies and provide alternative solutions. Ecology should put the <i>Draft Rule</i> on the back burner until EPA publishes its findings.	State Legislature (RCW 90.84) stipulates that Ecology must establish a rule for wetland mitigation bank certifications. EPA and the US Army Corps of Engineers approved the federal mitigation rule in April 2008. The federal rule identifies wetland banking as an important option for mitigation. This rule is consistent with the federal rule. No rule change needed.
Freethy, Diane - Skagit Citizen's Alliance for Rural Preservation	303	We feel the <i>Draft Rule</i> not only fails to serve the best interests of Washington State citizens overall, it has a particularly deleterious effect on the people of Skagit County. Until wetland mitigation banking's anticipated benefits are shown to outweigh the food producing qualities of Skagit Valley farmland, we believe WMBs should not be permitted in our County. We respectfully request that Skagit County be declared exempt from the <i>Draft Rule</i> and related <i>Pilot Projects</i> .	Each local jurisdiction may approve or deny certifications for banks proposed within their jurisdiction. Decisions on allowable land uses are made at the local level. No rule change needed.
Gehret, Kathryn - Perkins Coie	304	DOE should delay all pending bank certifications until the final rule is adopted. DOE should discontinue the certification process under the pilot rule at this time and require bank instruments currently under review to conform to the provisions of the final rule when it is adopted.	The state will continue to operate and certify banks under the pilot program until rule adoption. Banks approved after the effective date of the rule will be required to meet the rule standards. No rule change needed.
Glade, Tom - Evergreen Islands	305	A major flaw in WMB's is Washington State's and the Corps of Engineers' inability to enforce public policy.	Thank you for your comment. Comment noted. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Gleason, Eric - Skykomish Habitat	306	WAC 173-700-700 through 701 Roles and Responsibilities. If adopted by reference, the Federal Rules provide roles and responsibilities sections that should be maintained, and generally applied to the department consistent with its role as co-chair of the IRT. However, elimination of the roles of the Sponsor and other IRT members suggests a two party agreement in developing (only) a “department-approved” Instrument. In order for a bank to be eligible to provide full regulatory benefits, the roles and responsibilities need to be defined based on their inter-agency relationships to the overall IRT process.	The rule specifies actions by the department. The department cannot defer decision-making to other agencies. The rule outlines that the department will work with an IRT, but that the department is the decision-maker for terms of the state certification. The language in the state rule mirrors the federal role of the lead agency, but replaces the Corps with the department as appropriate. The language does not limit who can be signatories to the draft bank instrument. No rule change needed.
Gleason, Eric - Skykomish Habitat	307	WAC 173-700-602 through 173-700-604. We suggest separating Compliance with Remedial Action from default provisions, and adding a new section dedicated to Default. Sponsor should have the ability to respond to requests for remedial action (generally section 602 (1-3), and in the event Sponsor does not comply, the Sponsor shall be found to be in default. Generally speaking, a notice of noncompliance should be sent after adaptive management has failed to meet performance standards.	Section 173-700-601 has been revised to reflect that sponsors may first implement adaptive management actions prior to the department requiring remedial actions.
Good, Randy - Cattleman's Association	308	The proposed DOE language will have drastic effects on required drainage and flood control projects throughout Skagit County requiring another bureaucratic hurdle making flood control drainage projects even more cost prohibitive. This proposed language will require our Henson Creek flood control zone to pay up-front an enormous cost for mitigation and leave no money to do a project.	The rule does not address or set any requirements for specific development or flood control projects. The development of a wetland bank and the decision to use bank credits for compensatory mitigation is voluntary. This rule does not require that mitigation be done in advance of project impacts. The rule only applies to wetland mitigation banks. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Good, Randy - Cattleman's Association	309	This wetland mitigation rule language needs to be dropped. The whole wetland mitigation program needs to be dropped.	The State Legislature directed Ecology to develop a certification rule for wetland mitigation banks (RCW 90.84). The legislature also put into statute the state's policy to support wetland banking as a valuable tool for compensatory mitigation. No rule change needed.
Good, Randy - Cattleman's Association	310	True science proves man-made wetland banks function at mediocrity, are not needed, will ruin thousands of acres of farmland, and will hurt fish populations. Can our future generations afford this loss due to Department of Ecology's and Tribes' financial gains?	Ecology disagrees. The rule includes several safeguards to ensure that banks are successful. The rule contains criteria and considerations for determining whether a proposed bank is ecologically appropriate and sustainable (WAC 173-700-212). No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	311	A mitigation bank should improve the quality of mitigation.	Ecology agrees. The rule includes criteria and considerations to emphasize that bank siting and design should be consistent with and support watershed restoration priorities and goals. The rule contains several safeguards to ensure the success of wetland mitigation banks. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	312	A mitigation bank should limit decision-making to watershed entities with jurisdiction (including WDOE and the Corps). Affected tribe(s) must be engaged in and concur in decision-making (including mitigation priorities, sites, and the decision to conduct off-site mitigation).	This rule does not address or set requirements for other processes regulating wetland protection and impacts. Decisions on whether to allow off-site mitigation are determined through these other processes and is beyond the scope of this rule. Affected Tribes are invited to participate on the IRT for individual banks. Through participation in the IRT process, affected tribes can be engaged in decision-making on the terms of a bank's certification. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Graves, Gary - NW Indian Fisheries Commission	313	A mitigation bank should have the eligible/type of impacts to be mitigated would be limited to those that are tribally-approved.	This rule does not address or set requirements for other processes regulating wetland protection and impacts. Decisions on whether to allow a specific mitigation type are made through these other processes and is beyond the scope of this rule to dictate how decisions regarding wetland impacts will be made. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	314	A mitigation bank should not inhibit the tribes' ability to interact with federal agencies on permit mitigation issues.	This rule does not affect tribes' ability to interact with federal agencies on permitting and mitigation issues. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	315	A mitigation bank should have accountable contract administration that is developed within the watershed, either with a tribe or another approved entity.	Ecology is not clear on your comment. The contract associated with wetland mitigation banking is the bank instrument. These instruments are developed for individual banks by the IRT and bank sponsor. Tribes are invited to participate on the IRT and become a signatory to the bank instrument. No rule change needed.
Graves, Gary - NW Indian Fisheries Commission	316	The mitigation banking program must not facilitate impacts that ultimately prevent achievement of the level of watershed restoration needed to provide treaty fisheries.	Existing laws for wetland protection include but are not limited to: the federal Clean Water Act, the state Water Pollution Control Act, and local land use regulations and critical areas ordinances. These have regulatory processes for reviewing and denying or approving requests that will affect wetlands. This rule does not address or change these other rules or regulatory processes for authorizing impacts to wetlands. Wetland banking does not diminish the need to avoid and minimize impacts to wetlands. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Graves, Gary - NW Indian Fisheries Commission	317	<p>The Commission's member tribes have important roles in assuring that mitigation activities are consistent with and do not undermine tribal fish and wildlife restoration goals. Decisions regarding service areas, ecological design incentives (proposed WAC 173-700-300); wetland credit methods, rates, and exceptions (proposed WAC 173-700-312 through 321); remedial actions (proposed WAC 173-700-600 through 602) should be made with the concurrence of affected tribes. Due to their unique treaty-secured interests and roles within watersheds, affected tribes should be accorded the same participation rights as signatories, (should include the right to receive "as-builts" and monitoring reports. Affected tribes should also be able to review a bank's credit/debit ledger) (proposed WAC 173-700-701), regardless of whether a tribe chooses to be an actual "signatory".</p>	<p>The rule does not prohibit the department or bank sponsors from submitting "as-builts" or monitoring reports to Tribes or other interested parties. Tribes are invited and encouraged to participate on the IRT for individual banks. Tribes, agencies and the public are all able to view bank ledgers. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Graves, Gary - NW Indian Fisheries Commission	318	<p>The proposed rule appears to confuse mitigation and restoration. An example of where the proposed rule appears to confuse mitigation and restoration is contained in proposed WAC 173-700-211(3). It provides that a prospectus must contain "a statement of how the bank meets any watershed restoration needs..." (see also proposed WAC 173-700-222(4)). Again, by definition, a mitigation bank does not restore; it mitigates. At best, it nets out impacts. What the rule should require of proposed bankers, instead, is a demonstration of how the proposed bank will neither impair, limit, or hinder achievement of watershed restoration goals. A bank that proposes to restore habitat that is very limited (and consequently of high value) with a given watershed may be taking habitat that is needed for watershed restoration and allocating it to mitigation of future impacts. In such a situation, the bank would be impairing watershed restoration goals and the bank should not be certified.</p>	<p>The term "restoration" in the rule refers to activities which restore wetland conditions to a site where they formerly existed. Mitigation projects may restore wetlands in addition to rehabilitating, enhancing establishing or preserving wetlands. This rule does not address non-regulatory restoration activities. If a bank proposes to restore ecosystems that are needed in a watershed, the department views that as a positive outcome. The department wishes to encourage banks that restore watershed processes and contribute to the achievement of watershed goals, rather than banks which simply don't hinder achievement of watershed goals [173-700-100(4)(d) and 173-700-300]. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Graves, Gary - NW Indian Fisheries Commission	319	The proposed rule confuses restoration and mitigation in section 173-700-300. It is unclear how a bank can "restore" critical watershed processes when its entire purpose is to provide appropriate mitigation for future impacts. Section 173-700-302 (evaluating service area size on the basis of the degree to which a proposed bank would "restore" processes within the watershed. Section 173-700-314 degree to which bank restores ecological processes previously altered by human activity in a watershed. Section 173-700-500 encouraging local agencies to use mitigation banks as tools for implementing restoration plans). Mitigation banks are for mitigation and provisions need to be included to make sure that the mitigation actions being implemented by banks do not interfere with restoration plans being implemented by others.	The design and construction of a wetland bank can restore processes which have been impaired. Habitats and processes can be restored by removing alterations that inhibit or change watershed processes. The rule emphasizes restoring watershed processes in order to ensure that bank sites are sustainable on the landscape. Watershed processes drive ecosystem structure and function and are critical considerations in the evaluation of how well a wetland bank will function and remain on the landscape. The rule requires that sponsors evaluate the effect of their proposal on adjacent and nearby land uses. No rule change needed.
Heinrich, Mary - Ag Prospects	320	We are disappointed to find that this proposed final rule still allows the siting of wetland mitigation banks on agricultural soils of long-term commercial significance. This is in direct opposition to mandates set forth in the state's Growth Management Act.	Ecology disagrees. "The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. No rule change needed.
Heinrich, Mary - Ag Prospects	321	DOE and federal agencies are also ignoring the federal Farmland Protection Policy Act for a mandatory review of the effects of conversion of farmland to nonagricultural use.	The US Army Corps is the regulatory agency which would address this issue. The state wetland mitigation banking rule is consistent with the federal compensatory mitigation rules on banking. No rule change needed.
Heinrich, Mary - Ag Prospects	322	This rule should set new standards to meet the increased expectations in ecological and spatial performance you say will be created by the use of mitigation banks.	Ecology believes that the rule contains and requires sufficient standards. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Heinrich, Mary - Ag Prospects	323	This rule lacks any standards which will increase the performance of these facilities beyond that expected from on-site and individual mitigation projects.	Ecology disagrees. The rule contains several safeguards against bank failures including gradual release of credits based on performance, financial assurances, suspension of credits for non-compliance and perpetual protection of the bank site. No rule change needed.
Heinrich, Mary - Ag Prospects	324	Representatives from the Department admitted at the Public Hearing in Skagit County on April 15, 2009, that the draft rule lacked a process to reject an application. Yet the Department issued a Request for Applications after recognizing this program fault, and for applications which would then come under the regulations for pilot programs, which allow an application to avoid performance up to rule standards. We wonder why this occurred and whether the Department has slipped into the role of advocate rather than regulator. The lack of measurable or delineated standards in the proposed rule seems to reflect that role.	Ecology disagrees that the rule does not contain adequate standards for wetland mitigation banks. To address the issue raised during the pilot, Ecology added language consistent with the federal rule on compensatory wetland mitigation, 33 CFR Parts 325 and 332. The revised text in WAC 173-700-212(8)(b) provides an avenue to deny applications where the department determines that the proposed bank is not ecologically appropriate or able to provide adequate compensation for unavoidable wetland impacts. Performance standards will be contained within the instrument, which goes through the department and IRT review process. No rule change needed.
Heinrich, Mary - Ag Prospects	325	We suggest that it [ecosystem services] be inserted as one of the decision-making factors in the review and permitting process.	The ability of a proposed bank site to provide wetland functions and restore watershed processes is evaluated during the certification process. WAC 173-700-314 (1) - (8) include many ecosystem services that the department considers when determining credits. The department considers wetland functions and values as equivalent to some ecosystem services. Other ecosystem services provided by a bank and regulated under other authorities may also be included in a bank's crediting. [WAC 173-700-310] The EIS Section 2.2.1 discusses what the watershed approach and watershed processes are. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Hulbert, Mike - Citizen	326	It kills me to see what's going on in the one bank where they are aggravating all the dirt out and what long term effects that's going to have. I would like to put a moratorium on any future banks until we can analyze how these banks perform...long term effects, long term liabilities to neighboring lands around them.	The statute for wetland banking (90.84 RCW) articulates the intent of the legislature to support wetland banking as state policy. The potential effects of specific bank proposals are evaluated during the certification process. No rule change needed.
Jackson , Barbara - Citizen	327	As we face water crises globally, too much water from global warming and not enough water where it's gone - where it's disappearing underground. We must do this kind of work so carefully that we do not put ourselves more in jeopardy. It's not we who are alive now but for generations to come. And everything we do in terms of making decisions kind of sets a precedence as to how we will proceed in the future. I am just asking us to be very, very careful as we proceed, it sounds like you are learning and I thank you for all you are doing. We need to learn even more.	Thank you for your comment. No rule change needed.
Johnson, Nancy - Citizen	328	With the current economic problems, the possibility of future abandonment of WMBs should the credits not sell is another worry. I would not want to see an abandoned WMB site full of Japanese Knotweed or Scotch Broom.	Banks are required to post financial assurance for site management both during the operation of the bank and then after the bank has closed. In the event of an early closure (abandonment) of a bank, the department can access the financial assurances and direct the long term site steward to perform needed maintenance actions on the site. EIS Section 3.3.1 discusses the financial assurance requirements established in the rule for bank projects. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
General continued			
McRae, Janet - Citizen	329	When your funds are cut, who is going to monitor these banks? Will the fox then be watching the hen house?	The department is responsible for tracking and verifying the attainment of performance standards at certified wetland banks. Once certification is complete, we have a compliance team which will ensure that banks are meeting the requirements specified in their instrument. No rule change needed.
Miles, Betty - Citizen	330	I urge that wetland mitigation banks should be rejected wholeheartedly. This is an asinine concept that benefits ONLY the developers. I am fortunate to have wetlands on my property and I assure you they did not develop overnight. Each wetland is unique in its own way and cannot be replicated. Skagit County CAN refuse to permit wetland banks and they would be very wise to do so.	Thank you for your comment. The Wetlands Mitigation Banking law outlines public policy as determined by the Legislature. See RCW 90.84.005 which articulates the State's policy supporting wetland mitigation banking as an appropriate tool for providing compensatory mitigation. Each local jurisdiction may approve or deny certifications for banks proposed within their jurisdiction. Decisions on allowable land uses are made at the local level. No rule change needed.
Rawls, N. Bruce - Spokane County, Utilities Div.	331	We appreciate the purpose of wetland mitigation and how mitigation banks can be used as a tool in the process. The draft chapter seems to provide a logical, straight forward approach for development and use.	Thank you for your comment. No rule change needed.
Rockefeller, Sen. Phil - 23rd Legislative District	332	I urge the Department explore ways to ensure that the rules hold accountable both developers, as well as those agencies purchasing credits, for the effectiveness and preservation of wetland bank habitat.	Ecology agrees that there must be a party responsible for the success of the mitigation bank. Wetland banking differs from individual permittee-responsible mitigation in that it is the wetland banker and not the permittee who is responsible for the success of the mitigation bank. To ensure that banks are successful, Ecology has included several safeguards in the rule. These include gradual release of credits based on performance, financial assurances, suspension of credits for non-compliance and perpetual protection and management of the bank site. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Rockefeller, Sen. Phil - 23rd Legislative District	333	I am convinced that the significant investment of taxpayer dollars to qualify wetland banks to serve as replacements for indigenous wetlands demands that we sustain the value of such investments. So, too, does consideration of the need for sustainability of habitats that are intended to mitigate for the loss of natural ecosystem functions and services.	Ecology agrees. The site selection criteria are designed to ensure that sites for banks are appropriate for providing sustainable restoration projects. Bank sponsors are required to set aside funding for the long term management of the site and identify the long term steward for the bank site. The rule also requires permanent protection of the site. No rule change needed.
Sutton, Carolyn - Citizen	334	Why doesn't DOE strengthen the State Environmental Policy Act asking local governments to strengthen THEIR critical areas BEFORE developing any off-site wetland mitigation banking.	SEPA is addressed under other rules. Local land use regulations fall under the Growth Management Act. Cht. 90.84 RCW only authorizes establishment of a wetland mitigation banks rule. No rule change needed.
Thomas, Jennifer - Parametrix	335	I think these rules should apply to all mitigation. I think all mitigation should be in the ground before the impact.	RCW 90.84 only directs the department to adopt a rule for wetland bank certification. In section 90.84.020, the law specifically states that it does not provide authorization to develop rules or guidance for other types of mitigation. No rule change needed.
Thomas, Jennifer - Parametrix	336	I am concerned that they [banks] won't have great applicability for local governments.	We currently provide presentations to local governments to show the benefits of creating wetland mitigation banks to provide mitigation prior to wetland impacts occurring. The presentations also explain how to authorize the use of credits to offset authorized wetland losses. The department has also developed example language for critical area ordinances regarding wetland banks. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Thomas, Jennifer - Parametrix	337	<p>I would like it to be clear that I support that Washington State limits the amount of wetland fill permitted on an annual basis and think this should not change as a result of adopting wetland mitigation banking as a 'tool in the mitigation toolbox'. My concern is that unlike the federal rule, the state's proposed rule fails to provide a regulatory framework or context within which to understand how wetland mitigation banking relates to the standard compensatory mitigation process. This comprehensive mitigation framework is critical to make it clear that wetland mitigation banking is just one of several tools available. To set rules only for banks, and not for other mitigation options, establishes at least the perception of a very un-even playing field; one in which the bankers will be held to high standards above and beyond the standards for other mitigation options. As a result, I am concerned that most projects will use the standard sequencing process, and standard mitigation ratios per local critical areas ordinances. I'm concerned that banks simply won't be used.</p>	<p>The state Legislature only authorized the department to adopt a rule for a wetland bank certification program. In section 90.84.020, the law specifically states that it does not provide authorization to develop rules or guidance for other types of mitigation. No rule change needed.</p>
Thomas, Jennifer - Parametrix	338	<p>If the private sector incentives have been removed and the public sector has tried, and failed to implement banks, who would establish banks?</p>	<p>Ecology believes the credit rates provided within the rule are sufficient incentive for both public and private bank sponsors. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Thomas, Jennifer - Parametrix	339	<p>I am concerned that the promulgation of these proposed rules, in the absence of a broader regulatory context for wetland mitigation (and mitigation generally) will result in the following: 1) Failure to implement any banks; 2) Continuation of the existing compensatory mitigation process - project-by-project - which is ill-suited to a comprehensive, watershed-based approach to mitigation coordinated with watershed planning and broader ecosystem restoration goals; 3) The rise of the In-Lieu Fee program - simply because by being less clearly defined (or not defined at the state or local level) it becomes more appealing.</p>	<p>Wetland mitigation banking is one option to mitigate for authorized unavoidable impacts to wetlands, essentially one 'tool in the mitigation toolbox'. RCW 90.84 directs the department to adopt a rule only for wetland bank certification. In section 90.84.020, the law specifically states that it does not provide authorization to develop rules or guidance for other types of mitigation. The rule does not address regulatory processes addressing wetland impacts. No rule change needed.</p>
Thomas, Jennifer - Parametrix	340	<p>If promulgated, these rules should have direct links to the good work that you have been doing, such as the Mitigation that Works group, the watershed characterization process, and the guidance on siting mitigation within a watershed context. All of these resources would help in providing a broader perspective and context within which wetland mitigation banking could be implemented.</p>	<p>Ecology will continue to provide guidance to promote better mitigation as a whole. The rule does include language emphasizing consideration of watershed processes and encourages banks to be designed to restore watershed processes. A definition of a watershed approach to mitigation is included in the rule (WAC 173-700-104). No rule change needed.</p>
Thomas, Jennifer - Parametrix	341	<p>I think I counted 38 pages on bank establishment, and 2 pages on bank use. In contrast the federal rules prioritize use of banks.</p>	<p>The federal rules do have language prioritizing the use of wetland banks. The legislature did not give Ecology authority to adopt into rule a preference for banks over other mitigation options. However, we currently provide presentations to local governments to show the benefits of wetland mitigation banks and how credits can be used to compensate for authorized wetland losses. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Woodward, Victor - Habitat Bank	342	Providing an updated set of rules to improve the process of establishing successful mitigation banks, demonstrating a commitment to large scale mitigation projects and leadership on improving wetland mitigation processes for all jurisdictions in WA are important benefits to this process.	Ecology agrees. No rule change needed.
Woodward, Victor - Habitat Bank	343	Ecology must look at the big picture and take responsibility for creating a process that supports the best available science and best solution for mitigation of unavoidable impacts to critical areas in Washington. This process has become a vehicle for special interests to put major hurdles and add additional cost to the process of permitting wetland banks that will hurt the program in the long term.	Thank you for your comment. No rule change needed.
Woodward, Victor - Habitat Bank	344	These rules increase the initial and up front cost of proposing, permitting and constructing a mitigation bank. At the same time they increase the risk that a proposal will be rejected since they give opponents many more opportunities to tie up, delay, harass, litigate etc. proposals that really make sense.	The certification process is consistent with the federal wetland mitigation bank review and approval process. It is a rigorous process designed to minimize the potential for bank failures. By providing more detailed guidance on our requirements, Ecology tried to clarify agency expectations for applicants. There are two public processes where the agencies and bank sponsor can find out what concerns may need to be addressed prior to bank certification. As with any permit process, the rule provides an opportunity to appeal the certification decision. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Xaver, Andrea - Citizen	345	Who will be keeping track of WMBs? What will they do if something is found to be wrong? How long will it take to correct anything? Who will be doing any long-term protection? Will government agencies have conflicting control/advice? Where does the money come from and is it guaranteed - if the sponsor leaves, and easement holders go bankrupt, what then?	The IRT co-chairs and signatories will continue to track wetland mitigation banks. If items are found to be wrong, the IRT will notify the sponsor. Upon notice, the sponsor must implement adaptive management measures. The length of time for correction will depend on what is found wrong on the bank site. Banks are required to be permanently protected. Long-term protection conditions are specified within the bank's conservation easement. The IRT strives for consensus; however, Ecology (as the IRT chair) will make the final decision, as specified in WAC 173-700-201. A bank sponsor must post financial assurances on the bank. If the sponsor leaves, Ecology may access these funds to complete restoration of the bank site in order to make sure that any wetland impacts that have used credits will be adequately replaced. EIS Section 3.3.2 discusses site-specific monitoring, including long term management. EIS Section 3.3.1 discusses financial assurance requirements. No rule change needed.
Xaver, Andrea - Citizen	346	Who in DOE is mindful of the wildlife that will be eradicated in one wetland so that credits can be sold from one that is created? Will someone come in and move the wildlife from one place to the other. Frogs and amphibians are facing mass extinction, from a fungus, around the globe - rampant in the U.S. - who in DOE cares if there are enough places for them to re-establish and survive? I would hope that DOE takes into consideration wildlife when they are doing these wetland mitigation banks.	This rule does not address wetland permitting as it relates to the determination of whether wetland impacts are unavoidable and are authorized. The authorizations to affect wetlands are found under different laws such as the federal (Clean Water Act), State (Cht. 90.48 - state water pollution control act) and local land use regulations. The rule includes language concerning impacts to wildlife from bank construction. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
General continued			
Xaver, Andrea - Citizen	347	How can WMBs for the public good be compared to WMBs for private gain? Why should Skagit County or Washington State have to lose any of its resources to enable the increased financial gain of a developer? How is personal financial gain "unavoidable?" Please explain "unavoidable permitted losses" as they relate to private gain.	Thank you for your comment. Most authorized unavoidable wetland impacts are associated with some form of development which usually has private financial gain associated with it. The determinations of whether specific wetland impacts are authorized are made under other laws and rules. No rule change needed.
Xaver, Andrea - Citizen	348	We should keep all our natural, effective wetlands we have, instead of trying to lump them together.	The rule establishes the criteria for wetland mitigation banks and does not authorize or permit wetland impacts. This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Ecology believes that consolidating mitigation for small impacts at one site will provide greater benefits and ecological success than small scattered mitigation sites that may not be sustainable and do not have opportunity to contribute to watershed functioning. No rule change needed.
Xaver, Andrea - Citizen	349	WMBs for the public good (such as bridges or highways) is one thing; private gain is totally another. DOE is helping to create a monopoly within a county. A WMB could be so big that no others are "necessary." So, likely one private entity gets rich while leaving the county's natural resources at high risk.	As per legislative directive, the rule applies to both private and public banks. The rule does not limit the number of banks allowed in a county. Some counties may have only one bank others may have several. No rule change needed.
Growth management act (GMA)			
Bynum, Ellen - Friends of Skagit County	350	Wetland mitigation banking represents one symptom of a failed planning system. GMA and local planning departments have at their disposal, a range of ways to protect wetlands without using wetland banks.	Ecology agrees that local governments have their own regulations regarding wetlands. When impacts to wetlands are authorized, Ecology finds that wetland mitigation banks are one way to compensate for those losses. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Growth management act (GMA) continued			
Bynum, Ellen - Friends of Skagit County	351	Counties have identified and protected wetlands in the planning process. State agencies that advocate for wetland mitigation banks usurp the local government's decision-making authority for land use planning. The schedule for rule-making does not require at the beginning, consultation with local governments as to how the rule might affect planning, budgets or other local government activities.	Local governments have authority for land use regulations. This rule does not affect local authority for land use decisions. The certification process requires that the department send the local government notice of a proposed bank at the prospectus stage, as specified in 173-700-212. If the local government determines that a bank is not consistent with the applicable land use and zoning regulations then they can deny certification and the state will not certify the bank, as specified in 173-700-230. Local governments have been informed and updated on the pilot rule and throughout the rulemaking process. EIS Section 3.2.2 discusses the role of local governments in the approval of bank projects. No rule change needed.
Bynum, Ellen - Friends of Skagit County	352	It appears to violate the intent of the rule-making process to implement a rule after land use changes that appear to violate GMA and other state laws are finished.	We are not clear as to the intent of your comment. In response to your concern that the rule violates GMA: "The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. Neither Ecology or the department of Commerce found any conflicts between the rule and GMA. No rule change needed.
Bynum, Ellen - Friends of Skagit County	353	There may be other places where you are violating growth management act and you don't even know it.	We did not find any violations of the Growth Management Act in the proposed rule. Washington State Department of Commerce was consulted and confirmed Ecology's determination that the rule does not violate the Growth Management Act. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Growth management act (GMA) continued			
de Yonge, John - Wise Use Movement	354	They fail to protect our remaining existing wetlands. They fail to support the goals and policies of the GMA or advance the goal of net increase in wetland acreage and functions.	Ecology disagrees. The rules provide one option for mitigating impacts that may be caused by development. These impacts may be due to the focusing of development density in Urban Growth Areas. This is consistent with the goals and policies of the Growth Management Act (GMA). The substantive provisions of the GMA do not apply to Ecology certification of a wetlands mitigation bank. The GMA applies to the land use planning and regulations governing the siting of a wetland bank. This rule does not address whether a specific wetland impact is allowable or not. Those determinations are made under other state, federal and local regulations. This rule only applies to wetland mitigation banks as a form of compensatory mitigation. No rule change needed.
Heinricht, Mary - Ag Prospects	355	This rule is not consistent with the Growth Management Act.	Ecology disagrees. "The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. The department of Commerce, the agency responsible for implementation of the Growth Management Act, did not find any inconsistencies between the rule and the GMA. No rule change needed.
Johnson, Nancy - Citizen	356	I feel that WMB's will encourage sprawl - a violation of the Growth Management Act.	The presence of a certified wetland bank does not change or reduce existing wetland protection rules. Local governments are responsible for planning for and managing growth under the State Growth Management Act. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Growth management act (GMA) continued			
Wesen, Lyle - Citizen	357	This mitigation bank almost seems like a complete conflict with the growth management act because the growth management act said you are supposed to preserve farmland.	Thank you for your comment. Decisions on whether a wetland bank conflicts with land use regulations are made by the applicable local government. "The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply", cited as: AGO 2008 No. 1. No rule change needed.
MISC non-rule comments			
Barrentine, Marianne - Spokane County, Div of Engineering and Roads	358	Consider waiving the processing and review fees for public agencies – these projects provide overall public benefit, e.g. water storage and water quality improvements and reduced cost for public transportation project mitigation. Additional cost to the state could be justified with greater public benefit than multiple on-site mitigation areas.	Thank you for your comment. The draft rule does not contain text regarding processing fees for certification. No rule change needed.
Barrentine, Marianne - Spokane County, Div of Engineering and Roads	359	Consider reduced processing and review fees for public and private projects in Eastern WA as only smaller sites are going to be financially, and in many cases, ecologically viable. Overall economic viability of wetland banks in Eastern Washington even larger ones is now borderline at best.	The draft rule does not contain text regarding processing fees for certification. No rule change needed.
Brevoort, Doris - Citizen	360	What we really need to do is look at the building standards for development and require the highest standards of sustainable development in the first place, good land use.	Building standards are determined on the local level and are not addressed with this rule. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
MISC non-rule comments continued			
Byron, Arnold - Citizen	361	We have not taken into consideration the idea that it's a human element that needs to curtail its passions and it's wants in order to allow nature to take priority.	Thank you for your comment. Comment noted. No rule change needed.
Gerard, Mildred - Citizen	362	DOE spent \$1M on a PUD waterline that no one has hooked up to. Waste of taxpayers dollars.	Thank you for your comment. Comment noted. No rule change needed.
Glade, Tom - President, Evergreen Islands	363	Does God allow WMBs in heaven?	Comment noted. No rule change needed.
Heinricht, Mary - Ag Prospects	364	Where will the food come from for future generations?	Comment noted. No rule change needed.
Hughs-Hayton, Susan - Citizen	365	I read today there are fewer than 90,000 acres in ag production in our valley. The two proposed mitigation banks will permanently destroy 1,100 acres of prime farm ground. If my math is right, that is 1/90 of all that we have left. What kind of an answer to any problem is that.	Thank you for your comment. This comment is specific to a mitigation banking project, and not pertaining to the rule language. No rule change needed.
Johnson, Nancy - Citizen	366	I strongly feel that I need to share my concerns in reference to the proposed Wetland Mitigation Banks (WMBs) under consideration at this time. I think that there are too many unknowns to make these projects viable. My major concerns are for the loss of farmland- not just that for the banking area but for the land paved over through purchase of credits, and for wildlife habitat destruction that wouldn't occur without WMB credits available.	This comment is specific to a mitigation banking project. This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
MISC non-rule comments continued			
Johnson, Nancy - Citizen	367	I wonder if this is the best use of Department of Ecology's and Army Corps' dollars at this critical time. This may be your only opportunity to realize that our environment is in peril and that we cannot continue to expend our limited resources to pave over habitat and farmland so that a few individuals can profit while ordinary citizens suffer the consequences.	Wetlands are essential to our environment. For that reason, Ecology believes that wetland mitigation banking provides a good option for mitigation. Wetland impacts due to development are addressed under other regulatory programs not within the wetland mitigation banking rule. No rule change needed.
Wesen, Lyle - Citizen	368	Why is preserving farmland so important? If we don't have enough agriculture in the county to maintain our service industry that goes along with it, the tractor dealers, the fuel dealers, and all of this type of stuff - you pretty soon don't have farming.	Thank you for your comment. No rule change needed.
Xaver, Andrea - Citizen	369	How many natural, effective wetlands exist in Skagit County and in Washington? How can you have a rule without knowing what it might effect?	We do not have the number of "natural, effective wetlands" in Skagit County. No rule change needed.
Xaver, Andrea - Citizen	370	Who is concerned about contaminated water affecting the wetlands?	Comment noted. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
MISC non-rule comments continued			
Xaver, Andrea - Citizen	371	DOE gave a quarter million dollar grant to the County to study the feasibility of dumping Big Lake's partially treated effluent into Nookachamps Creek. This creek will potentially run into these banks. This water should be clean, but 'no' it will have pharmaceuticals in this water. Right now it's pumped to the Skagit River, but its set to go into Nookachamps Creek. If we're trying to protect the environment; thus, the department, and we are trying to protect the animals within, why are we doing something of this nature.	Comment noted. No rule change needed.
Opposes rule			
de Yonge, John - Wise Use Movement	372	The Wise Use Movement is strongly opposed to Ecology certifying banks in the state in the absence of any certification regulations. Opposed to the adoption of these rules. We request that Ecology decertify all existing banks.	Ecology was operating under an approved Pilot Program which allowed certification of bank projects. This current rule addresses those projects that would be certified after final rule adoption. No rule change needed.
Glade, Tom - Evergreen Islands	373	Evergreen Islands opposes wetland mitigation banks in general.	Thank you for your comment. No rule change needed.
Mower, John - Citizen	374	I remain steadfastly opposed to wetland mitigation banking. There is no way to justify the filling of wetlands for any reason.	Thank you for your comment. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS)			
Bynum, Ellen - Friends of Skagit County	375	In considering the number of small businesses affected by the pilot rule project, DOE has only addressed developers of wetland mitigation banks. The intent of the legislature was to determine the effect of the project on any small business.	RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigation bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. Language in the Revised SBEIS has been edited to clarify this issue.

