Chapter 222-23 WAC

RIVERS AND HABITAT OPEN SPACE PROGRAM

WAC

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WAC 222-23-010 Policy and definitions. *[Effective 6/19/11]*

(1) **Policy.** The legislature determined that it is in the public interest to acquire (by purchase or donation) conservation easements on forest lands within unconfined channel migration zones and forest lands containing a critical habitat for threatened or endangered species as designated by the board. The rivers and habitat open space program (formerly known as the riparian open space program), established in RCW 76.09.040, is for these forest lands voluntarily enrolled by the landowner. The department may acquire a permanent conservation easement over such lands. The purpose of this program, which will be administered by the department, is to provide for ecological protection and fisheries and wildlife enhancement. This chapter implements the rivers and habitat open space program (hereinafter referred to in this chapter as "program"). In any circumstance where qualifying channel migration zone lands or qualifying critical habitat lands are not acquired by the department through a conservation easement, the landowner may elect to develop a management option for the lands in cooperation with the department, other agencies and affected Indian tribes.

(2) **Definitions.** The following definitions apply to this chapter:

(a) "Qualifying channel migration zone (CMZ) lands" means those forest lands located within an unconfined channel migration zone. Qualifying CMZ lands are eligible for easement acquisition if they meet the standards in WAC 222-23-020 (5).

(i) An "unconfined channel migration zone" means the area within which the active channel of an unconfined stream is prone to move and where the movement would result in a potential near-term loss of riparian forest adjacent to the stream. A merchantable stand of timber may exist within the zone and is considered a part of the channel migration zone. The unconfined channel migration zone does not include areas that are permanently restricted from channel movement by a dike or levee.

(ii) An "unconfined stream" is generally:

(A) A fifth order or larger water;

(B) Less than two percent gradient; and

(C) Found in a valley more than four times wider than the bankfull width of the channel.

(b) "Qualifying critical habitat lands" means those forest lands that qualify as one or more of the critical habitats (state) defined in WAC 222-16-080 including forest lands that have existing plans or evaluations described in WAC 222-16-080 (6). Qualifying critical habitat lands are eligible for easement acquisition if they meet the standards in WAC 222-23-020 (5).

(c) "Unacceptable liabilities" means exposure to undesirable responsibilities or problems as determined by the department. This includes, but is not limited to, the presence of hazardous substances on the lands or by other conditions that may create a liability to the department, or that may jeopardize the department's ability to maintain ecological protection, and fisheries and wildlife enhancement of the qualifying lands. Unacceptable liabilities may exist when the applicant is unwilling or unable to provide reasonable indemnification to the department.

(d) "Hazardous substances" includes, but is not limited to, hazardous substances as defined in RCW 70.102.010 (5), and 70.105D.020 (10), and solid waste as defined in RCW 70.95.030 (23).

(e) "Conservation easement" means a voluntary, legally enforceable land preservation agreement between the landowner and easement holder to permanently limit the type and amount of alteration of identified habitat or CMZ on the subject property while the landowner retains ownership.

WAC 222-23-020 Submitting and processing of applications for the rivers and habitat open space program. *[Effective 6/19/11]*

(1) **Rivers and habitat open space application.** An owner or owners of qualifying lands may apply to the department to place the qualifying CMZ lands or qualifying critical habitat lands within the program. The department will accept or reject the program application based on eligibility for an easement acquisition. The application for the program shall be in writing on a form provided by the department. The application shall contain information the department determines is necessary to assess whether the land qualifies for the program, as well as the following information (see board manual section 18 for details):

(a) A description of the methods the landowner used to propose that the land meets the eligibility for easement acquisition criteria;

(b) A statement indicating the landowner's desire to place the land covered by the application within the program and whether the landowner wishes to grant a conservation easement to the state on both land and trees or in trees only;

(c) Whether the landowner wishes to receive the statutory compensation for the conveyance or wishes to donate the qualifying lands;

(d) Whether the landowner is aware of the presence of any hazardous substances on the lands;

(e) A statement affirming that the person or persons submitting the application stating they are the landowner and believes that the information contained in the application and its supporting materials is true and complete.

