RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Washington Department of Fish and Wildlife

Permanent Rule Only

Effective date of rule:
Permanent Rules
☒ 31 days after filing. 11-78
☐ Other (specify) _____ **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☒ No If Yes, explain:

Purpose: This amendment deletes the requirement for a Bald Eagle Management Plan unless the bald eagle is listed as endangered or threatened in Washington State.

The bald eagle protection rule was established by the Fish and Wildlife Commission in 1986 to ensure habitat protection for bald eagles. Currently, this rule requires agencies (e.g. DNR, local governments) that issue permits for timber harvest, building, or land development to review a database of bald eagle nest and communal roost locations before issuing a permit. If a nest or communal roost is determined to be on the property proposed for development, then a Bald Eagle Management Plan between WDFW and the landowner is developed to help ensure minimal impact on bald eagles. In 2007, the bald eagle was removed from the federal endangered species list. Following the federal delisting, the state status for bald eagle was down-listed from endangered to sensitive in Washington.

The United States Fish and Wildlife Service (USFWS) has continuing authority and obligation to manage this species under the Bald and Golden Eagle Protection Act. Landowners who currently have a Bald Eagle Management Plan will need to review their activities with USFWS to determine if a federal permit is required; any landowners who need a new or revised permit will be referred directly to the USFWS.

Reasons supporting proposal:
Washington Department of Fish and Wildlife recognizes that bald eagle recovery has occurred and that for this reason emphasis on site-specific bald eagle habitat management should be reduced. The substantial reduction in bald eagle management efforts has been identified as an opportunity for Wildlife and Habitat Programs to shift focus to more pressing issues.

Citation of existing rules affected by this order:
Repealed:
Amended: WAC 232-12-292
Suspended:

Statutory authority for adoption: 77.12.047

Other authority : N/A

PERMANENT RULE (Including Expedited Rule Making)
Adopted under notice filed as WSR 11-03-088 on January 19, 2011.
Describe any changes other than editing from proposed to adopted version: See Statement of Changes.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: phone ( ) _____
Address: fax ( ) _____
e-mail _____

Date adopted: April 8, 2011

NAME (TYPE OR PRINT)
Miranda Wecker

SIGNATURE
Miranda Wecker

TITLE
Chair, Fish and Wildlife Commission

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: April 28, 2011
TIME: 4:12 PM

WSR 11-10-049

(COMPLETE REVERSE SIDE)

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New _____ Amended _____ Repealed _____

The number of sections adopted in the agency's own initiative:

New _____ Amended 1 Repealed _____

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New _____ Amended _____ Repealed _____

The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

STATE OF WASHINGTON
DEPARTMENT OF FISH AND WILDLIFE
WILDLIFE PROGRAM

Fish and Wildlife Commission Meeting
April 8-9, 2011

STATEMENT OF CHANGES

WAC 232-12-292 Bald eagle protection rules.

Changes from the text of the proposed rule and reasons for difference:

- Section 1.1 was changed to provide the rule's applicability:

  Rule Applicability

  1.1 The following rules are only applicable and enforceable when the bald eagle is listed under state law as threatened or endangered.

- The changes in the version of the rule filed with the CR-102 were dropped so that the original language remained in place.

- Sections were re-numbered accordingly.

These changes were made to provide greater clarity to the rule.

AMENDATORY SECTION (Amending Order 01-283, filed 12/28/01, effective 1/28/02)

WAC 232-12-292 Bald eagle protection rules.

Rule applicability

1.1 The following rules are only applicable and enforceable when the bald eagle is listed under state law as threatened or endangered.

Purpose

((~~1.1~~)) 2.1 The purpose of these rules is to protect the habitat and thereby maintain the population of the bald eagle so that the species is not classified as threatened, endangered or sensitive in Washington state. This can best be accomplished by promoting cooperative efforts to manage for eagle habitat needs through a process which is sensitive to the landowner goals as well. The following rules are designed to promote such cooperative management.

Authority

((~~2.1~~)) 3.1 These rules are promulgated pursuant to RCW 77.12.655.

Definitions

((~~3.1~~)) 4.1 "Communal roost site" means all of the physical features surrounding trees used for night roosting that are important to the suitability of the roost for eagle use. These features include flight corridors, sources of disturbance, trees in which eagles spend the night, trees used for perching during arrival or departure and other trees or physical features, such as hills, ridges, or cliffs that provide wind protection.

((~~3.2~~)) 4.2 "Cultural activities" means activities conducted to foster the growth of agricultural plants and animals.

((~~3.3~~)) 4.3 "Department" means department of fish and wildlife.