Commenter - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Bynum, Ellen - Friends of Skagit County	376	Section 3: Construction and Financial Assurance does not mention or address the risk management ratios of failed banks due to flooding, collapse of steep slopes or other catastrophic events which may be increased due to the bank.	<p>The rule contains language and requirements pertaining to maintenance of wetland bank functionality over time. Initial site information and the wetland bank prospectus required contribute to an understanding of the risks mentioned in your comment, as well as any other reasons the prospective bank may be at risk of failure or reduced function. As part of the certification process, the riskiness of wetland bank projects is considered, and the rule allows for appropriate requirements such as additional monitoring or higher financial assurance, as well as authority to access financial assurance funds to prevent loss of wetland functions. The information about adjacent land uses, buffer requirements, and considerations of the impact of adjacent properties to a prospective bank, also serves to protect surrounding properties and land uses, by including these adjacent properties in the overall certification decision. The rule requires banks be constructed in such a way that they do not damage nearby agriculture. The rule also mitigates risk and any damages to nearby properties due to wetland failures, by requiring additional preventative, monitoring, and financial assurance measures on higher risk projects. No change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Bynum, Ellen - Friends of Skagit County	377	While the media size may be accurate for the pilot projects, there is no calculation of the increased cost and risk with larger banks.	Costs and risks for larger banks are reflected in both the assumption of constant costs per acre for larger banks, and in the range of commercial bank construction and maintenance costs, as reflected in credit prices surveyed in the Northwestern Division region of the Army Corps of Engineers (including areas of Washington, Oregon, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, and Missouri). Ecology believes the underlying sizes of existing commercial banks across this area is representative of the sizes of banks that may be created in the future in Washington. No change needed.
Bynum, Ellen - Friends of Skagit County	378	No estimates are provided for the cost of not filling wetlands and/or providing mitigation on-site as opposed to banks.	Providing on-site mitigation (concurrent mitigation, CM) is the baseline under existing regulation. These costs are included in estimates for the Cost-Benefit Analysis and the SBEIS. Due to limitations on the size of the SBEIS (10-pages unformatted) set by the Office of the Code Reviser, not all underlying data is able to be presented in the SBEIS, but is included in the associated Preliminary and Final Cost-Benefit Analysis documents (Ecology pub.#09-06-002 for the proposed rule). Ecology did not include calculation of the costs of not filling wetlands during development, because the choice to impact wetlands is not a compliance requirement of this rule. The rule regulates wetland mitigation banks and how credits may be used. Ecology's analysis is of rule impacts on behavior in order to comply, and the resulting costs. The rule applies after the impact has occurred and provides another option for mitigation of those impacts. No change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Bynum, Ellen - Friends of Skagit County	379	<p>The SBEIS only addresses the person owning or developing wetland mitigation banks. The SBEIS should factor in all costs and should be added to the analysis. For example, the following factors are part of the cost of developing the bank by converting farmland, but are not included in DOE's SBEIS. *long-term loss of the productivity of the farmland being converted. *Lost opportunity costs to the farmers, for at least 50 yrs into the future. *Additional cost of providing transport for food imported to replace the locally produced food, etc.</p>	<p>RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigations bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. The SBEIS analyzes only those compliance costs necessary for a wetland bank to comply with the rule -- including, but not limited to, site attributes, financial context, management, records, use of credits. The rule does not require conversion from agricultural land, of any other land use. This choice is exogenous to the rule, and land use is a consideration in the rule language determining appropriate site attributes. If an individual or business chooses to try to convert from extising land use to wetland banking, based on a perceived higher net benefit, the rule then governs compliance requirements to become certified. Language in a Revised SBEIS has been edited to clarify this issue.</p>
Bynum, Ellen - Friends of Skagit County	380	<p>In section 6, DOE did not include farmers, agricultural businesses, supporting businesses, such as insurance providers, or any other small businesses related to the Skagit farmland being converted to banks in the NAICS codes for industries it expects to be impacted by the proposed rule.</p>	<p>RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigations bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. No change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Bynum, Ellen - Friends of Skagit County	381	Section 7: DOE did not accurately estimate job losses as the jobs lost from current use of the land.	RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigations bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. The jobs impact is estimated as based on compliance costs to businesses required to comply with the rule. Language in a Revised SBEIS has been edited to clarify this issue.
Bynum, Ellen - Friends of Skagit County	382	No mention of the failure rate of wetland mitigation and banking on page 1 Mitigation Banking section in the SBEIS.	Both concurrent mitigation and wetland mitigation banking success (and therefore failure = 100% - success) rates are discussed as underlying calculations in Ecology's analyses. Due to limitations on the size of the SBEIS (10-pages unformatted) set by the Office of the Code Reviser, not all underlying data is able to be presented in the SBEIS, but is included in the associated Preliminary and Final Cost-Benefit Analysis documents (Ecology publication #09-06-002 for the proposed rule). Language in a Revised SBEIS has been edited to clarify this issue.

