

December 21, 2000 version  
**NONPROJECT REVIEW FORM**

**1) Background**

a) Agency and contact name, address, telephone, fax, email

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b) Designated responsible official

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c) Name of proposal, if any, **and brief description.**

Department of Ecology (Ecology) is developing a rule amendment to WAC 173-158 that will guide the assessment procedures and criteria (described in subsections 3 & 4 of ESHB-2934) relating to the re-building of residential structures within the State's floodways as defined in RCW 86.16.

d) Describe the jurisdiction or area where the proposal is applicable.

1. Statewide within all Federal Emergency Management Agency (FEMA) designated floodways, as mapped under the authority of the National Flood Insurance Program (NFIP).
2. Exceptions to the requirements under RCW 86.16.041 for floodway farmhouses are limited to those agricultural lands designated under the Growth Management Act.

e) What is the legal authority or mandate for the proposal?

NFIP regulations (44CFR) allow any substantial improvement or replacement of structures in the designated floodway provided there is no increase in encroachment. Substantially damaged structures by definitions would be substantial improvements. Substantial damages would not be limited to flood damages but would include all damages such as damage from wind, snow-loading, earthquake, and fire.

RCW 86.16 further restricts the NFIP requirements to prohibit substantial improvement or replacement of residential structures in the designated floodway.

Farming has been determined to be a good use of the floodplain because large land tracts are maintained as open space. In order to maintain the family farmhouse near the farming activity, improvements to the farmhouse need to be made.

The designated floodway is the area of the floodplain that need to be reserved to maintain the flood flows. It is usually the area with high depth, high velocity, and greatest erosion potential. However, there are areas of the designated floodway not subject to depth, velocity, and erosion that would preclude replacement of a damaged structure. The legislation, under ESHB-2934, allows exceptions to RCW 86.16.041 to:

- 1) continue agricultural activities by allowing substantial improvement to a farmhouse.
- 2) evaluate water velocity, depth and erosion potential in the determination of replacement of a residential structure other than a farmhouse.

## 2) Need and Objectives

### a) Describe the problem to be addressed and the need for the action.

RCW 86.16 precludes substantial repair, replacement, reconstruction or improvement to a residential structure located in a designated floodway. This bill exempts substantial repair or replacement of farmhouses located within a designated floodway under certain conditions. The regulatory floodway does not always depict hazardous areas subject to depth, velocity and erosion potential. This bill allows DOE to consider recommending repair or replacement of residential structures other than farmhouses located within a designated floodway under certain conditions and with concurrence of local government.

The need for action is the mandate under ESHB 2934 to have the revised rule adopted by December 31, 2000.

### b) Describe the primary objective(s) of the proposal.

Establish criteria, which will allow replacement or repair of a residential structure, including a farmhouse, located within a designated floodway, while reducing the potential for flood-related damages. The following conditions must be met:

1. There is no potential safe building location for the replacement structure outside the regulatory floodway.
2. A replacement residential structure shall not increase the total square footage of floodway encroachment.
3. Repairs or reconstruction shall not increase the total square footage of floodway encroachment.
4. The elevation of the lowest floor of the substantially damaged or replacement residential structure is a minimum of one foot higher than the base flood elevation.
5. New or replacement water systems are designed to eliminate or minimize infiltration of floodwaters into the system.
6. New or replacement sanitary sewerage systems are designed and located to eliminate or minimize infiltration of floodwater into the system and discharge from the system into the flood waters.
7. All other utilities and connections to public utilities are designed, constructed, and located to eliminate or minimize flood damage.
8. Conduct scientific analysis of depth, velocity, flood related erosion.

### c) Are there any other objectives? If so, describe.

To amend RCW 86.16 to correspond with the NFIP definition of substantial improvement.

### d) What are the current known or anticipated key environmental issues or areas of controversy or concern?

A key environmental issue relating to this rule is the still evolving requirements relating to the protection of endangered species under the federal Endangered Species Act (ESA), specifically as it relates to the preservation/protection of riparian areas. Advocates for expanded protection may consider these revisions as a weakening of state and local land use controls that may adversely impact the effort under the ESA. This concern may also apply to the State of Washington Shoreline Management Act (SMA) guidelines. However, these rule revisions should actually improve environmental conditions by reducing the number of unsafe structures located in designated floodways.