(2) **Review and processing of application.** The application process will follow the program funding cycle process described in board manual section 18. After the department receives a complete and accurate application for the program, the department will make a preliminary determination whether the application is eligible for the easement acquisition. This determination is subject to the department's complete review, and subsequent confirmation of all information required for the program and identification of qualifying lands. After the preliminary determination of eligibility, the following shall occur:

(a) The landowner, in cooperation with the department, shall delineate on the ground the boundary line of the qualifying lands as indicated in the application;

(b) The department shall verify the appropriateness of the delineation of qualifying lands using the procedure outlined in board manual section 18, make a final determination whether there are any unacceptable liabilities on the lands proposed for inclusion in the program, and communicate the foregoing to the landowner.

(c) The department will rate, rank, and fund, as described in WAC 222-23-025 (1), the eligible applications for each category of qualifying CMZ lands or critical habitat lands and for each funding cycle using a standardized scoring system.

(d) The department will prepare a combined preliminary project priority list, after evaluation and scoring of all applications.

(e) The department will submit the preliminary project priority list to the state legislature for budget consideration.

(f) The department will notify the applicant in writing of the funding decision for their application, subject to available funding from the legislature.

(g) For those applications determined to be funded, and if the department determines there are no unacceptable liabilities on the lands, the department shall follow the guidelines in WAC 222-23-030 (2) and the landowner shall enhance the boundary (as verified) using boundary marking methods specified by the department.

(h) For those applications determined to be eligible but not funded, the application will be returned to the applicant. At any time thereafter, the applicant may resubmit the application with or without revision. This resubmitted application will be placed on the next available funding cycle and will be reprioritized under the process described in (c) through (g) of this subsection.

(i) For those applications determined to be ineligible for reasons other than funding, the department must notify the landowner of the reason(s) and the application will be rejected.

(j) Once the landowner completes the boundary enhancement required in (g) of this subsection, the department shall:

(i) Perform a traverse of the boundary of the qualifying lands;

(ii) Conduct and finalize a cruise of the timber on the qualifying lands;

(iii) Determine the statutory compensation to be paid to the landowner;

(iv) Prepare conveyance documents consistent with this chapter; and

(v) Prepare any other documents necessary for closing and recording the conveyance, including without limitation a real estate excise tax affidavit.

(3) **Timber cruise.** For the purpose of determining the compensation, a timber cruise will be conducted by the department using a cruiser acceptable to the department and the landowner, using a cruise methodology determined by the department and sampling intensity acceptable to both parties.

The department will provide the cruise data to the landowner. Within thirty days thereafter, the landowner shall advise the department whether the cruise results are acceptable. The landowner or the department may, at their option, perform a check cruise.

(4) **Compensation for conveyances.** RCW 76.09.040 (3) specifies the compensation the department shall pay for the conveyance of a conservation easement under this chapter, unless the landowner chooses to donate the conservation easement. The department will calculate compensation based on stumpage and land use value tables described in (a) and (b) of this subsection. The tables applied will be those in effect as of the date the complete timber cruise is received by the department for new or resubmitted applications.

(a) For conveyances of a conservation easement in which the landowner conveys an interest in the trees only, the compensation shall only include the timber value component, as determined by the cruise volume multiplied by the appropriate stumpage value for timber of the same species shown on the appropriate table used for timber harvest excise tax purposes under RCW 84.33.091.

(b) For conveyances of a conservation easement in which the landowner conveys interests in both land and trees, the compensation shall include the timber value component plus such portion of the land value component as determined just and equitable by the department. The timber value component will be as set forth in (a) of this subsection. The land value component must be the acreage of qualifying lands to be conveyed, multiplied by the average per acre value. The department shall determine the averages based on the land value tables established by RCW 84.33.140 and revised annually by the department of revenue with separate values for western and eastern Washington.