Committer - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Heinrich, Mary - Ag Prospects	383	We note that the SBEIS completely avoids examination of the potential impacts on existing agricultural businesses that will or may be displaced by placement of these regulatory facilities on agricultural lands of long term commercial significance.	RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigation bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. Ecology acknowledges many likely underlying cost, financial, and logistical incentives that may drive the prospective private profitability of a wetland bank versus other land use. These are the incentives faced by land owners in the choice to become a wetland bank. The conversion to another land use, however, is separate from the rule's requirements -- the rule does not necessitate it, and, in fact, includes avoiding or reducing impacts to significant agricultural land as a component in siting mitigation banks. If a landowner chooses to convert his land (or sell it for conversion) from an existing use to a more profitable use, he may also do so in the absence of the rule, based on the expected profitability over time of various land uses. Language in a Revised SBEIS has been edited to clarify this issue.

Committer - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Heinricht, Mary - Ag Prospects	384	<p>You are allowing structures that block these rivers to create hydrology for new banking facilities, yet you have not examined the effect it will have on local small agricultural businesses. The report only examines the business of wetland mitigation banking. This is an error of omission that should be corrected. The program is redistributing ecosystem services that may be vital to the long term ecological viability of the watershed and region, which will directly affect the natural resource based businesses in the region.</p>	<p>Several laws regulate in water structures. Banks are not authorized to block rivers. In water work approved has been for engineered log structures for salmon habitat. The rule requires ownership of or access to water rights as a component of the overall viability for wetland banking (citation in rule). The rule creates no new water rights or reallocation of water. RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigations bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. Language in a Revised SBEIS has been edited to clarify this issue.</p>

Commenter - Affiliation	Comment no.	Summary	Response
Small business economic impact statement (SBEIS) continued			
Shelby, Mike - Western Washington Agricultural Association	385	Both the economic impact analysis and cost benefit analysis document fail to analyze and quantify loss of farming opportunity or adverse economic impacts related to the agricultural industry affected by the incremental loss of available production farmlands that will result from projects authorized by this program. We were especially discouraged to see a specific statement in the cost benefit analysis which recognizes that “development happens in areas that are being developed, driving up land prices.” “While WMB does not allow the mitigation bank to be too far from the impact location, it is likely to be in a significantly more rural area where land is cheaper.”	RCW 19.85.040(1) states that Ecology "shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320." The SBEIS is required to consider impacts of compliance costs on those businesses required to comply with the rule. The rule regulates wetland mitigations bank certification, and how credits may be used. Therefore, wetland mitigation banks are the businesses required to comply with the rule. As reflected in the statements quoted in your comment, Ecology acknowledges many likely underlying cost, financial, and logistical incentives that may drive the prospective private profitability of a wetland bank versus other land use. These are the incentives faced by land owners in the choice to become a wetland bank. The conversion to another land use, however, is separate from the rule's requirements -- the rule does not necessitate it, and, in fact, includes avoiding or reducing impacts to significant agricultural land as a component in siting mitigation banks. If a landowner chooses to convert his land (or sell it for conversion) from an existing use to a more profitable use, he may also do so in the absence of the rule, based on the expected profitability over time of various land uses. No change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Supports Rule			
Graves, Gary - NW Indian Fisheries Commission	386	The Commission recognizes that mitigation banking provides an opportunity to significantly improve the quality of compensatory mitigation. We support that. Tribes have also recognized and encouraged mitigation bankers who are working hard to create good programs to the extent that future development impacts affecting wetlands are reasonable, necessary, and "unavoidable," mitigation banks arguably provide an effective source of compensatory mitigation.	Thank you for your comment. No rule change needed.
Pearl, Randall - Salmon Creek Watershed Council	387	Fully supports enactment of proposed rule	Thank you for your comment. No rule change needed.
Thomas, Jennifer - Parametrix	388	I generally support overall where they [the state rules] are going in terms of raising the bar, having longer monitoring periods, and really strict performance standards - that is critical to the success of mitigation overall. These are necessary and valid improvements given the failure of compensatory mitigation based on past studies.	Thank you for your comment. No rule change needed.
Watershed approach			
Graves, Gary - NW Indian Fisheries Commission	389	A mitigation bank should be watershed specific - that is, the bank is developed for a specific watershed and all key decisions are made by the relevant entities in that watershed.	Bank designs, goals and objectives are site and watershed specific. The department invites interested tribes, local governments and state and federal agencies to participate on the IRT. The department works with the IRT to develop requirements and conditions for wetland banks. No rule change needed.
Lattyak, Nolan - Citizen	390	Method should be in place so mitigation banks are placed in areas lacking guaranteed wild spaces.	The rule emphasizes using a watershed or landscape approach to locate a bank. [173-700-300] Whether or not a bank should be located in an area without other natural areas will be made on a case-by-case basis. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Watershed approach continued			
Lattyak, Nolan - Citizen	391	Mitigation banks can provide habitat in urban areas.	Ecology agrees. No rule change needed.
Wetland impacts			
Bynum, Ellen - Friends of Skagit County	392	Wetland mitigation banks are to date, scientifically unproven in replacing the ecological functions of destroyed natural wetlands.	Comment noted. No rule change needed.
Bynum, Ellen - Friends of Skagit County	393	Wetland mitigation is less than 51% successful.	The percentages quoted do not pertain to wetland mitigation banking, but to concurrent mitigation. The rule was designed to address issues raised in state and national studies on mitigation that highlight problems with mitigation. Ecology did this to avoid the types of failures seen with concurrent mitigation projects. The rule provides more safeguards than concurrent mitigation to ensure successful performance of the bank. Safeguards include gradual release of credits based on performance, financial assurances, suspension of credits for non-compliance and perpetual protection of the bank site. No rule change needed.
Bynum, Ellen - Friends of Skagit County	394	It is blatantly inaccurate to state that wetland mitigation banks "protect wetlands". DOE has provided no evidence that wetland mitigation banks can provide similar ecological values to natural wetlands. There are no scientific standards required for determining the values of the wetland replaced. The data standards for the banks are no longer than 10 years, which are not comparable to the life of natural wetlands.	Mitigation banks are required to provide data showing hydrological information to ensure successful restoration, and they must meet performance standards to demonstrate success. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
Dannhauer, Ann - Citizen	395	By providing the option of mitigating wetland destruction rather than avoiding altogether, I think they will result in the loss of wetlands. Developers may very well choose the mitigation option rather than preserving wetlands on their property. Let's halt the practice of "mitigating" wetland loss and work instead to save the ones we have.	The rule does not authorize filling of wetlands. The rule does not replace existing regulatory requirements to first avoid and minimize impacts to wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. The rule only applies to the certification and operation of wetland banks. No rule change needed.
de Yonge, John - Wise Use Movement	396	Banking is very risky because compensatory mitigation doesn't work and banks will result in larger-scale failures.	To ensure banks do not fail, Ecology has built into the rule text numerous safe guards. For example, credits are not released until specific performance standards have been met and financial assurances must be in place. Banks are monitored closely to ensure that problems are caught and addressed early. No rule change needed.
de Yonge, John - Wise Use Movement	397	Banks substitute wetland preservation or wetland creation for the loss of wetlands which may be thousands of years old.	Wetland losses are addressed under other regulatory programs. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
de Yonge, John - Wise Use Movement	398	Banking could promote impacts to wetlands through avoiding mitigation sequencing requirements.	This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. EIS Section 1.1 discusses mitigation sequencing requirements in the state through other regulations. EIS Section 2.1.1 discusses how wetland mitigation banking is not anticipated to increase the amount of wetland impacts in the state. No rule change needed.
de Yonge, John - Wise Use Movement	399	Banks could result in the net loss of wetland in some sub-basins. Use of riparian and upland areas and preservation to generate credits would result in net losses of wetland area and function.	This rule does not change existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. Use of bank credits can result in shifts of wetland area and function from one subbasin to another. For additional evaluation of how banks may move wetland resources around on the landscape see EIS Section 2.1.2. This section discusses resource tradeoffs with respect to use of wetland mitigation bank credits. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
de Yonge, John - Wise Use Movement	400	Banks will result in the loss of wetlands in urban areas	<p>This rule does not change existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. Use of bank credits can result in shifts of wetland area and function from one subbasin to another. For additional evaluation of how banks may move wetland resources around on the landscape see EIS Section 2.1.2. This section discusses resource tradeoffs with respect to use of wetland mitigation bank credits. No rule change needed.</p>
de Yonge, John - Wise Use Movement	401	Banks could result in the loss of small, isolated wetland and the replacement with large, contiguous wetlands.	<p>Wetland bank credits might be used to mitigate for impacts to isolated wetlands. This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. A wetland bank simply provides one option for offsetting wetland impacts. Without use of a bank, those losses could still be mitigated off site through existing regulatory programs. No rule change needed.</p>

Commenter - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
de Yonge, John - Wise Use Movement	402	Concerns over listed salmon species could result in banks focusing on fish benefits with resulting losses to non-fish-bearing wetlands.	Potential benefits of a proposed bank to listed species is only one consideration during the evaluation of a proposed bank site and design. The ability of a bank to support salmon recovery does not outweigh the determination on whether use of a bank provides appropriate compensation for a specific wetland impact. No rule change needed.
Derig, Gene - Friends of Skagit County	403	Numbers quoted from a wetland mitigation study. Why is DOE apparently wasting the public's time and money on considering wetlands mitigation banking as a solution for anything? Why would any undertaking with this dismal track record even be considered by DOE?	The percentages quoted do not pertain to wetland mitigation banking, but to concurrent mitigation. The rule was designed to address issues raised in state and national studies on mitigation that highlight problems with mitigation. This was done to avoid the types of failures seen with concurrent mitigation projects. The rule provides more safeguards than concurrent mitigation to ensure successful performance. Safeguards include gradual release of credits based on performance, financial assurances, suspension of credits for non-compliance and perpetual protection of the bank site. No rule change needed.
Freethy, Diane - Skagit Citizen's Alliance for Rural Preservation	404	The <i>Draft Rule</i> permits destruction of natural wetlands.	The rule establishes the criteria for wetland mitigation banks. This rule does not authorize or regulate wetland impacts. This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. No rule change needed.

Commenter - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
Freethy, Diane - Skagit Citizen's Alliance for Rural Preservation	405	Ecology's draft rule permits wetland destruction.	Ecology disagrees. Wetland mitigation banking provides one tool to compensate for authorized unavoidable wetland impacts. This rule does not address other processes for regulating wetland impacts. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state Water Pollution Control Act) and local land use and critical area regulations. No rule change needed.
Gerard, Mildred - Citizen	406	Wetlands should not be fooled with.	Several laws and rules exist for protecting wetlands. These have regulatory processes for reviewing and denying or approving requests that will affect wetlands. This rule does not address these other rules or regulatory processes for authorizing impacts to wetlands. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state Water Pollution Control Act) and local land use and critical area regulations. No rule change needed.
Glade, Tom - President, Evergreen Islands	407	Why did Ecology bring us this tool that enables destruction of our natural wetlands and promotes development instead of something that protects this wondrous place [Skagit County]?	This rule does not address other processes for regulating wetland impacts. In section 90.84.020 WAC, the law specifically states that it does not provide new authorization for developing new wetland regulations or developing rules or guidance for other types of mitigation other than what is specified in the law. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
Good, Randy - Cattleman's Association	408	The proposed rule identifies the criteria necessary for implementing an environmentally sound banking system and also describes the certification process. The department has no true field tested criteria to determine that. Once again, DOE is assuming their science is right, even though study after study is showing no benefit from man-made wetlands.	The rule includes several safeguards to ensure that banks are successful. The rule contains criteria and considerations for determining whether a proposed bank is ecologically appropriate and sustainable. No rule change needed.
Heinrich, Mary - Ag Prospects	409	It is puzzling that avoidance of wetland impacts is not mandated.	This rule does not address other processes for regulating wetland impacts. In section 90.84.020 WAC, the law specifically states that it does not provide new authorization for developing new wetland regulations or developing rules or guidance for other types of mitigation other than what is specified in the law. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state Water Pollution Control Act) and local land use and critical area regulations. No rule change needed.
Heinrich, Mary - Ag Prospects	410	To allow continuing impacts - and to "plan" for so many more wetlands banks will leave future generations without salmon and clean water.	This rule does not address other processes for regulating wetland impacts. In section 90.84.020 WAC, the law specifically states that it does not provide new authorization for developing new wetland regulations or developing rules or guidance for other types of mitigation other than what is specified in the law. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. No rule change needed.