((~~3.4~~)) 4.4 "Endangered" means a species which is seriously threatened with extirpation throughout all or a significant portion of its range within Washington.

((~~3.5~~)) 4.5 "Government entities" means all agencies of federal, state and local governments.

((~~3.6~~)) 4.6 "Landowner" means any individual, private, partnership, nonprofit, municipal, corporate, city, county, or state agency or entity which exercises control over a bald eagle habitat whether such control is based on legal or

equitable title, or which manages or holds in trust land in Washington state.

((~~3.7~~)) 4.7 "Nest tree" means any tree that contains a bald eagle nest or has contained a nest.

((~~3.8~~)) 4.8 "Nest site" means all of the physical features surrounding bald eagle nests that are important to normal breeding behavior. These features include alternate and potential nest trees, perch trees, vegetative screening, foraging area, frequently used flight paths, and sources of disturbance. This site is also referred to as the territory defended by a breeding pair of eagles.

((~~3.9~~)) 4.9 "Perch tree" means a tree that is consistently used by eagles. It is often close to a nest or feeding site and is used for resting, hunting, consumption of prey, mating display and as a sentry post to defend the nest.

((~~3.10~~)) 4.10 "Predacides" means chemicals used to kill or control problem wildlife.

((~~3.11~~)) 4.11 "Region" means an ecological/geographic area that forms a unit with respect to eagles, e.g., Hood Canal, lower Columbia River, outer coast and south Puget Sound.

((~~3.12~~)) 4.12 "Sensitive" means any wildlife species native to the state of Washington that is vulnerable or declining and is likely to become endangered or threatened in a significant portion of its range within the state without cooperative management or removal of threats.

((~~3.13~~)) 4.13 "Site management plan" means a legal agreement between the department and the landowner for management of a bald eagle nest or roost site. This plan may be a list of conditions on a permit or a more detailed, site-specific plan.

((~~3.14~~)) 4.14 "Threatened" means a species that could become endangered within Washington without active management or removal of threats.

Applicability and operation

((~~4.1~~)) 5.1 The department shall make available to other governmental entities, interest groups, landowners and individuals information regarding the location and use pattern of eagle nests and communal roosts.

((~~4.2~~)) 5.2 The department shall itself and through cooperative efforts (such as memoranda of understandings pursuant to chapter 39.34 RCW) work with other government agencies and organizations to improve the data base for nest and communal roost site activity and productivity and to protect eagle habitats through site management plans.

((~~4.3~~)) 5.3 The department's goal shall be to identify, catalog and prioritize eagle nest or communal roost sites. The department shall notify permitting agencies of nesting or roost site locations.

((~~4.4~~)) 5.4 When a landowner applies for a permit for a land-use activity that involves land containing or adjacent to an eagle nest or communal roost site, the permitting agency shall notify the department.

If the department determines that the proposed activity would adversely impact eagle habitat, a site management plan shall be required. The department, a permitting agency, or wildlife biologist may work with the landowner to develop a plan. The department has final approval authority on all plans.

((~~4.5~~)) 5.5 It is recognized that normal on-going agricultural activities of land preparation, cultivating, planting, harvesting, other cultural activities, grazing and animal-rearing activities in existing facilities do not have significant adverse consequences for eagles and therefore do not require a site management plan. New building construction, conversion of lands from agriculture to other uses, application of predacides and aerial pesticide spraying, may, following a conference with the department, be subject to the site management planning process described in these rules.

((~~4.6~~)) 5.6 Emergency situations, such as insect infestation of crops, requires immediate action on the site management plan or special permission to address the impending crisis by the department.

Site management plan for bald eagle habitat protection

((~~5.1~~)) 6.1 The purpose of the site management plan is to provide for the protection of specific bald eagle habitat in such a way as to recognize the special characteristics of the site and the landowner's property rights, goals and pertinent options. To this end, every land owner shall have fair access to the process including available incentives and benefits. Any relevant factor may be considered, including, but not limited to, the following:

((~~5.1.1~~)) 6.1.1 The status of the eagle population in the region.

((~~5.1.2~~)) 6.1.2 The useful life of the nest or communal roost trees and condition of the surrounding forest; the topography; accessibility and visibility; and existing and alternative flight paths, perch trees, snags and potential alternative nest and communal roost trees.

((~~5.1.3~~)) 6.1.3 Eagle behavior and historical use patterns, available food sources, and vulnerability to disturbance.

((~~5.1.4~~)) 6.1.4 The surrounding land-use conditions, including degree of development and human use.

((~~5.1.5~~)) 6.1.5 Land ownership, landowner ability to manage, and flexibility of available landowner options.