(5) **Qualifying lands.** The lands proposed in an application must include qualifying CMZ lands or qualifying critical habitat lands that are eligible for easement acquisition as follows:

(a) Qualifying lands are lands that, once a complete application is received, are identified in records of the applicable county assessor as being assessed and taxed either under chapter 84.33 RCW as designated forest land or under chapter 84.34 RCW as current use classification timber land or open space.

(b) Qualifying lands are lands owned by an individual, partnership, corporation or other nongovernmental entity.

(c) Lands do not qualify for the program where the department has determined that:

(i) The lack of access to the land is likely to materially impair the department's ability to administer the program with respect to the land;

(ii) The land is subject to unacceptable liabilities. See WAC 222-23-010 (2)(c).

WAC 222-23-025 Priorities for conveyances and funding--Use of lands conveyed. *[Effective 6/19/11]*

(1) **Priorities for conveyances and funding.** The department shall rate, rank, and fund eligible CMZ applications separately from eligible critical habitat applications based on conservation benefits and landowner management options. See board manual section 18 for the rating, ranking and funding details for qualifying lands. The department will consult with representatives of affected Indian tribes, department of fish and wildlife, and department of ecology as necessary for technical expertise.

(2) **Use and management of lands and easement interests acquired under rivers and habitat open space program.** Subject to the exceptions set forth in this subsection (or as otherwise provided in the easement documents), the lands subject to the conservation easements under this chapter shall be managed by the department only in a manner necessary for ecological protection, and fisheries and wildlife enhancement. The easements under the program shall not create a right of public access to or across adjoining or other lands owned by the landowner granting an easement.

(3) **Transfer of easement interest or management responsibility.** After acquisition of an easement interest in qualifying lands, the department may transfer its interest in such lands by a recorded instrument to another state agency, a local governmental entity within which the lands lie, or a private nonprofit nature conservancy corporation (as defined in RCW 64.04.130). Alternatively, the department may contract with one or more of the foregoing entities to exercise the department's management authority over the qualifying lands. Any such contract will include provisions fully advising the contracting party of the rights of the landowner under this chapter and the conveyance instrument. The department shall notify the landowner of any transfer of its interest in the qualifying lands or any transfer of management responsibilities over those lands, provided that failure to so notify the landowner shall not affect the validity of the transfer.

WAC 222-23-030 Conveyance forms and procedure. *[Effective 6/19/11]*

(1) **Conservation easement.** Conveyances of a conservation easement shall be through execution by the landowner and the department of a conservation easement in a form acceptable to the department and the landowner. The easement shall be perpetual and not for a term of years. The easement will include terms reasonably necessary and appropriate to the circumstances of the particular lands involved. Prior to closing, the landowner shall procure a preliminary title insurance report from a title company, provided that in the case of an easement being donated to the department, the department shall pay the cost of the report.

(2) **Description standards.** The description of the qualifying lands being conveyed shall be a legal land survey description unless the cost of securing the survey would be unreasonable in relation to the value of the lands conveyed. When the department determines a survey need not be performed, the description shall be in the form that can depict the location of the lands conveyed without relying on verbal evidence, or another form acceptable to the department.

(3) **Closing and recording.** Upon execution of the conveyance documents and other documents required for closing, the department shall pay any compensation owed to the landowner and record the conveyance documents. The department shall pay the recording fees. No compensating taxes under chapters 84.33 and 84.34 RCW shall be owed. Title insurance premiums and any real estate excise tax owed shall be paid by the landowner conveying the easement.

(4) **Internal department of natural resources procedure for review of decisions.** Certain decisions of the department pursuant to this chapter may be appealed to the supervisor of the department or his or her designee. Any person that wishes to appeal final written decisions of the department pertaining to the following procedural determinations: Application eligibility, application prioritization, easement valuation, and related decisions made may submit a request for review within thirty days after the date of the department's final written notice of procedural determination. The request for review must identify the issue being raised and provide any supporting documentation. The supervisor will issue a written response within thirty days. The supervisor's written response shall constitute the department's final decision.