Committer - Affiliation	Comment no.	Summary	Response
Wetland impacts continued			
Sutton, Carolyn - Citizen	411	Wetlands and estuaries are essential nursery grounds for fish and wildlife and therefore essential for us as well. When they go they go forever. Repeatedly voices are heard against the destruction of wetlands and the preservation of farmland but money and greed continue to threaten. Let the developers build "up" and "away" from wetlands increasing infrastructures instead of sprawl and decimation of fragile ecosystems that wetlands provide.	Wetland losses due to development are addressed under other regulatory programs. No rule change needed.
Sutton, Carolyn - Citizen	412	51% of all wetland mitigation, including banks, fail to work in providing the environmental functions they promise.	The percentages quoted apply to concurrent mitigation not wetland mitigation banks. The rule was designed to address issues raised in state and national studies on mitigation that highlight problems with mitigation. This was done to avoid the types of failures seen with concurrent mitigation projects. To ensure successful performance, the rule provides more safeguards than are placed on concurrent mitigation. These safeguards include gradual release of credits based on performance, financial assurances, suspension of credits for non-compliance and perpetual protection of the bank site. No rule change needed.
Sutton, Carolyn - Citizen	413	Let the developers build "up" and "away" from wetlands increasing infrastructures instead of sprawl and decimation of fragile ecosystems that wetlands provide.	The rule establishes the criteria for wetland mitigation banks. This rule does not authorize or permit wetland impacts. This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state Water Pollution Control Act) and local land use and critical area regulations. No rule change needed.

The following pages contain comments on the environmental impact statement and Ecology's responses.

From: [n l](#)
To: [Holder, Yolanda \(ECY\)](#);
Subject: Re: Mitigation Banking Official Comment -addendum-
Date: Tuesday, April 07, 2009 9:49:58 PM

My first paragraph ("1.") is missing a few words; the second to the last sentence should read: "Specific examples need to be codified as law."

Also, please see my two questions at the end of my comments.

Best,

Nolan

Sent from Olympia, Washington, United States

On Tue, Apr 7, 2009 at 9:45 PM, n l <nol.lat@gmail.com> wrote:

Hello,

Please add these personal comments to the official comments for consideration for rule making:

1. The term 'avoidable' should be clearly defined. Currently the applicant is referred to federal guidance which is not specific and is not codified as law. All adverse impacts can be avoided: The development can be stopped; a building could be raised above the ground; adaptable architecture can be used to work around sensitive areas; everything is avoidable. A useful term for avoidable needs to be more specific and realistic. A developer can too easily say that if the area to be impacted doesn't fit with the home plans they've bought and are building around, then it's not avoidable. Or they could say that their Return on Investment will be adversely affected and therefore it's not avoidable.

I understand that this issue has come up before and that a new term, "unavoidable" has been defined as "adverse impacts that remain after all appropriate and practicable

avoidance and minimization has been achieved”. However the terms “appropriate”, “practicable” and “minimization” will mean very different things depending on who the concerned parties are: the developer, the NIMBY neighbor, the state government worker, the concerned citizen, etc. Specific examples codified as law. The term is still ambiguous and open to interpretation, influence and intent.

2. The term ‘mitigation sequencing’ should be clearly defined, codified as law, given specific examples and enforced. As it stands, mitigation sequencing is defined in Chapter 197-11-768 but it appears that the term is open to interpretation and is optional or discretionary according to research I’ve done on counties that implement mitigation sequencing. Mitigation sequencing should also be re-thought as it can be arbitrarily applied – terms like “rectifying”, “reducing” and “compensating” are not specifically defined. This also leaves room for interpretation, influence and intent.

Projects which are also subject to CWA requirements incorporate the 404(b)(1) guidelines which provide flexibility to mitigation sequencing and the phrase “least environmentally damaging practicable alternative” is open to interpretation.

3. Placement of mitigation banks should not be arbitrary and open to the whims of commerce, entrepreneurs or government. A method should be in place so that mitigation banks can exist in key areas which are lacking or will be lacking guaranteed wild space. An example of a high density growth area is that within the Urban Growth Boundary. As planned, mitigation banks are not required to be within Urban Growth Boundaries and it appears most if not all will not be. Mitigation banks in an Urban Growth Boundary could help provide wildlife corridors in high density growth areas. Wildlife corridors have been shown to be very effective at salvaging

wild populations. This has been a popular and successful method of preservation of wild areas and animal populations in Europe. Moving all wild areas out of an Urban Growth Boundary has several deleterious effects including negative impacts on human health and human morale, decline of certain animal populations and the creation of heat sinks due to large areas of contiguous development.

Though wetland banks are generally going to be located in the area where impacts are to occur this is simply not sufficient. Market forces, whim and convenience cannot successfully dictate true conservation.

1-1

4. The Draft EIS (Publication #01-06-022) states on page 20 that “other agencies and local citizens” should be responsible for keeping their county/state/private project in line with regard to mitigation sequencing. This duty should fall to Ecology and there should be enforcement, inspection and investigative capability given to the Department of Ecology to follow-through with this duty.

1-2

5. The Draft EIS (Publication #01-06-022) admits to the concern on page 21 that there can be significant impacts from removing wetlands. But the document does not propose solutions to address specific problem such as the following and therefore does not sufficiently address the issue:

“Natural areas are considerably more socially valuable when located within developed areas.”

“These wetlands can provide vital habitat for native amphibians (Richter 1996) and serve as habitat islands for birds and urban wildlife.”

Hydrogeology considerations/compensation watershed considerations/compensation and salmon-stream considerations/compensation will not be sufficient to address this significant quality of life issue.

Nolan D. Lattyak

When and where will I be able to see how the comments are responded to? Will they be aggregated or answered individually?

From: [n l](#)
To: [Holder, Yolanda \(ECY\)](#);
Subject: Mitigation Banking Official Comment
Date: Tuesday, April 07, 2009 9:45:59 PM

Hello,

Please add these personal comments to the official comments for consideration for rule making:

1. The term 'avoidable' should be clearly defined. Currently the applicant is referred to federal guidance which is not specific and is not codified as law. All adverse impacts can be avoided: The development can be stopped; a building could be raised above the ground; adaptable architecture can be used to work around sensitive areas; everything is avoidable. A useful term for avoidable needs to be more specific and realistic. A developer can too easily say that if the area to be impacted doesn't fit with the home plans they've bought and are building around, then it's not avoidable. Or they could say that their Return on Investment will be adversely affected and therefore it's not avoidable.

I understand that this issue has come up before and that a new term, "unavoidable" has been defined as "adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved". However the terms "appropriate", "practicable" and "minimization" will mean very different things depending on who the concerned parties are: the developer, the NIMBY neighbor, the state government worker, the concerned citizen, etc. Specific examples codified as law. The term is still ambiguous and open to interpretation, influence and intent.

2. The term 'mitigation sequencing' should be clearly defined, codified as law, given specific examples and enforced. As it stands, mitigation sequencing is defined in Chapter 197-11-768 but it appears that the term is open to interpretation and is optional or discretionary according to

research I've done on counties that implement mitigation sequencing. Mitigation sequencing should also be re-thought as it can be arbitrarily applied – terms like “rectifying”, “reducing” and “compensating” are not specifically defined. This also leaves room for interpretation, influence and intent.

Projects which are also subject to CWA requirements incorporate the 404 (b)(1) guidelines which provide flexibility to mitigation sequencing and the phrase “least environmentally damaging practicable alternative” is open to interpretation.

3. Placement of mitigation banks should not be arbitrary and open to the whims of commerce, entrepreneurs or government. A method should be in place so that mitigation banks can exist in key areas which are lacking or will be lacking guaranteed wild space. An example of a high density growth area is that within the Urban Growth Boundary. As planned, mitigation banks are not required to be within Urban Growth Boundaries and it appears most if not all will not be. Mitigation banks in an Urban Growth Boundary could help provide wildlife corridors in high density growth areas. Wildlife corridors have been shown to be very effective at salvaging wild populations. This has been a popular and successful method of preservation of wild areas and animal populations in Europe. Moving all wild areas out of an Urban Growth Boundary has several deleterious effects including negative impacts on human health and human morale, decline of certain animal populations and the creation of heat sinks due to large areas of contiguous development.

Though wetland banks are generally going to be located in the area where impacts are to occur this is simply not sufficient. Market forces, whim and convenience cannot successfully dictate true conservation.

4. The Draft EIS (Publication #01-06-022) states on page 20 that “other agencies and local citizens” should be responsible for keeping their county/state/private project in line with regard to mitigation sequencing. This duty should fall to Ecology and there should be enforcement, inspection and investigative capability given to the Department of Ecology to follow-

through with this duty.

5. The Draft EIS (Publication #01-06-022) admits to the concern on page 21 that there can be significant impacts from removing wetlands. But the document does not propose solutions to address specific problem such as the following and therefore does not sufficiently address the issue:

“Natural areas are considerably more socially valuable when located within developed areas.”

“These wetlands can provide vital habitat for native amphibians (Richter 1996) and serve as habitat islands for birds and urban wildlife.”

Hydrogeology considerations/compensation watershed considerations/compensation and salmon-stream considerations/compensation will not be sufficient to address this significant quality of life issue.

Nolan D. Lattyak

When and where will I be able to see how the comments are responded to? Will they be aggregated or answered individually?

Letter 1 – Response to comments to Nolan Lattyak

- 1-1** Thank you for your comment. Debit projects are regulated under other laws and rules. Ecology is currently following up and inspecting on all certified banks.
- 1-2** This concern is addressed in Section 2.1.2 Wetland resource tradeoffs within the final EIS.

Reed 4/15/09 @
Mt. Vernon hearing

FRIENDS of SKAGIT COUNTY
110-North First Street, Suite C.
Mount Vernon, WA 98273
360-419-0988

April 14, 2009

Department of Ecology
P.O. Box 46700
Olympia, WA 98504-7600

To Whom It May Concern:

Friends of Skagit County, (hereafter referred to as *Friends*), has many concerns about the Draft Rule on Wetland Mitigation Banking. We believe it is weak and may violate other State and Federal regulations relating to wetland and critical areas protection, shorelines, SEPA, NEPA, GMA and local comprehensive plans and development codes.

The Proposed Rule Making form CR-102 (June 2004) is required when introducing a draft rule. CR-102 asks whether the rule is necessary and being considered because of a Federal Law, Federal Court Decision or State Court Decision. The DOE answered "**NO**" to all 3 questions regarding the Draft Rule for Wetland Mitigation Banking.

Friends has many questions about the use of Wetland Mitigation Banks for compensating the loss of wetlands. Among those questions are these:

--- In that any wetland mitigation banking program is not a requirement of any existing program, rule or law of Washington State or the Federal agencies, why is DOE encouraging this program if the program is only optional?

--- Where is evidence that any market analysis was done by the DOE to determine the actual number of acres of wetlands which may require wetland banking as mitigation? If there was no statewide market demand study, why has DOE plowed ahead with the approval of seven banks which are now operating, with ten additional banks proposed?

Attached find DOE's publication 00-06-016 (Evaluation Study 2001). According to the publication, of the 45 compensatory wetland mitigation sites randomly selected:

- 55% were implemented to plan
- 34 projects had performance standards that could be evaluated
- Of those 34 projects, 12 projects (35%) were meeting all performance standards.

---Attached find DOE's publication 02-06-009 (Evaluating Success 2002). Table 6-2 (**Results of studies examining the success of compensatory mitigation**) has the following "Level of Success" percentages cited:

- 13% fully successful
- 33% moderately successful
- 33% minimally successful
- 21% not successful

From another location in Washington, the results were 3% success on 38 sites. On 17 sites, 65% functioned poorly.

From Table 6-3 (**Level of overall compliance of compensation projects**), under the column "**% of Projects in Compliance with all requirements**", compliance percentages range from 29% to 21% to 18%. With percentages such as these why is DOE apparently wasting the public's time and money on considering wetlands mitigation banking as a solution for anything? The evidence of success or even the chance for success is just not there. The following quote is from that same publication: "While the Federal Corps of Engineers conducts regular compliance site visits, **the Washington State Department of Ecology rarely does.**" Why would any undertaking with this dismal track record even be considered by DOE?

Friends has even more questions in terms of the openness and fairness of the process that was used to develop the Proposed Rule:

---Why is DOE touting its public process record? If the process is so open, why does the proposed rule state in the Proposed Rulemaking form, sent to the Code Reviser on March 3, 2009 (WSR 09-06-086) that: "...The purpose of this rule is to **encourage** wetland mitigation banking..." Why is DOE holding these public meetings when it appears DOE has already made up its minds on the issue? This does not appear to be a pattern followed by an agency which is truly concerned with what the public says.

---The draft rule changes are not easily tracked: there is no reference to the other laws that might be affected by the rule. New language that was added was labeled "New Section" with no pages that have the strike-throughs -- a reader friendly method which allows the citizen to compare the new with the old.

---It appears the Mitigation Bank Review Team (MBRT) members were selected to advocate for the program. What was the level of scientific ability or experience in Wetland Mitigation Banks which was required of the members? Why aren't scientific credentials listed? Without qualifications listed, a shadow is cast on the unbiased nature of the process. How can the public have confidence in the quality of oversight that is supposed to be provided?

---. Doesn't the promotion of WMBs for agency mitigation purposes negate the very intention of public input policy? Isn't this more of a signal by DOE that the fix is in: that the final decision is a foregone conclusion? And that this is a promise from DOE to the developer that he/she can sell bank credits? How can anyone, looking at the process, come to any conclusion other than that the DOE definitely appears to be promoting WMBs?

Attached is a study by scientists who are recognized as experts in the field of wetland issues by their peers and other professional entities. The study, "Effects of Wetland Mitigation Banking on People", by Professors Salzman and Rhul of Florida State University contains warnings and skepticism about WMBs. It is only one of many professional scientific studies on the subject. I have checked through several volumes of wetland and wetland mitigation studies published by reputable scientists with respected credentials in both academic and field work. I chose the Salzman/Ruhl study for these comments because it is quite comprehensive and not as lengthy as others. While searching through the works of professionals in the wetland science field, I found no papers published as accepted scientific papers or abstracts by any of the individuals listed on the advisory or oversight teams chosen by DOE. Shouldn't a subject as serious as the consideration of wetland mitigation banks be cause for DOE to place crafting of the rule into the hands of recognized scientists who use facts and data to arrive at conclusions?

2-1 [---What credible studies regarding outcomes, not predictions, has DOE staff enlisted in their efforts to work through this rule? Where is the data to convince the public taking part in these proceedings that WMBs have a success rate superior to that of a flip of a coin?

Sincerely,



Gene Derig, President
Friends of Skagit County

Washington State Wetland Mitigation Evaluation Study 2001

Phase 1: Compliance

Washington State Dept. of Ecology. Publication No. 00-06-016

In the Phase I study, out of **Forty-five** compensatory wetland mitigation sites randomly selected:

- **Only 23 projects (55%)** were implemented to plan
- **Only 34 projects** had performance standards that could be evaluated
- Of those 34 projects, **only 12 projects (35%)** were meeting all performance standards

While the federal Corps of Engineers conducts regular compliance site visits, **the Washington State Department of Ecology rarely does.**

Phase 2: Evaluating Success 2002

Washington State Dept. of Ecology. January 2002, Publication #02-06-009

Table 6-2. Results of studies examining the success of compensatory mitigation

Location of Study and Reference No. a	# Projects Evaluated	Level of Success	Evaluation Criteria
Washington State (10)	24	13% fully successful 33% moderately successful 33% minimally successful 21% not successful	Wetland acreage, performance standards, goals/objectives, contribution to functions, comparison with wetland lost
Washington/King County (16)	38	3% successful 97% not successful	Replacing functions
Western Washington (20)	17	23% functioned well ecologically 65% functioned poorly 12% were not completed	Vegetation diversity, non-native plant dominance, structural diversity, wildlife use, adjacent land uses, vegetation cover vs. open water

Table 6-3. Level of overall compliance of compensation projects.

Location of Study and Reference No. a	#Projects Evaluated	% of Projects in Compliance with all requirements	Evaluation Criteria
Washington (9)	45	29%	<ul style="list-style-type: none"> • Project installed • Installed according to plan • Meet performance standards
Washington (10)	24	29%	<ul style="list-style-type: none"> • Establish required wetland acreage • Meet performance standards • Meet goals/objectives
Washington/western (20) b	17	18%	<ul style="list-style-type: none"> • Installation of both development and compensatory mitigation projects as required
Washington/King County (16) c	29 (38)	21% (16%)	<ul style="list-style-type: none"> • Meet performance standards (project installed)



THE EFFECTS OF WETLAND MITIGATION BANKING ON PEOPLE

J.B. Ruhl and James Salzman

(This working paper is under submission for publication.)

**Florida State University
College of Law**

Public Law and Legal Theory
Working Paper No. 179

January 2006

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=878331>

A complete index of FSU College of Law Working Papers is available at
http://www.law.fsu.edu/faculty/publications/working_papers.html

The Effects of Wetland Mitigation Banking on People

J.B. Ruhl* and James Salzman**

In the decade since the Corps of Engineers (Corps) and Environmental Protection Agency (EPA) officially blessed wetland mitigation banking for purposes of satisfying mitigation requirements under Section 404 of the Clean Water Act (CWA),¹ the practice has fueled an ongoing debate about its pros² and cons.³ For the most part, however, the debate has focused on the relative advantages and disadvantages of banking programs in terms of administrative efficiency and ecological impact, with little attention being paid to the effects of wetland mitigation banking *on people*. This article presents the first comprehensive empirical study of the demographics of wetland mitigation banking, revealing what has long been suspected—that banking facilitates the redistribution of wetland resources from urban to rural areas, taking with them the important ecosystem service values wetlands provide to human communities.