### 3) Previous Documentation

- a) Identify and briefly describe any similar or related plan, regulation, policy, etc. currently in effect governing this geographic area and that contains the means to further the primary objective.

Growth Management Act (GMA) Comprehensive Plans, Shoreline Management Act, local Shoreline Master Programs (SMP), Comprehensive Flood Hazard Management Plans (CFHMP), local Floodplain Ordinances, local Critical Area Ordinances, local Zoning Regulations. All of the above regulate development in the designated floodway.

- b) Is this proposal likely to result in an amendment to or replacement of such existing regulation, policy or plan? Briefly describe.

Amendments to WAC 173-158 to incorporate the changes in the law under 86.16 RCW and the subsequent amendments to local floodplain ordinances. It is assumed that any additional regulatory requirements with GMA, SMA or Critical Area Ordinances would be addressed as conditions of the permitting process.

- c) List any environmental documents (SEPA or NEPA) that have been prepared for items identified in 3a above. Identify the type of document, lead agency, and issue date.

Local government is the lead agency to address documents listed in 3a above. These documents are on file at the local government office for public review.

- d) Do the SEPA documents in 3c adequately analyze any or all of the impacts from the alternatives being considered? **(Impacts with previous adequate analysis need not be re-analyzed, but should be incorporated by reference into the NPRF.)**

All regulations, plans, ordinances, etc. are subject to public review and comment, including review by State of Washington environmental resource agencies. Degree of environmental consideration is dependent upon purpose and complexity of the project. Since plans and ordinances are generally based on some degree of scientific analysis, it is assumed that most significant impacts would be addressed prior to SEPA review and would incorporate resolution of any such impacts noted during review prior to adoption.

### 4) Alternative Approaches

- a) Briefly describe any legal or other mandate that requires a particular approach?

CFR 44, Part 60.3 (d) (3) prohibits encroachments within the regulatory floodway. RCW 86.16.041 is more restrictive than CFR 44 and remains so after the passage of ESHB 2934, which mandates this rule revision.

- b) If there is no mandated approach, what type of approaches could reasonably achieve the objectives? N/A

- c) *Why was the approach presented in the proposal selected?*

State statute RCW 86.16.041 is more restrictive than the FEMA minimum federal standards set forth in CFR 44 Part 60.3 (d) (3). The passage of ESHB 2934 changed the state law and requires the revision of the rule. This legislation provides the option of a waiver to the existing rule in the case of farmhouses and other structures under certain conditions, which should result in the reduction of structures at risk to flood damage and improved coordination with local governments.

## 5) Public, Agency and Tribal Involvement

### a) Who are the known primary stakeholders?

All local jurisdictions participating in the National Flood Insurance Program and all citizens residing within a FEMA designated floodway. This includes: individual property owners; farmers, ranchers, and other agricultural interests, such as the Grange, Cattlemen's Association and other such groups; building and construction trades associations; real estate interests; and property rights groups.

### b) What other jurisdictions are involved and for what reason?

Washington Fish and Wildlife, FEMA, Associations of Washington Cities and Counties, Community Trade and Economic Development, Washington Department of Agriculture. Each agency has some regulatory impact for activities located within a designated floodway.

### c) What types of processes will be used for soliciting, evaluating, and documenting input from stakeholders, agencies, tribes and the public?

A Technical Advisory Committee has been established with representatives from federal, state, county and city governments to assist in the preparation of rule language. A general mailing will be done explaining briefly the proposed action and providing the opportunity for interested parties to request detailed information for their review. Also, public hearings will be conducted in at least two appropriate locations to solicit public comment.

\*Employ the Technical Advisory Committee of stakeholders for review and comment. Provide a mailing to local governments offering the opportunity to review detailed information and address any resulting salient comments. Post the draft regulation on the DOE website. Conduct at least two public hearings prior to rule adoption and respond to all comments received.

