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Department of Ecology Seeks Public Comment on Wetland Mitigation Bank Rule

Proposed rule is intended to encourage wetland mitigation banking by providing an efficient, predictable statewide framework for the certification and operation of banks.

After an 8-year process, including a 5-year pilot program and an extensive advisory group effort, the Washington State Department of Ecology proposed for public comment a new rule for purposes of establishing wetland mitigation banks. Ecology's proposed rule (*Chapter 173-700 WAC*), including supporting materials, is available at: <http://www.ecy.wa.gov/laws-rules/activity/wac173700.html>.

Under RCW 90.84, the legislature directed Ecology to adopt rules for the "certification, operation and monitoring of wetland mitigation banks." Pursuant to that authority, Ecology formed an 18-member advisory group committee representing other state agencies, the Army Corps of Engineers, businesses, mitigation banking organizations, and environmentalists to guide a pilot project and develop a new wetland banking rule.

Wetland banking involves restoring or creating wetlands to compensate for activities that damage or eliminate wetlands. Wetland banking is intended to maximize the ecological function of a watershed by consolidating mitigation into larger contiguous areas in order to achieve regionally significant ecological benefits. In addition, local governments or developers may generate "credits" to compensate for damage they or others cause to an existing wetland. Wetland mitigation banking can facilitate compliance with permit requirements by providing a mechanism for the establishment of new wetland areas, or "banks," in advance of anticipated losses.

Highlights of Ecology's Proposal

The proposed rule applies to both public and private wetland mitigation banks and provides for a market-based purchase and sale of credits from certified wetland mitigation banks to compensate for unavoidable wetland impacts authorized under federal, state or local permits.

The rule includes technical requirements for establishment of wetland mitigation banks and procedures for their certification, operation, monitoring, and compliance as well as an appeals process for wetland mitigation bank certifications.

It is important to note that under the proposed rule, the sequencing of avoidance, minimization, and compensation still applies prior to using credits from any mitigation bank. In contrast to traditional mitigation activities, mitigation banking requires that compensation—restoration, creation, enhancement, and/or preservation—*occurs before a site is affected by a project*.

A key provision of the proposal focuses on the development of banks that provide “significant ecological benefits and are sustainable.” In order to achieve this, incentives have been built into the certification and bank establishment process to encourage the siting and designing of banks that provide significant ecological benefits and restore watershed processes in areas identified as high priorities under a watershed-based approach to mitigation. See WAC 173-700-300.

The proposed rule also requires that banks must be sited, planned, and designed to be self-sustaining over time. Noting that Ecology shall carefully consider ecological suitability, ecological sustainability, and land use compatibility when determining if a site is an appropriate location for a bank. See WAC 173-700-303.

Ecology will hold a series of public workshops in April to provide additional information and to solicit public comment. Written comments on the proposed rule must be submitted to Ecology by 5:00 p.m. on April 23, 2009.

If you would like to discuss the implications of Ecology’s proposed Wetland Mitigation Bank rule or seek assistance in responding with comments, please contact Tim Hogan (206.389.1782), thogan@riddellwilliams.com, Loren R. Dunn (206.389.1794), ldunn@riddellwilliams.com, or David C. Weber at dweber@riddellwilliams.com (206.389.1783).

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