After an overview of the economic service values wetlands provide, the structural biases inherent in the wetland mitigation banking program, and the lack of information about the effects of wetland banking in general, we present the results of an empirical study of 24 wetland mitigation banks in Florida accounting for over 95 percent of all bank activity. By comparing the demographic attributes of the area around each bank to the areas around the development projects that purchase mitigation bank “credits” to satisfy their mitigation requirements, we show that the loss of wetland resources is concentrated in urban areas, whereas the “compensatory” mitigation provided by wetland banks is concentrated in rural areas, and that the composition of the project area and bank area populations is significantly different. We examine the policy implications of this effect and suggest several steps that can be taken to better understand and respond to its impact on the distribution of ecosystem services associated with wetland resources.

* Matthews & Hawkins Professor of Property, The Florida State University College of Law, Tallahassee, Florida. This paper would not have been possible without the Herculean research assistance of Adam Schwartz, FSU College of Law Class of 2006. Special thanks are also due to Keith Ihlanfeldt, FSU Eminent Scholar in Economics, and participants in workshops at the University of Minnesota and Georgetown University law schools for project input, and to Kirl Kim and Tom Chapman of the FSU Geography Department for GIS analysis.

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¹ See Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605 (Nov. 28, 1995) [hereinafter *Mitigation Bank Guidance*]. For a comprehensive explanation of the regulation of land uses in wetland areas under section 404 of the Clean Water Act, see MARGARET N. STRAND, *WETLANDS DESKBOOK* (2d ed. 1997).

² For recent advocacy of the merits of wetland mitigation banking, see Royal C. Gardner and Theresa J. Pulley Radwan, *What Happens When a Wetland Mitigation Bank Goes Bankrupt?*, 35 *Envtl. L. Rep.* (Envtl. L. Inst.) 10590, 10591-92 (2005).

³ For a comprehensive discussion of concerns expressed about wetlands mitigation banking, see James Salzman and J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 *STAN. L. REV.* 607, 657-68 (2000).

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Wetland Mitigation and Ecosystem Services

When a land development project involves filling of wetland areas regulated under the CWA or similar state laws, one condition of the permit authorizing the activity usually is to require mitigation for the loss of wetland functions. Permittees can accomplish this themselves directly through creation or enhancement of wetlands on the development site (onsite mitigation) or on an offsite location (offsite mitigation), or by paying a fee to fund wetland mitigation by a third party conservation entity in lieu of providing direct mitigation (in-lieu fee mitigation).⁴ Wetland mitigation banking provides a third party variation on offsite mitigation by allowing the developer to compensate for the resource loss by purchasing “credits” from another landowner—the wetland banker—who has created or enhanced wetland resources elsewhere.

Although wetland mitigation banking began mainly as a means for state highway departments and other government agencies to satisfy their regulatory wetland mitigation needs by establishing their own banks,⁵ several hundred entrepreneurial banks now operate in the nation, selling credits within defined “service area” boundaries to private and public land developers needing to satisfy a regulatory wetland mitigation requirement.⁶ Mitigation banking today reportedly accounts for [X] percent of all regulatory mitigation carried out under Section 404 nationwide.⁷ Moreover, as the shortcomings of onsite and offsite compensatory mitigation provided directly by development project permittees has become increasingly apparent,⁸ EPA and the Corps

⁴ For a comprehensive explanation of wetland mitigation approaches, see ENVIRONMENTAL LAW INSTITUTE, *BANKS AND FEES: THE STATUS OF OFF-SITE MITIGATION IN THE UNITED STATES* (2002) [hereinafter *BANKS AND FEES*].

⁵ See Dennis Durbin, *Wetlands and the Federal Highway Program*, NAT'L WETLANDS NEWSL., Sept-Oct. 2005, at 7; Lawrence R. Liebesman and David M. Plott, *The Emergence of Private Wetlands Mitigation Banking*, 13 NAT. RESOURCES & ENV'T 341, 341 (1998) (before the mid-1990s, 75 percent of all banks were public agency, single-user banks linked to public works projects).

⁶ Office of Wetlands, U.S. Environmental Protection Agency, *A Watershed Decade 19* (2001), available at <http://www.epa.gov/owow/home/accomplishments/wetlands.pdf> (last visited Oct. 28, 2005).

⁷ See [forthcoming Corps report]. The Corps study is based on the first comprehensive nationwide survey comparing the respective shares of mitigation attributable to individual onsite mitigation, individual offsite mitigation, purchase of credits from mitigation banks, and in-lieu fees. A much lower figure of 10 percent for the mitigation banking share had previously been reported by the National Mitigation Banking Association, though the empirical basis for that estimate was not provided. See Craig Denisoff, *Banking and Transportation Projects: Merging Ecological Protection and Economic Growth*, NAT'L WETLANDS NEWSL., Sept-Oct 2005, at 9, 10.

⁸ Mitigation provided directly by permittees has been described as resulting in numerous “postage stamp” mitigation sites, making it difficult for the Corps and EPA to monitor the permittees’ performance. See NATIONAL RESEARCH COUNCIL, *COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT* (2001). Members of the NRC Committee that produced the report on wetlands mitigation summarized their findings and the findings of numerous other studies in several other publications. See R. Eugene Turner, Ann M. Redmond, and Joy B. Zedler, *Count It by Acre or Function—Mitigation Adds Up to Net Losses of Wetlands*, NAT'L WETLANDS NEWSL., Nov-Dec. 2001, at 5; Joy Zedler and Leonard Shabman, *Compensatory Mitigation Needs Improvement, Panel Says*, NAT'L WETLANDS NEWSL., July-Aug. 2001, at 1. See also U.S. ARMY CORPS OF ENGINEERS, *NEW ENGLAND DISTRICT, SUCCESS OF CORPS-REQUIRED WETLAND MITIGATION IN NEW ENGLAND* (2003); WASHINGTON DEPARTMENT OF ECOLOGY, *WASHINGTON STATE WETLAND MITIGATION EVALUATION STUDY* (2002); NEW JERSEY DEPARTMENT OF

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continue to praise the attributes of wetland banking⁹ and federal policy now goes so far as to encourage federal agencies to use mitigation banking as their means of compensating for wetlands losses their projects cause.¹⁰ In its ten short years of official endorsement, in other words, wetland mitigation banking has gone from a novel concept to a government promoted and routinely employed wetland mitigation option.

Not surprisingly, because it simplifies offsite wetland mitigation, and thus arguably simplifies development in wetland areas, banking has attracted both praise and criticism focusing on its purported administrative advantages over “first party” onsite or offsite mitigation provided directly by project permittees,¹¹ as well as on its overall ecological effects.¹² Remarkably, however, what has been missing from this debate is any attention to the *economic* effects of wetland mitigation banking. Wetlands provide important ecosystem service values to human populations, such as flood mitigation, groundwater recharge, water filtration, and sediment capture.¹³ These benefits, while unquestionably of economic value if measured in terms of the adverse impacts were they removed or the cost to replace them with technological substitutes, usually are not valued in the marketplace.¹⁴ Recent natural disaster events, such as Hurricane Katrina, make all too clear that this omission is a case of market failure, suggesting that structural barriers exist to rational economic behavior.¹⁵ In particular, because of the complex ecological and geographic attributes of ecosystem services, landowners cannot easily charge for the

ENVIRONMENTAL PROTECTION, CREATING INDICATORS OF WETLAND STATUS (QUANTITY AND QUALITY): FRESHWATER WETLAND MITIGATION IN NEW JERSEY (2002).

⁹ See, e.g., Office of Wetlands, U.S. Environmental Protection Agency, *Wetlands Mitigation Banking*, <http://www.epa.gov/owow/wetlands/facts/facts16.html>.

¹⁰ See 10 U.S.C. § 2694b (authorizing military agencies to use mitigation banks); Pub.L. 108-136, Div. A, Title III, § 314(b), 117 Stat. 1431 (2003) (requiring the Corps of Engineers to promulgate standards facilitating mitigation banking).

¹¹ See Mitigation Bank Guidance, *supra* note ___, at 58,607. There is some recently compiled evidence that agencies have greater success monitoring wetland mitigation banks than is the case for “first party” onsite and offsite mitigation provided directly by the project permittee. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-898, WETLANDS PROTECTION: CORPS OF ENGINEERS DOES NOT HAVE AN OVERSIGHT APPROACH TO ENSURE THAT COMPENSATORY MITIGATION IS OCCURRING 19-20 (Sept. 2005). Some studies show the administrative advantages are not necessarily as great as claimed. See MINNESOTA DEP’T NATURAL RESOURCES ET AL., MINNESOTA WETLAND MITIGATION BANKING STUDY 13 (Mar. 1998) [hereinafter MINNESOTA BANKING STUDY].

¹² The debate over the relative merits of “first party” permittee mitigation versus wetlands mitigation banking continues in often heated dialogue. Compare Society of Wetland Scientists, *Wetland Mitigation Banking: Clarifying Intent*, NAT’L WETLANDS NEWSL., Sept.-Oct. 2005, at 5 (response of Society of Wetland Scientists to criticism by National Wildlife Federation that Society’s prior report on wetland mitigation banking overstated its proven merits), with Julie Sibbing, *Mitigation Banking: Will the Myth Ever Die?*, NAT’L WETLANDS NEWSL., Nov-Dec 2005, at 5 (reply from National Wildlife Federation).

¹³ See Sandra Postel and Stephen Carpenter, *Freshwater Ecosystem Services*, in NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 195-211 (Gretchen Daily ed. 1997).

¹⁴ See GEOFF HEAL, NATURE AND THE MARKETPLACE: CAPTURING THE VALUE OF ECOSYSTEM SERVICES (2000).

¹⁵ Some wetlands types can absorb over 1.5 million gallons of flood water per acre. Not surprisingly, the most economically destructive flooding in New Orleans was on prior coastal wetland areas that had been drained and developed. See *Nature Destroys, But It Also Can Protect*, THE ENVTL. F., Sept.-Oct. 2005, at 18.

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offsite flood or pollutant mitigation benefits flowing from wetlands they own, making the services a positive externality that appears free for the taking to other landowners who benefit from them.¹⁶ Consequently, and understandably, a landowner's decision about whether to convert wetlands to other uses is unlikely to take into account their service value to others. This opens the door to the question whether, if land markets do not adequately take ecosystem service values into account, regulatory programs such as wetland mitigation banking should attempt to fill the gap.

Onsite wetland mitigation, while perhaps administratively cumbersome, is in principle neutral with respect to ecosystem services in the sense that it keeps wetland resources in generally the same location. By contrast, as a convenient "third party" form of offsite mitigation, wetland mitigation banking facilitates moving wetland resources from one location—the development project—to a potentially distant location—the bank site.¹⁷ It may well be that this provides, on balance, a net ecological advantage over onsite mitigation. Even assuming that is the case, however, it *cannot* be the case that the same human population benefits from the ecosystem service values associated with the wetlands when wetlands mitigation banking is the mitigation method of choice. Simply put, if the wetlands move, their ecosystem services go with them.¹⁸ This means that some people inevitably will lose (and others will gain) the economic benefit of wetland ecosystem services when wetland mitigation banking takes hold in a region. On the assumption that people generally object to losing something of value—that is, when they know about it—it seems reasonable to demand that advocates of wetland mitigation banking address the potential the program has to redistribute wetland ecosystem services. Yet the debate over the ecological impacts of wetlands mitigation banking has thus far left out this potential economic impact as a relevant policy concern.

Structural Biases in Wetland Mitigation Banking

To be sure, wetland mitigation banking employs some safeguards designed to ensure ecological performance that can, whether intended or not, also sustain the delivery of ecosystem services to a particular human population. Wetland mitigation banking policy generally requires that the "swap" be for wetlands of similar kind and within a "service area" usually defined by relevant watershed boundaries.¹⁹ Some ecosystem services thus may be provided on the same basis to the human population within the service area

¹⁶ See James Salzman, Barton H. Thompson, Jr., and Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309, 311-12 (2001).

¹⁷ The propensity for wetlands mitigation banks to be located at significant distances from the development projects to which they sell credits was identified early in the history of banking. See MINNESOTA BANKING STUDY, *supra* note __, at 10-11. These early studies did not compile demographic information about the different human populations in the respective locations.

¹⁸ This concern was first raised in Salzman & Ruhl, *supra* note __, at 666-67, and later covered in J.B. Ruhl & R. Juge Gregg, *Integrating Ecosystem Services Into Environmental Law: A Case Study of Wetlands Mitigation Banking*, 20 STAN. ENVTL. L.J. 365 (2001), James Salzman & J.B. Ruhl, "No Net Loss" and Instrument Choice in Wetland Protection, NAT'L WETLANDS NEWSL., Jan.-Feb. 2004, at 3, 18, and LEONARD SHABMAN AND PAUL SCODARI, PAST, PRESENT, AND FUTURE OF WETLAND CREDIT SALES 21-23 (Resources for the Future, Dec. 2004).

¹⁹ See BANKS & FEES, *supra* note __, at __.

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regardless of where the development projects deplete the wetlands and the banks enhance them. But some of the ecosystem services flowing from wetlands are primarily local in terms of who benefits from them, or at least are more pronounced the closer to the wetland one is located. For example, research on the effects of the 2004 Asian tsunami shows that the presence of coastal wetlands significantly mitigated the nearby inland damage caused by the wave forces.²⁰ Research from Florida has shown that wetlands help regulate local moisture and temperature, which has proven to be of benefit to nearby agricultural lands.²¹ Even small wetlands in urban areas, it has been demonstrated, provide important pollutant control services to the local urban population,²² and clusters of small isolated wetland areas provide important functions as an ecological complex.²³ Hence, moving wetland resources, even within a bank's defined service area, is likely to alter who benefits from the associated ecosystem services.

Indeed, there is good reason to believe that wetland mitigation banking, given its market incentive drivers, will systematically move wetland resources from urban areas to rural areas within a given bank's service area. Entrepreneurial bankers are in the business to make a profit, and thus are likely to seek the least cost land that will produce the desired stream of credits for sale.²⁴ Land developers are also in their business to make a profit, and are likely to seek the least cost land in the desired development market. It is highly unlikely, however, that bankers and developers will compete for land in the same market—bankers need large tracts capable of wetland restoration, which, if they do exist in a development market area, are likely to be too pricy for the banker to compete with the developers. Indeed, the whole point of wetlands mitigation banking—what makes its economic incentive gears work—is that developers get to wipe out wetland patches in the higher-priced land markets and bankers get to establish wetland banks in the less pricy land markets. One ought not be surprised, therefore, were it to be that development projects using wetlands mitigation banking to satisfy regulatory mitigation requirements are located in urban areas, and that banks are located in rural areas.²⁵ If so, wetland mitigation banking is likely also to asymmetrically redistribute local ecosystem service values associated with wetlands between those two areas.

²⁰ See Finn Danielson et al., *The Asian Tsunami: A Protective Role for Coastal Vegetation*, 310 SCIENCE 643 (2005).

²¹ See C.H. Marshall et al., *Crop Freezes and Land Use Change in Florida*, 426 NATURE 29 (2003).

²² See U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL MANAGEMENT MEASURES TO PROTECT AND RESTORE WETLANDS AND RIPARIAN AREAS FOR THE ABATEMENT OF NONPOINT SOURCE POLLUTION 11-14 (July 2005); Brant Keller, *What We Always Knew: Wetlands Win Hands Down at Pollution Mitigation*, NAT'L WETLANDS NEWSL., Sept.-Oct 2005, at 12.

²³ See Raymond D. Semlitsch, *Size Does Matter: The Value of Small Isolated Wetlands*, NAT'L WETLANDS NEWSL., Jan.-Feb. 2000, at 5.

²⁴ See MINNESOTA BANKING STUDY, *supra* note __, at 12 (finding that the location of wetland banks is dictated almost entirely dictated by the presence of willing landowners and seldom on ecological or hydrological needs).

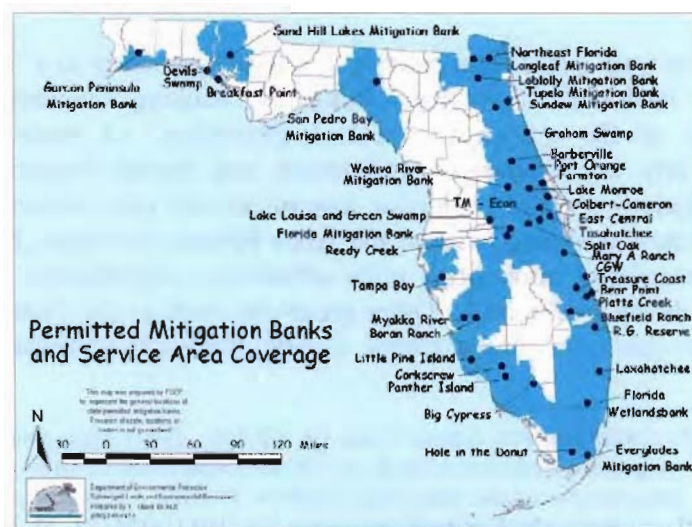
²⁵ A few early empirical studies suggested this urban-to-rural shift effect. See Dennis M. King and Luke W. Herbert, *The Fungibility of Wetlands*, NAT'L WETLANDS NEWSL., Sept.-Oct 1997, at 10, 11 (single watershed in Florida); Ann Jennings, Roy Hoagland & Eric Rudolph, *Down Sides to Virginia Mitigation Banking*, NAT'L WETLANDS NEWSL., Jan.-Feb. 1999, at 9, 10.