((~~5.1.6~~)) 6.1.6 Appropriate and acceptable incentive mechanisms such as conservation easements, transfer or purchase of development rights, leases, mutual covenants, or land trade or purchase.

((~~5.1.7~~)) 6.1.7 Published recommendations for eagle habitat protection of other government entities such as the U.S. Fish and Wildlife Service.

((~~5.2~~)) 6.2 The site management plan may provide for

((~~5.2.1~~)) 6.2.1 Tailoring the timing, duration or physical extent of activities to minimize disturbance to the existing eagle habitat and, where appropriate, identifying and taking steps to encourage and create alternative eagle habitat; and

((~~5.2.2~~)) 6.2.2 Establishing a periodic review of the plan to monitor whether:

a) The plan requires amendment in response to changing eagle and landowner circumstances

b) The terms of the plan comply with applicable laws and regulations,

c) The parties to the plan are complying with its terms.

((~~5.3~~)) 6.3 The site management plan may also provide for implementing landowner incentive and compensation mechanisms through which the existing eagle habitat can be maintained or enhanced.

Guidelines for acquisition of bald eagle habitat

((~~6.1~~)) 7.1 Real property interests may be acquired and agreements entered into which could enhance protection of bald eagle habitat. These include fee simple acquisition, land trades, conservation easements, transfer or purchase of development rights, leases, and mutual covenants. Acquisition shall be dependent upon having a willing seller and a willing buyer. Whatever interest or method of protection is preferable will depend on the particular use and ownership characteristics of a site. In discussing conservation objectives with private or public landowners, the department shall explore with the landowner the variety of protection methods which may be appropriate and available.

((~~6.2~~)) 7.2 The following criteria and priorities shall be considered by the department when it is contemplating acquiring an interest in a bald eagle habitat.

((~~6.2.1~~)) 7.2.1 Site considerations:

a) Relative ecological quality, as compared to similar habitats

b) Ecological viability--the ability of the habitat and eagle use to persist over time

c) Defensibility--the existence of site conditions adequate to protect the eagle habitat from unnatural encroachments

d) Manageability--the ability to manage the site to maintain suitable eagle habitat

e) Proximity to food source

f) Proximity to other protected eagle habitat

g) Proximity to department land or other public land

h) Eagle population density and history of eagle use in the area

i) The natural diversity of native species, plant communities, aquatic types, and geologic features on the site.

((~~6.2.2~~)) 7.2.2 Other considerations

a) Ownership

b) Degree of threat

c) Availability of funding

d) Existence of willing donor or seller and prior agency interest

e) Cost

In general, priority shall be given to the most threatened high quality eagle habitats with associated natural values which require the least management.

Resolution of site management plan disputes

((~~7.1~~)) 8.1 The department and the landowner shall attempt to develop a mutually agreeable site management plan within 30 days of the original notice to the department.

((~~7.2~~)) 8.2 Should agreement not be reached, the landowner may request an informal settlement conference with the department.

((~~7.3~~)) 8.3 If the landowner chooses not to use the informal settlement conference process or if resolution is not reached, the department shall within 15 days provide a site management plan to the landowner.

((~~7.4~~)) 8.4 Upon issuance of a final site management plan, the landowner may initiate a formal appeal of the department's decision. The appeal shall be conducted according to the Administrative Procedure Act, chapter 34.05 RCW and the model rules of procedure, chapter 10-08 WAC.

A request for an appeal shall be in writing and shall be received by the department during office hours within thirty days of the issuance of the final site management plan. Requests for appeal shall be mailed to Department of Fish and Wildlife, 600 Capitol Way N., Olympia, Washington 98501-1091, or hand delivered to 1111 Washington Street S.E., Wildlife Program, Fifth floor. If there is no timely request for an appeal, the site management plan shall be unappealable.

The written request for an appeal shall be plainly labeled as "request for formal appeal" and shall contain the following:

(a) The name, address, and phone number of the person requesting the appeal;
(b) The specific site management plan that the person contests;
(c) The date of the issuance of the site management plan;
(d) Specific relief requested; and
(e) The attorney's name, address, and phone number, if the person is represented by legal counsel.

The appeal may be conducted by the director, the director's designee, or by an administrative law judge (ALJ) appointed by the office of administrative hearings. If conducted by an ALJ, the ALJ shall issue an initial order pursuant to RCW 34.05.461. The director or the director's designee shall review the initial order and enter a final order as provided by RCW 34.05.464.

Penalties

((~~8.1~~)) 9.1 Failure of a landowner to comply with the processes set forth in these rules or with the provisions of a site management plan approved by the department constitutes a misdemeanor as set forth in RCW 77.15.130.