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What We Don't Know about Wetlands Mitigation Banking

The fact of the matter, however, is that we really have no solid empirical foundation on which to assess the impact of wetland mitigation banking on the distribution of ecosystem services, because it is simply not a factor wetland mitigation banking policy has integrated into the decision making calculus or the monitoring protocol. Take Florida's wetland program as an example. Florida's permitted banks include three banks that have sold out of credits, 30 banks actively selling credits, and 10 banks approved for operation but not yet selling credits.²⁶ So far, over 1000 land development projects have purchased credits from banks in Florida, with over 4800 total credits sold. Credit prices, though not public information, are reported to vary widely, with prices well into the tens of thousands of dollars per credit as the norm.²⁷ The permitted banks cover over 117,000 acres and have the potential, if they meet all permit conditions, to offer over 36,000 credits for sale. Figure 1 shows the locations of the permitted banks and their combined service areas, which covers about half the land mass of Florida.



That sums up what is known about wetland mitigation banking in Florida. Between the Corps, the Florida Department of Environmental Protection (DEP), and the regional

²⁶ Florida was an early entrant into wetland mitigation banking, enacting a 1993 statute directing its state wetland agencies to “encourage and participate in the establishment of private and public regional mitigation areas and mitigation banks.” Fla. Stat. 373.4135. For information on Florida’s wetland mitigation banking program, including the summary information on banks contained in the text paragraph, see Florida Department of Environmental Protection, *FDEP: Mitigation and Mitigation Banking: Questions and Answers*, <http://www.dep.state.fl.us/water/wetlands/mitigation/banking.htm> (last visited Oct. 28, 2005). Florida operates its state wetlands program, including wetland mitigation banking, in coordination with the federal program the Corp of Engineers administers under Section 404 of the Clean Water Act. See OPERATING AGREEMENT BETWEEN THE U.S. ARMY CORPS OF ENGINEERS ET AL., CONCERNING REGULATORY PROGRAMS FOR ACTIVITIES IN WETLANDS AND OTHER SURFACE WATERS, Parts IV – V (1998).

²⁷ See BANKS & FEES, *supra* note __, at __. Liebesman & Plott, *supra* note __, at 371 (one sold out bank in Florida priced its credits at \$45,000 per credit in the late 1990s)

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water management districts administering wetlands regulation in Florida, none maintains a database of wetland mitigation banking transactions allowing anyone readily to identify the geographic location of land development projects using wetland banks for mitigation or to evaluate the economic, ecological, and demographic impacts of the wetland mitigation banking transactions. Moreover, although Florida, commendably, has recently adopted a uniform method of estimating wetland losses and credits that focuses on wetland functions rather than merely counting acres, the method does not integrate ecosystem service impacts as a factor for approving banks, estimating wetland losses, assigning bank credits, or tracking bank transactions.²⁸ Overall, nothing about the wetland mitigation banking program in Florida recognizes ecosystem service distribution impacts as a relevant policy consideration, much less provides information with which to evaluate the impacts. Unfortunately, after an exhaustive survey we found that neither the Corps, the EPA, nor any other state administering a wetland mitigation banking program performs any better than Florida in this respect, though the gORM/RIBITS system the Corps and EPA currently are testing would be a significant step forward in wetlands mitigation data management.²⁹

This data vacuum is truly ironic for a practice its advocates portray as a “win-win” for the environment and landowners. Wetland mitigation banking frequently is glowingly portrayed as one of the innovative “second generation” of environmental policy instruments that rely on information enrichment and market incentives rather than regulatory proscriptions to guide behavior toward desired environmental management goals.³⁰ Some of these programs, such as the Toxic Release Inventory, have been shown to collect and disseminate information quite effectively, significantly altering polluter behavior without direct regulation.³¹ Other programs, such as the Clean Air Act sulfur dioxide trading program for power plants, closely track environmental behavior and

²⁸ See Fla. Stat. § 373.414(18)(b); Fla. Admin. Code Ch. 62-345. For a plain English explanation of Florida’s impact and mitigation assessment method, see Florida Department of Environmental Protection, *Mitigation Banking: Development of the State-Wide Uniform Wetland Mitigation Assessment Method*, <http://www.dep.state.fl.us/water/wetlands/mitigation/uwmam.htm> (last visited Oct. 28, 2005).

²⁹ The Corps and EPA have begun a pilot study in three Corps regional offices of a tracking system, known as Regional Internet Bank Information Tracking System (RIBITS), designed to allow the agency and mitigation banks to monitor bank transactions and ecological performance through an online system. But RIBITS is a restricted access format that limits public access to the information, and it does not track demographic information for a bank or its projects. See U.S. Army Corps of Engineers, Engineer Research and Development Center, RIBITS Fact Sheet (June 2005). The Corps and EPA also reportedly are planning to integrate RIBITS with the Corps’ GIS-enabled permit tracking data management system, currently under development, called gORM. If successful, gORM/RIBITS will track spatial information associated with all authorized impacts and required compensatory mitigation, including mitigation banks, which will make it much easier to illustrate any spatial redistribution of ecological functions taking place under the 404 permit program.

³⁰ See Gardner & Radwan, *supra* note __, at 10592 (wetland mitigation banking is a “market-based trading system” that creates “economic incentives for mitigation providers to do their jobs well”).

³¹ See U.S. Environmental Protection Agency, *Toxic Release Inventory (TRI) Program*, at <http://www.epa.gov/tri> (last visited October 28, 2005). For a general discussion of the use and advantages of information disclosure in environmental policy, see Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001).

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market trade pricing data to allow evaluation of the program's environmental and economic effects.³² In sharp contrast, federal and state wetland mitigation banking programs do not assemble data about the land values of development project and bank sites or the price of credit sales, and they do not collect and manage ecological, economic, or demographic data associated with the projects and the banks in any way that makes it easy for landowners, banks, the agencies, or the public to evaluate what is happening. Indeed, if our experience is any indication, it is difficult to obtain even the paper files providing raw data about the projects and banks, much less find an agency that has provided web or archival access to the kind of data compilations that might be useful for evaluating the program.³³

³² See USEPA, ACID RAIN PROGRAM 2004 PROGRESS REPORT 8-12 (2005) (detailing continuous emission monitoring program).

³³ See, e.g., MINNESOTA BANKING STUDY, *supra* note ___, at 14 (finding "there exists a lack of comprehensive, easily-accessible data" on wetlands banking).

Survey of Wetland Mitigation Banking Demographics in Florida

As a first step toward improving the empirical data necessary for opening a dialogue on the ecosystem service effects of wetland mitigation banking, we collected information on all of Florida's active and sold-out wetland banks and all of the land development projects that purchased credits from them to satisfy their regulatory mitigation requirements. Wetland banks are required to maintain paper ledgers documenting their sale of credits.³⁴ Ledger entries include rudimentary information such as date of sale, number of (but not price of) credits sold, and identification number of the wetland permit issued to the land development project. Taking the 24 banks for which adequate data were available,³⁵ representing over 900 development projects and over 4000 credits sold, we cross-referenced the permit numbers with other databases to identify the county parcel identification numbers of each land development project location. With parcel identification numbers in hand, we were able to generate the geographic information system (GIS) location, represented as mapped polygon boundaries, for each project and bank. Our first phase of research then focused on mapping each bank and its associated development projects and generating demographic data for all locations to allow comparison of the human populations around them.³⁶

Our findings, summarized in Table 1, confirm the hypothesized migration of wetland resources to less densely populated areas, which took place for 19 of the 24 banks studied.

³⁴ At the time of our research no agency maintained the ledgers in an online form, and ledgers for some banks had not been properly maintained in any form. Obtaining the ledgers from the various state agencies that monitor the banks thus was a surprisingly painstaking process that took over one year and hundreds of telephone and e-mail communications. Of course, we understand that many agency personnel experience heavy workloads and that satisfying our data compilation requests was not in their general job descriptions, and thus are thankful to the many agency personnel who cooperated with our research.

³⁵ Our study includes 24 of the 33 banks actively selling or sold out of credits. We eliminated banks that had sold credits to five or fewer development projects, on the basis that no demographic pattern has emerged for those banks, and we were unable to obtain adequate data from agencies to compile a sufficiently complete dataset for several of the banks.

³⁶ Because our focus is on the relocation of ecosystem services wetlands provide locally, we drew demographic data from a relatively close radius around the locations. For the development projects, we used the demographic data for the census tract in which the centroid of the project was located and computed an average for all projects associated with a bank. For the banks, we used an average of the demographic data for any block group touching within three miles of the bank.

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Bank	Projects	Credits sold	Population Density (sq/mi)		Median Income		Percent Minority		Average Distance to Projects (mi)
			Projects	Bank	Projects	Bank	Projects	Bank	
Barberville	15	30	779	34	53750	32250	24	24	21
Big Cypress	20	126	553	4	50500	31250	17	70	35
Bluefield Ranch	24	85	748	66	35000	29000	17	40	17
Boran Ranch	44	74	413	35	31250	37500	18	10	28
CGW	14	40	425	1975	42000	35250	20	29	4
East Central	46	144	2349	39	43500	37750	31	12	16
Everglades	40	182	2448	11	53000	35500	38	42	40
Farmton	136	404	789	486	48250	53750	21	11	20
Florida MB	93	588	1024	1246	41750	64250	37	39	9
Florida Wetlands	63	367	3365	2254	57750	77500	48	41	8
Lake Louisa	25	172	511	116	50000	50000	28	30	19
Lake Monroe	10	233	1713	352	62250	41750	26	18	12
Little Pine	94	97	941	401	44750	37250	18	11	15
Loblolly	20	115	786	211	53500	36250	28	15	11
Loxahatchee	43	157	1376	2469	61250	75750	22	15	13
Mary A. Ranch	18	86	1297	6	39000	66750	28	14	21
Northeast Florida	108	377	987	115	43000	44250	24	21	15
Panther Island	74	935	798	61	55250	35750	12	28	12
Reedy Creek	16	84	460	465	40500	39500	39	40	12
Split Oak	19	88	1112	88	41000	65250	42	10	15
Sundew	13	67	348	31	32500	36500	24	2	18
TM-Econ	21	66	2285	12	57000	65250	39	10	12
Tosohatchee	11	153	60	12	65250	65250	13	10	11
Tupelo	8	128	1179	86	41250	35750	28	13	17

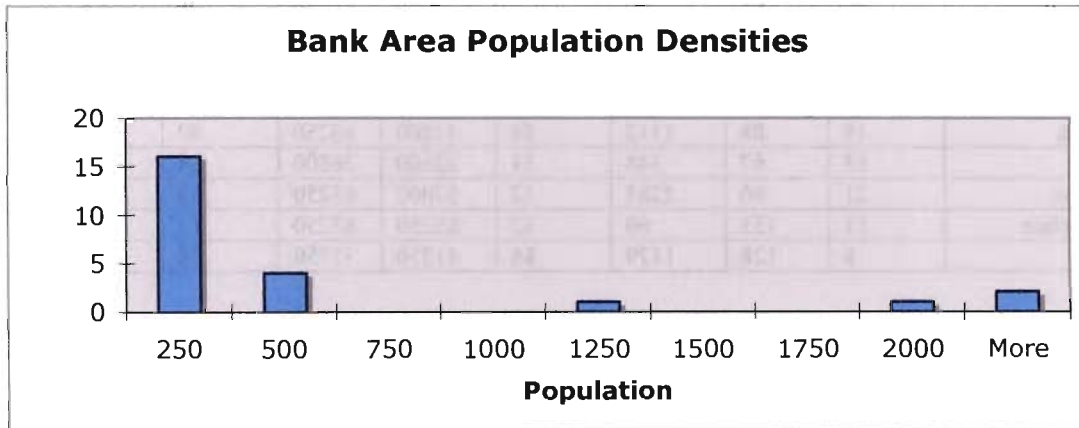
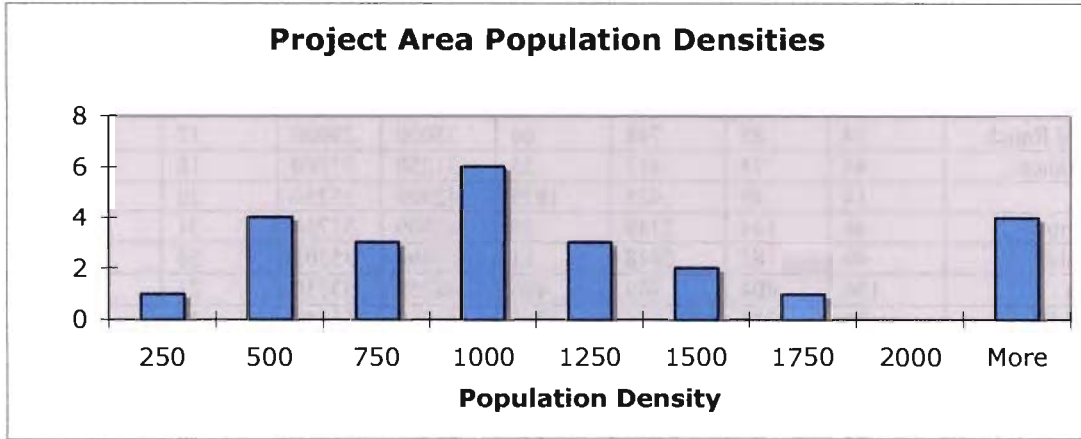
Table 1. This table provides the following information for the 24 mitigation banks in Florida included in our study: (1) number of land development projects that have purchased credits from the bank; (2) total number of credits the bank has sold; (3) the population density of the local populations for the development projects and the bank; (4) the median income of the local populations for the development projects and the bank; (5) the percent minority of the local populations for the development projects and the bank; and (6) the average distance in miles from the bank to its development projects.

The population density distributions in Charts 1 (Projects) and 2 (Banks) illustrate the sharp skewing of project area population density toward the urban end and of bank area population density toward the rural end. For the banks exhibiting this urban to rural shift, the population density around the projects was on average 934 people per square mile higher than for their associated banks. But the pattern for median income and minority population was less clear than for population density. Project area median incomes were higher than bank area incomes for 11 banks, lower for 11, and equal for two. Percentages of minority population were higher in project areas for 15 banks, lower for 7, and within a percentage point for two. Nevertheless, although the directions were mixed, overall there were significant differences in median income and minority populations for project areas and banks. The average difference for median income was \$11,750, and the

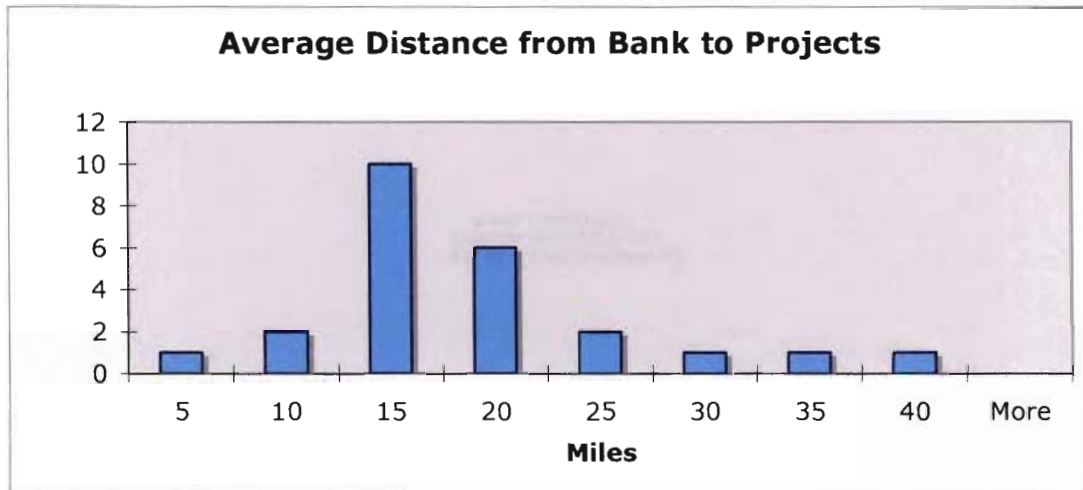
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average minority population difference was 13 percentage points. The majority of banks exhibited higher incomes in whichever area had the lower minority population component.



And as shown in Chart 3, the average distance from a bank to its associated project areas was considerable for many banks—over 10 miles for all but three of the 24 banks studied.



When put together, the strong trend of shifting wetlands from urban to rural areas, the significant differences between bank areas and project areas for population density, median income, and percent minority, and the considerable distance between banks and their associated projects all point to the conclusion that completely different populations were winners and losers in terms of locally-delivered wetland ecosystem service values. In many cases, moreover, the projects responsible for filling urban wetlands were tightly clustered, raising the concern that any synergistic effects of an urban wetland complex have been lost. Figure 2, a map showing project and bank locations for the Panther Island bank near Naples in southwest Florida, illustrates this phenomenon.

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QuickTime™ and a
TIFF (LZW) decompressor
are needed to see this picture.

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Hence, even assuming that wetland mitigation banking is administratively and ecologically superior to onsite mitigation, wetlands mitigation banking as implemented has unquestionably redistributed wetland ecosystem services from one set of human populations to another.

Bringing Wetland Mitigation Banking Back Down to Earth

Our research raises more questions than it answers, simply because so little information is available about the economic effects of wetlands mitigation banking. We cannot say, for example, whether the effect of redistributing wetland ecosystem services is to increase or decrease overall social welfare. Moreover, ecosystem services are just one of the values associated with wetlands and land development, so we also cannot say whether any net loss of wetland ecosystem service values is offset by other considerations such as the economic impact of urban development facilitated by the wetlands banking program. Nor would either of those quantifications, if we could perform them, likely remain static. It is certainly possible, for example, that over time the population around wetland banks could grow, meaning that larger populations would enjoy their associated ecosystem services, and that increased economic development values in urban areas losing wetlands far outstrip the costs associated with the lost wetland services. One conclusion we can firmly draw, however, is that wetlands mitigation banking does redistribute some wetland ecosystem services between human populations, and that nothing in federal or state banking programs is tracking this trend, at least not in any way visible to the public.

The question, of course, is whether this should matter for wetlands policy. It is difficult to approach that question intelligently, however, given the data vacuum that exists about the scope and magnitude of the distributional effects. Wetlands mitigation banking procedures do not perform what would be necessary to test the policy implications of the phenomenon—i.e., track the redistribution of wetlands, estimate the effects thereof on ecosystem service values, notify the affected public, and provide opportunity for public input. The “losers” in wetlands mitigation banking—the people in communities losing wetlands to the banking areas—do not even know that they are losing anything of economic value, much less what and by how much. And given that ecosystem services are economically valuable, one could reasonably expect the “losers” at least to be interested in knowing about their losses, so that they may make an informed decision to about whether they care. It only seems appropriate, therefore, to identify the scope and magnitude of the phenomenon before deciding its policy outcome.

But our study suggests more than just a reason to conduct more research. The redistribution effect calls into question two central foundations of wetlands conservation policy. First, it suggests that the national “no net loss” policy is not enough of an answer to the economic pressure to develop in wetlands. Second, it exposes the soft underside of “market-based” environmental management instruments.

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No Net Loss Does Not Mean Nobody Loses

Wetland mitigation banking has no doubt played an important role in pursuing the much-heralded goal of “no net loss” of wetlands, which President George H. Bush’s administration first ushered in to federal wetlands policy³⁷ and every subsequent administration has retained as the overarching theme.³⁸ Even assuming the policy achieves no net loss of ecological function, when the geographic distribution of wetlands changes, one cannot reasonably assert that there has been no net change in the wetlands universe. Wetland banks may provide greater confidence than have other mitigation approaches that compensatory wetland functions are in fact delivered and sustained. That said, however, our study reveals that no net loss does not mean that nobody experiences a loss of wetland service values as a result of wetland mitigation banking. Even assuming a net gain of wetland resources, the redistribution of wetlands inherent in the banking approach has resulted in significant losses of ecosystem service values for some human populations and gains for others. In other words, some people are bearing most of the loss side of the no *net* loss ledger.

Market-Based Does Not a Market Make

Defenders of wetland mitigation banking might be quick to reply that the redistribution of ecosystem services is not a concern because, as a market-based instrument, banking produces the most efficient allocation of resources and therefore the redistribution is, on balance, not only appropriate but desirable. There are winners and losers in any market, the argument would go, so the fact that some people lose ecosystem service values associated with wetlands while others gain is just a consequence of the market.

The problem with this argument is that wetlands mitigation banking is *not* a market, at least not one that can satisfy the principles of efficient allocation. The only reason wetlands mitigation banking exists as a practice is because federal and state laws restrict development in wetlands and mandate compensatory mitigation in return for authorization. The “market” for wetland bank credits, therefore, is purely a construct of the regulatory program. As such, developers seeking to buy credits and bankers seeking to sell them take into account only what is relevant to the regulation-constructed “market” context, and it is clear that the regulatory authorities have not made distribution of ecosystem service relevant to that setting.

³⁷ See Memorandum of Agreement Between the Environmental Protection Agency and Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990). The United States has lost 50 percent of its original wetland base—about 100 million acres—to draining and filling, mostly for conversion to agricultural uses. The national loss rate has declined over the last 40 years, however, from about 460,000 acres to 60,000 acres annually. See Office of Wetlands, U.S. Environmental Protection Agency, *A Watershed Decade 19* (2001), available at <http://www.epa.gov/owow/home/accomplishments/wetlands.pdf> (last visited Oct. 28, 2005).

³⁸ See National Wetland Mitigation Action Plan, <http://www.mitigationactionplan.gov> (last visited Oct. 28, 2005).

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Location, location, location is the mantra of any real estate broker, but wetlands mitigation banking has left the location of ecosystem services out of the calculus for evaluating bank credits and development project debits. In that sense, nobody can blame developers and bankers for not taking ecosystem service distribution into account, but neither can anyone reasonably claim that the “market” for credits produces the most efficient allocation of wetland resources. So long as federal and state wetlands regulation programs do not acknowledge the geographic distribution of ecosystem service values as a criterion for regulation and a factor in wetlands mitigation policy, the “market” for wetland mitigation credits will not do so either, and we can only expect what has happened thus far—development projects in urban areas purchasing credits from banks located in distant rural areas.

Next Steps and Pathways of Reform

Our research reveals a conundrum for the evolution of wetlands management policy. Onsite compensatory mitigation keeps wetland resources within the local community, and thus would, if it worked, avoid the problem of redistributed ecosystem service values. But onsite compensation has proven to be unwieldy and unsatisfying given its administrative complexities and inherent disfavor among developers. Wetlands mitigation banking presents just the reverse set of conditions—administrative efficiency and private incentives to produce and sustain mitigation wetlands, but an inevitable redistribution of wetlands and their ecosystem service values. The trick will be how to solve the distribution problem in wetlands mitigation banking, if we decide it should be addressed as a matter of policy, without undermining the administrative and incentive advantages of the banking technique. Several approaches being tested in other resource management regimes seem well-suited to the banking program as well.

Steering Behavior through an Enriched Information Base

Programs such as the TRI reveal the power to change environmentally undesirable behavior in response to the dissemination of information into the public policy marketplace. The impact the TRI had in causing sources of pollution to reduce emissions came down to the fact that it provided citizens in the local area around each source readily accessible data about the quantity and quality of emissions to which they were being exposed. It is not unreasonable to expect, were the public given ready access to the kind of information our research assembled on wetland mitigation banking, that agencies, communities, land developers, and prospective mitigation bankers may alter their perceptions of the pros and cons of particular banking arrangements. This might be motivated by purely passive approaches, such as posting real-time versions of tables and maps like those included herein on the web, leaving it to interested parties to use the data in private and public forums to influence short-term and long-term trends. A more active approach could require development projects and mitigation banks to produce and make public an ecosystem services impact assessment to accompany each credit transaction, thus placing the burden of data collection and transmission on the beneficiaries of the program.

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Restructuring Banking Incentives

Whereas information-based instruments rely indirectly on consumers of the information to shape policy responses, the information could also be used by agencies to track the “market” behavior of wetlands mitigation banking and identify points at which active intervention may be justified to alter the incentives structure for particular banks. In other words, to change how wetland mitigation banking influences ecosystem service distribution, we could examine changing the incentive structure. For example, when agency monitoring identifies a region in which migration of wetlands from urban to distant rural areas presents concerns, an incentive premium, such as an enhanced credit allotment, could be awarded to banks that locate closer to the urban areas losing wetland resources. Bankers would have an increased expected revenue stream to offset higher land process, and the urban population would benefit from a bank in closer proximity. Such reforms change expected outcomes but keep wetland mitigation banking market-based in orientation.

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Adaptive Regulation

Although structural features give rise to an inherent asymmetry between bank and development project locations, it may be difficult to predict where development projects will locate, at what rates, and in what clustered concentrations. The changing distribution of ecosystem services will be at least as dynamic over time as well. Necessarily, therefore, the decision whether to approve a proposed wetland bank location and service area could, at best, be based on only a rough prediction of future ecosystem service distributions. Information enrichment and market restructuring thus are unlikely to ameliorate all instances in which banking appears to be promoting undue redistribution of wetland ecosystem services. Direct regulatory intervention may be justified in such instances, such as through closing affected areas from further trades while an ecosystem services inventory is conducted and other policy responses evaluated.

Of course, just as with information-based and market-based policies, effective regulation of a dynamic program such as wetlands mitigation banking requires a reliable and continuous stream of monitoring data and room for an agency to make informed adaptive responses. The techniques of adaptive management are well-suited to this kind of large-scale, evolutionary landscape management problem. Rather than define a wetland bank location and service area and never look back, adaptive management involves a process of goal setting (e.g., not to promote unduly disproportionate redistribution of wetland ecosystem services), continuous monitoring (e.g., tracking development locations associated with banks in real time), and decision adjustment (e.g., revisiting service areas, adjusting credit allotments, emphasizing onsite mitigation in certain areas, closer examination of future bank locations, etc.). Agency learning, in other words, should not end at the time of bank approval. The gORM/RIBITS GIS-based mitigation tracking system initiative planned by the Corps and EPA³⁹ thus would be a step in the right direction.

Conclusion

Our research has revealed a potential downside of wetland mitigation banking—and any form of offsite mitigation for that matter—that had been posited in the literature but never empirically demonstrated to be as systematic and pervasive as our findings suggest. Yet the response should not be to rush to abandon wetland mitigation banking or to radically overhaul its structure. Rather, we suggest further research to identify with more precision the magnitude of ecosystem service redistribution and other socioeconomic effects associated with bank transactions. In short, wetland mitigation banking has been touted as a “win-win” program, but unless someone keeps score we really can’t know whether it truly fits that billing.

Furthermore, to the extent we find that wetland mitigation banking has overlooked important effects on ecosystem services, reforms should be measured and adaptive. Corrective measures thus should be implemented carefully, requiring that regulatory

³⁹ See note __, *supra*.

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authorities be equipped to conduct adequate monitoring and make adaptive responses as bank transactions progress within a bank's service area. Even with such an approach, it is likely that the any administrative and incentive advantages wetlands mitigation banking has over onsite mitigation will become less pronounced once ecosystem service distribution is taken into account. As it stands now, however, we know that at least part of the advantage wetlands mitigation banking enjoys over onsite mitigation is a function of it not taking ecosystem services distribution into account. We do not know how much this advantages wetland mitigation banking, where, when, or who wins or who loses and by how much as a result. We do not know this because, quite simply, the Corps, EPA, and state wetland agencies have not been asking the right questions. We suggest it is time they begin doing so.

Letter 2 – Response to comments to Gene Derig, Friends of Skagit County

- 2-1** Ecology used lessons learned nationwide, wetland studies conducted, and experiences from the pilot program to influence the rule language. Please see the list of the wetland studies in the reference section in the final EIS.

From: [DeForest Arbogast](#)
To: [Holder, Yolanda \(ECY\)](#);
Subject: DOE WMB Draft EIS comments
Date: Saturday, April 18, 2009 9:00:42 PM

Hi Yolanda,

It was good to meet you, Lauren and Kim face-to-face at the Mount Vernon WMB workshop. You all must have an incredible workload keeping up the WMB Program. Unfortunately, I do not share your optimism for such a program. None-the-less, I wish you the best in making that program work.

Here are my comments on the Draft WMB EIS.

The least sound method for determining the status of the nation's wetlands is data analysis of regulatory and incentive program data. Unregulated wetlands destruction, wetlands destroyed illegally and losses due to natural events, such as coastal Louisiana erosion, are not even counted. So I will not waste your time recounting all the dismal WMB studies I've read.

- 3-1 [As I see it, the elimination of our natural wetlands to enhance development is an abomination. Your attempts at creating and maintaining man-made wetlands is not even appropriately funded by the state legislature, thus dooming all the enhanced regulations in Chapter 173-700 WAC. You are, in fact,
- 3-2 [helping to set the stage for further development while at the same time degrading rural communities with the loss of our most valuable farmland.
- 3-3 [One of your stated goals is to "Support sustainable communities and natural resources". Your WMB program appears to be at odds with your goals.

DeForest Arbogast
Camano Island, WA

Letter 3 – Response to comments to DeForest Arborgast, Citizen

- 3-1** Thank you for your comment.
- 3-2** Several laws and rules exist for protecting wetlands. These have regulatory processes for reviewing and denying or approving requests that will affect wetlands. This rule does not address these other rules or regulatory processes for authorizing unavoidable impacts to wetlands. Existing laws for wetland protection include but are not limited to: the federal Clean Water Act, the state water pollution control act, and local land use regulations and critical areas ordinances. The rule contains language that discourages the placement of banks on prime farmland 173-700-303 (2).
- 3-3** Thank you for your comment.



Naturam Expellas Furca

Tamen Usque Recurret

WISE USE MOVEMENT

P.O. Box 17804, Seattle, WA 98127

April 20, 2009

TO: Yolanda Holder
Department of Ecology
P.O. Box 46700
Olympia, WA 98504-7600
<yhol461@ecy.wa.gov>

RE: Wetland Mitigation Bank Rule and DEIS Comments

The Wise Use Movement has reviewed the proposed rules for Wetland Mitigation Banks (Chapter 173-700 WAC) and submits the following comments on the draft rule and on the draft environmental impact statement (DEIS).

Comments on the DEIS

4-1 The Wise Use Movement strongly objects to the inadequate DEIS. Nowhere does the DEIS comply with the basic requirements of the SEPA rules to “describe the existing environment that will be affected by the proposal.” *WAC 197-11-440 (6)(a)*. No information is provided to the public concerning the State’s historical amount of wetlands or the amount of remaining wetlands which would be filled due to the adoption of the draft rule. Nor does the DEIS provide any appreciation for the age of most of the state’s remaining wetlands, which likely date to thousands of years. We request that the FEIS provide this information. The DEIS is inadequate unless the FEIS is revised to include this information.

4-2 The DEIS is also inadequate because it fails to analyze the requirements of the Growth Management Act (RCW 36.70A.060) to protect critical areas, including wetlands. *RCW 36.70A.030(5)*. The GMA does not authorize wetland mitigation banks. The Attorney General has already issued an AG Opinion (2008 No. 1 – January 03, 2008) stating that a certification of a wetland mitigation bank by Ecology does not require a County to issue permits for such a bank. In addition, the purpose of the Growth Management Act is to identify land suitable for development in urban growth areas. RCW 36.70A.110.

Therefore, development should be directed to upland areas within urban growth areas, not to remaining wetlands.

We request that the FEIS address how wetland mitigation banks meet the goals and policies of the GMA to protect critical areas, including wetlands.

4-3 We request that the FEIS address how wetland mitigation banks meet the goals and policies of the GMA to direct development to upland areas within urban growth areas.

4-4 We request that the FEIS address how wetland mitigation banks meet the goal of a net increase in wetland acreage and functions.

Comments on the Draft Mitigation Bank Rule

Overall, the Wise Use Movement is strongly opposed to the adoption of these rules. They fail to protect our remaining existing wetlands. They fail to support the goals and policies of the Growth Management Act or advance the goal of a net increase in wetland acreage and functions. As noted above, the DEIS for the proposed rules is inadequate. In addition, the proposed rules are riddled with loopholes and more weasel words than one typically finds even in Corps of Engineers regulations.

Ecology's News Release dated March 11, 2009, states that Ecology has already certified seven wetland mitigation banks with another seven in the certification process. The Wise Use Movement is strongly opposed to Ecology certifying wetland mitigation banks in the state in the absence of any certification regulations. We request that Ecology decertify all existing banks.

In addition to the wetland mitigation bank problems already listed in the DEIS (p. xiii), there are additional reasons why Ecology should oppose wetland mitigation banking:

4-5 ▪ Banking could promote impacts to wetlands through avoiding mitigation sequencing requirements.

4-6 ▪ Banking is very risky because compensatory mitigation doesn't work and banks will result in larger-scale failures.

4-7 ▪ Banks could result in the net loss of wetlands in some sub-basins.
▪ Use of riparian and upland areas and preservation to generate credits would result in net losses of wetland area and function.

4-8 ▪ Banks will result in the loss of wetlands in urban areas and their replacement in rural and agricultural areas resulting in a redistribution of wetlands on the landscape and a loss of productive agricultural lands.

- 4-9 ▪ Banks could result in the loss of small, isolated wetlands and their replacement with large, contiguous wetlands.
- 4-10 ▪ Concerns over listed salmon species could result in banks focusing on fish benefits with resulting losses to non-fish-bearing wetlands.
- 4-11 ▪ The public will not have adequate opportunity to provide input on the design and requirements for banks.
- 4-12 ▪ If the bank approval process is not reasonable (i.e. it takes too long) then the environmental benefits of banking will be decreased due to the shorter time frame between bank construction and use of credits.

Wetland Mitigation Banks also compete for wetland restoration sites. According to a 1996 US Geological Survey report:

“Estimates of presettlement wetland acreage in Washington range from 1.17 to 1.53 million acres, depending on the historical information and research assumptions used (Canning and Stevens, 1989; Dahl, 1990; Washington State Department of Ecology, 1992b). Based on a 1988 estimate by the FWS, about 20 to 39 percent of Washington's wetlands, have been lost during the past two centuries. Other estimates place the total loss as great as 50 percent, and some urbanized areas of the Puget Sound area have experienced losses of from 70 to 100 percent. Estimates of continuing wetland loss range from 700 to 2,000 acres per year. In addition, most of the State's remaining wetlands have been significantly degraded (Washington State Department of Ecology, 1992b,d).”
<http://wa.water.usgs.gov/pubs/misc/wetlands/>

Unfortunately, potential wetland restoration areas such as those where draining can be stopped or dikes breached are the low hanging fruit sought after by mitigation bankers. So instead of having a net increase in wetland area and function, wetland mitigation banking allows these same areas to be used to mitigate for wetland losses elsewhere.

In addition, given the historical loss of wetlands in the state of Washington, there is a critical need to restore wetlands, especially in urbanized areas of Puget Sound. What remains are often isolated wetlands, which still provide needed wetland habitat in a mosaic across the landscape. The filling of isolated urban wetlands doom wildlife that cannot read the map to locate the wetland mitigation bank far away.

Centralized wetland mitigation at a distant wetland mitigation bank site may also doom wildlife at existing wetlands proposed for filling, such as amphibious species that rely on shallow wetlands to avoid fish predation.

Wetland mitigation banks shut out the public from notice and comment on release of credits from such banks. Ecology proposes to allow public comment on the certification of banks, but not on the release of credits. Because the Corps of Engineers has issued nearly 50 nation-wide permits which allow wetland filling without public notice, the public has little to no opportunity to comment on wetland filling in the state of Washington. The Corps will be even less likely to require individual permit applications (which do require public notice and comment) knowing that the applicant can meet nationwide permit mitigation requirements through phony wetland mitigation bank credits.

Wetland mitigation banks substitute wetland preservation or wetland creation for the loss of wetlands which may be thousands of years old.

As noted above, wetland mitigation banks appear to be contrary to the Growth Management Act's requirements to protect critical areas, including wetlands.

Specific comments on the proposed rule are as follows:

***WAC 173-700-100 Background and purpose.** Subsection (2) does not specify that banks will provide mitigation in advance of "unavoidable" impacts to wetlands. By dropping the word "unavoidable," Ecology is signaling that the real purpose of the proposed rules is not wetland avoidance first, but rather, as wetland bankers know full well, to provide mitigation for projects which have no business filling wetlands in the first place. Subsection (3) is also faulty because banks do not prioritize restoration of wetland functions on site. After wetland filling occurs, those wetland functions are destroyed. Restoration of wetland functions should be a priority, but not at the expense, as these rules allow, of filling natural wetlands elsewhere. Subsection (4) is also faulty because it fails to include any role for the public in bank certification.

***WAC 173-700-201 Decision-making procedure.** This section is worthless because Ecology need only "consider" Interagency Review Team, tribal, or public comments submitted to Ecology as part of the certification. Ecology should be required to respond in writing to all substantive comments received.

***WAC 173-700-211 Content of the prospectus.** The proposed rule fails to protect existing wetlands because this section fails to include a requirement disclosing how the bank will alert the public when a credit has been "debited."

***WAC 173-700-212 Submittal of the prospectus.** Subsection (8) should be amended to require that Ecology respond in writing to all substantive comments submitted on the prospectus.

***WAC 173-700-220 Convening the interagency review team.** This section should be amended to include public notice of all IRT meetings.

***WAC 173-700-221 Purpose of the instrument.** Subsection (1) should be amended to include public participation as a purpose of the instrument.

***WAC 173-700-222 Content of the instrument.** This section should be amended to include public participation as an element in the instrument.

***WAC 173-700-223 Preliminary review of the technical elements of the draft instrument.** This section should be amended to clarify that sponsor meetings with the IRT are open to the public.

***WAC 173-700-230 Submittal of the final instrument.** Subsection (4) should be amended to require that the sponsor respond in writing to all substantive public comments.

***WAC 173-700-232 Dispute resolution process.** This section is completely unacceptable. Ecology has shown itself to be a biased agency, incapable of independent judgment. Ecology cannot function as both a signer and a dispute resolution decider. Any dispute must go through an independent dispute resolution process.

*** WAC 173-700-301 Service area.** The proposed rule fails to protect existing wetland because there is no ecological or biological basis for the establishment of banks with a service area in an adjacent WRIA. This option should be deleted.

***WAC 173-700-302 Considerations for determining service area size.** This section fails to account for historical wetland filling in the service area. The higher the wetland loss, the less desirable off-site out of kind mitigation.

***WAC 173-700-303 Site selection.** This section fails to address how allowing the filling of wetlands that may be thousands of years old can be mitigated by banks which can not be guaranteed to be self-sustaining.

***WAC 173-700-312 Default method for determining credits.** The proposed rule fails to protect existing wetland functions by allowing the area of a wetland to function as the default credit unit.

*** WAC 173-700-313 Wetland credit conversion rates.** The proposed rule fails to protect existing wetlands by allowing a 1:1 ratio for wetland creation, the least likely mitigation technique to succeed. The proposed rule fails to protect existing wetlands by allowing preservation of other existing wetlands to substitute for wetland mitigation.

***WAC 173-700-315 Considerations for determining credit conversion rates for wetland preservation.** This section should be deleted, as preservation of existing wetlands does not mitigate for wetland filling elsewhere.

***WAC 173-700-317 Considerations for determining credit conversion rates for banks in urban areas.** This section should be deleted because in urban areas, wetland restoration should take place without tradeoffs for other wetland filling.

***WAC 173-700-318 Credit conversion rates for uplands and other habitats.** This section should be deleted because uplands cannot provide mitigation for filling wetlands elsewhere.

***WAC 173-700-319 Considerations for determining credit conversion rates for uplands and other habitats.** This section should be deleted because uplands cannot provide mitigation for filling wetlands elsewhere.

***WAC 173-700-320 Exceptions to credit conversion rates.** This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to set a conversion rate outside of the ranges previously specified. This section should be deleted.

*** WAC 173-700-321 Using an alternative method to determine credits.** This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to use alternative methods to determine credits. This section should be deleted.

***WAC 173-700-330 Schedule for the release of credits.** This section fails to protect existing wetlands because it allows for release of credits without any public notice of comment. Public notice and comment on proposed release of credits should be provided.

***WAC 173-700-331 Credit release--Preconstruction.** This section fails to protect existing wetland by allowing credits to be released prior to construction of a bank and without public notice or comment. This section should be deleted.

***WAC 173-700-332 Credit release--Postconstruction.** This section fails to protect existing wetland by allowing credits to be released without public notice or comment. Public notice and comment should be provided.

***WAC 173-700-333 Credit release--Attainment of hydrologic performance standards.** This section fails to protect existing wetland by allowing credits to be released without public notice or comment. Public notice and comment should be provided.

***WAC 173-700-334 Credit release--Final release.** This section fails to protect existing wetlands by allowing credits to be released without public notice or comment. Public notice and comment should be provided.

*** WAC 173-700-335 Additional credit releases.** This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to release credits early. This section should be deleted.

***WAC 173-700-410 Obtaining credit releases.** This section fails to protect existing wetlands by allowing credits to be released without public notice or comment. Public notice and comment should be provided.

***WAC 173-700-500 Use of bank credits.** This section fails to protect wetlands by failing to limit wetland filling to “unavoidable” impacts. Just because an impact is authorized does not mean that it is not avoidable. In addition, no bank credits should be released without public notice and comment.

***WAC 173-700-502 Use of bank credits outside of the service area.** This section fails to protect wetlands by allowing a gigantic loophole and weasel words to allow Ecology to approve credits outside of the service area. This section should be deleted.

***WAC 173-700-800 Appeals process.** This section should make clear that any citizen may appeal a final certification or the approval of a bank credit to the Pollution Control Hearings Board.

Conclusion

In summary, the Wise Use Movement remains strongly opposed to the adoption of these rules, because they will likely accelerate wetland loss in the State of Washington.

John de Yonge

John de Yonge
President

Letter #4 – Response to comments from John de Yonge, Wise Use Movement

- 4-1** Establishment of a bank does not equate to wetland fill. Several laws and rules exist for protecting wetlands. These have regulatory processes for reviewing and denying or approving requests that will affect wetlands. This rule does not address these other rules or regulatory processes for authorizing unavoidable impacts to wetlands. By definition, exactly what wetlands and how much area will be offset by a bank is not known at the time of a bank certification. This EIS evaluates the programmatic effects of the rule and the wetland banking program, not specific banks or impacts.
- 4-2** The substantive provisions of the GMA do not apply to Ecology certification of a wetlands mitigation bank. The GMA provision relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply, cited as: AGO 2008 No. 1. Decisions on where to allow and encourage development are made at the local level by the local jurisdiction. The rule does not apply to where or whether wetland impacts are authorized.
- 4-3** The substantive provisions of the GMA do not apply to Ecology certification of a wetlands mitigation bank. Cited AGO 2008 No. 1. Decisions on where to allow and encourage development are made at the local level by the local jurisdiction.
- 4-4** Comment noted.
- 4-5** This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. EIS Section 1.1 discusses mitigation sequencing requirements in the state through other regulations. EIS Section 2.1.1 discusses how wetland mitigation banking is not anticipated to increase the amount of wetland impacts in the state. No change needed.
- 4-6** To ensure banks do not fail, Ecology has built into the rule text numerous safe guards. For example, credits are not released until specific performance standards have been met and financial assurances must be in place. Banks are monitored closely to ensure that problems are caught and addressed early.
- 4-7** This rule does not change existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact

wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), state (Cht. 90.48 - state water pollution control act) and local land use and critical area regulations. Use of bank credits can result in shifts of wetland area and function from one subbasin to another. For additional evaluation of how banks will move wetland resources around on the landscape see EIS Section 2.1.2. This section discusses resource tradeoffs with respect to use of wetland mitigation bank credits.

- 4-8** The rule does not require that wetland banks be located in rural or agricultural areas. Ecology recognizes that many urban wetlands provide locally significant functions. Ecology included incentives in the rule to encourage the development of banks in urban areas. Decisions on whether bank credits provide adequate compensation for authorized impacts to wetlands are made during the permitting process. Use of bank credits can result in shifts of wetland area and function from one subbasin to another. The concerns raised in this comment are addressed in further detail within Section 2.1 of the final EIS. No change needed.
- 4-9** Wetland bank credits might be used to mitigate for impacts to isolated wetlands. This rule does not replace existing requirements to avoid and minimize impacts to wetlands. Applicants are required to go through existing regulatory processes when proposing to impact wetlands. Proposing to use credits from a wetland bank does not change existing requirements to apply mitigation sequencing. Whether a wetland impact is unavoidable and authorized is determined through other rules, laws, ordinances and statutes. Regulations protecting wetlands are found under different laws at all three levels of government: federal (Clean Water Act), State (Cht. 90.48 - state Water Pollution Control Act) and local land use and critical area regulations. A wetland bank simply provides one option for offsetting wetland impacts. Without use of a bank, those losses could still be mitigated off site through existing regulatory programs. No change needed.
- 4-10** Potential benefits of a proposed bank to listed species is only one consideration during the evaluation of a proposed bank site and design. The ability of a bank to support salmon recovery does not outweigh the determination on whether use of a bank provides appropriate compensation for a specific wetland impact. No change needed.
- 4-11** Ecology disagrees. Section 173-700-230, 173-700-240 and 173-700-241 address public notices for banks and specifically require that the department issue a public notice on the final mitigation bank instrument. The purpose of the public notice is to solicit public comments on the proposed certification. The bank instrument contains design and technical requirements of the bank. No change needed.
- 4-12** Bank credits are not released for use until after a bank is certified. The length of the certification process is not related to the timing of credit releases. No change needed.

Western
Washington
Agricultural
Association

April 22, 2009

Department of Ecology
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APR 24 2009

Shorelands & Environmental
Assistance Program

Ms. Yolanda Holder
Wetlands Section
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

RE: Wetland Mitigation Banks Rule
Review Comments

Dear Ms. Holder,

Thank you for the opportunity to review the proposed administrative rules for the Wetland Mitigation Banks, Chapter 173-700 WAC. We have also reviewed the accompanying documents including the Environmental Impact Statement (EIS), Small Business Economic Impact Analysis Statement, and the Preliminary Cost Benefit and Least Burden Analysis.

Our comments will focus on the principal concern our organization has consistently expressed to the department concerning the development of the Wetland Mitigation Bank Program. The question is 'Aren't we fixing one problem...the loss of important wetlands, by adding to another...the loss of prime farmlands'.

The Wetlands Mitigation Banking statute and implementing rules are the primary regulatory framework that drives wetland mitigation bank project location and design, and ultimately authorizes the construction of these projects. We firmly believe that the proposed rule, in its present form clearly conflicts with the vision and mandate of the state's Growth Management Act (GMA) to protect and preserve farmlands. The GMA calls for the designation of agricultural lands of long-term commercial significance to assure the conservation of agricultural land for their continued use for agricultural purposes. The GMA clearly expresses its desire for the conservation of agricultural lands in order to maintain and enhance the agricultural industry and to discourage incompatible uses. The Wetland Mitigation Banking Program administrative rule must be constructed so as to not defeat the purpose or intent of the GMA or any other state statute that speaks to protecting

prime agricultural lands for the long-term interest of growing food, fiber and alternative fuels.

5-1

The environmental impact statement provides a reasonable discussion of the agricultural land issues related to siting of wetland mitigation bank projects on farmland. However, we must note that both the economic impact analysis and cost benefit analysis document fail to analyze and quantify loss of farming opportunity or adverse economic impacts related to the agricultural industry affected by the incremental loss of available production farmlands that will result from projects authorized by this program. We were especially discouraged to see a specific statement in the cost benefit analysis which recognizes that “development happens in areas that are being developed, driving up land prices.” “While WMB does not allow the mitigation bank to be too far from the impact location, it is likely to be in a significantly more rural area where land is cheaper.” The cost benefit analysis acknowledges that development benefits from the program include reducing costs for developers. As we have said before most of the prime agricultural lands in western Washington have already disappeared due to unrestrained growth, development and other land use conversions. **Our remaining farmland base cannot be asked to continue carrying the burden of accommodating these other land uses including developer’s wetland mitigation banks.** Our increasingly scarce farmland resources must be preserved, or otherwise protected through mitigation, to assure the sustainability of the few remaining viable local agricultural communities and their economies. For too long we asked ecological systems to subsidize development. Now we are transferring that subsidy to our agricultural natural resource lands. These few remaining prime farmland areas are, like wetlands once were, now the disappearing critical natural resource lands.

As you know, from our conversations and ongoing involvement in the development of this rule proposal we have strongly advocated for the absolute avoidance of authorizing such non-agricultural uses as wetland mitigation banks on prime farmland soils, i.e. those lands designated as “agricultural lands of long-term commercial significance.” We will again emphasize our desire to see this exclusion placed in the final adopted rules. To fully address our concerns we would offer the following revisions to the proposed rule language in WAC 173-700-303(2):

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

(a) This program discourages the location of banks on prime agricultural soils designated ALLCS due to the important resource and societal values of those resource lands.

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

(i) The project applicant shall provide a showing of 1) extraordinary circumstance and need for the bank project; 2) that there is a local market demand for the bank services; 3) that it will provide significant ecological benefit for the area; and, 4)

Deleted: Impacts to ALLCS both on-site and off-site shall be avoided to the maximum extent possible;

demonstrated steps for avoidance, minimization and mitigation of the project impacts to the agricultural lands.

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

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(iii) Placement of banks on ALLCS must be consistent with the local government's agricultural, natural resource lands goals, comprehensive plan, and zoning and development code;

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(iv) The applicant shall demonstrate that the project cannot be sited elsewhere, and will be located on marginal non-prime soils, not as suitable for agricultural purposes, within the designated ALLCS; and

Deleted: The bank shall be located on nonprime soils to the greatest extent possible

(v) The bank must be sited, designed and constructed to be compatible with and not adversely affect adjacent and nearby agricultural operations. This includes, but is not limited to: Adverse effects on water flows to neighboring farms, and minimizing shading effects on adjacent farms or inflate agricultural land values in the area.

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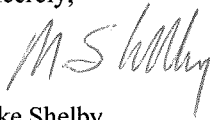
(c) It shall also be demonstrated by the applicant that the wetland mitigation bank, if located on agricultural lands, will not set a precedent for other similar projects that taken together could cumulatively create substantial adverse impact to the designated agricultural lands of long-term commercial significance.

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

We respectfully request that the department consider the proposed changes recommended above which will provide the necessary provisions to insure that wetland mitigation bank projects will be sited, designed and operated to avoid, minimize and mitigate for the adverse affect of these projects on farmlands. We believe, with the changes recommended, that the program can move forward in a manner consistent with the mandates of the state's Growth Management Act. If the rules remain as proposed we fail to see how they have been reconciled with the intentions of the GMA. And, we are certain that the program will continue to undermine and damage the state's public interest and policy framework enunciated for the protection and conservation of our disappearing prime western Washington farmlands.

Again, thank you for the opportunity to comment on this proposed rule making action. If you have any questions regarding our review, or if you would like to discuss our comments with us, please give me a call (360) 424-7327.

Sincerely,



Mike Shelby
Executive Director

Letter 5 – Response to comments to Mike Shelby, Western Washington Agricultural Association

5-1 Thank you for your comment.