### d) If different from above, briefly describe the processes used in addressing the public's and other interested parties concerns and comments? N/A

*Guidance #6: This response should describe those attributes of the area(s) likely to be affected by "on the ground" activities. The specificity will vary depending on both the nature of the anticipated nonproject action as well as the jurisdictional constraints. A nonproject action covering all contaminated sites should broadly describe whether or not most or many sites are in urban areas, near water bodies, in industrially developed areas, etc. A nonproject action for a one hundred-acre rezzone will contain considerably greater detail-to the degree that the reader can visualize the area.*

## 6) Existing Environment

a) Generally describe the existing environmental landscapes (i.e., status or quality of ecosystem) likely to be affected if the proposal is implemented. Include a description of the existing environment where resulting "on the ground" activities may occur and adjacent areas and facilities likely to be impacted. The following should be included, as appropriate:

- Primary physical features
- Development level and infrastructure
- Percent impervious surfaces (approximate)
- Unique features, including historic and cultural sites, potential or existing critical areas, resource lands
- Endangered or Threatened Species in or near the area

The primary physical features of the environment affected by the rule are within the 100-year floodplain and are low-lying, generally flat areas adjacent to rivers and streams. The operating definition of the floodway is the stream channel plus that portion of the overbank area needed to discharge 100-year flood flows as designated on the FEMA Floodway or Flood Insurance Rate Maps. The development levels and infrastructure contained in the floodway areas varies by local jurisdiction, but is generally limited due to their potentially hazardous nature. In many cases the floodway is not sufficiently wide enough to accommodate much development or impervious surface and the restrictions that have been placed on development in these areas since the inception of the NFIP and floodplain management regulations has been a further limiting factor. Unique features that may be part of the floodway areas include: frequently flooded areas; riparian corridors for fish and wildlife habitat; channel migration or erosional zones; wetlands; historic and cultural sites for Native American and pioneer developments or activities; and often agricultural areas.

This rule applies to improvement, repair, replacement or relocation of existing structures and precludes any increase in development level and infrastructure. Therefore, impacts to any critical areas should be beneficial in terms of protection and preservation.

## 7) **Broad Impacts**

- a) In meeting the primary objective (identified in 2b of this form) is it likely that the non-project action will direct an agency to develop or construct projects? Describe.

No development or construction projects will be initiated just by the adoption of the revised wording of WAC 173-158 mandated by the implementation of ESHB – 2934.

- b) In meeting the primary objective is it likely that the non-project action will encourage physical changes to the natural or built environment? Describe.

The impact will be on existing structures in the regulatory floodway. NFIP statistics show that approximately 70% of the structures reporting flood damage occur to those structures that were in place prior to the NFIP and floodplain management regulations. This rule would not encourage further development and would, in fact, probably reduce the number of structures in the floodway areas as it is applied, since one of the criteria is siting the replacement or relocation in areas not subject to high flood water depth, velocity or erosion potential. Also, by requiring replacement or improved structures to be built as flood resistant structures, damage to structures will be reduced or eliminated and result in comparable reduction in environmental damage. Therefore, any changes to the natural and built environments should be beneficial to the surrounding environment.

- c) What is the location (geographic area) where changes will be directed or encouraged? Include the area directly affected, as well as adjacent or other areas where changes will be indirectly encouraged.

All activity will be restricted to within the FEMA designated floodway. Any structure being improved, repaired, replaced or relocated must meet the criteria established in the rule. It is estimated that less than 100 farmhouses, primarily within county jurisdictions, would be potentially affected. It is estimated that less than 250 other structures would be potentially affected by this rule.

- d) Will this action constrain certain activities or development, but not preclude all activities or developments? Briefly describe.

This action is restricted to only those developments located within the FEMA designated floodway. It does not preclude development, but rather prescribes, under certain criteria, how development will be allowed. This procedure is designed to reduce or preclude future damage to residential structures located within the designated floodway.

*Guidance #8: In the development of a nonproject proposal, preliminary decisions are made as to what direction or alternatives will best meet the objective(s). This section documents those issues, analyze the environmental consequences, and describes alternatives (particular to those with lesser adverse environmental impacts). For the selected preliminary decision, mitigation should be reviewed as to whether or not it is consistent with the objective(s). Documentation of the rationale such as, economics or constrained by existing law, for not considering other alternatives should be provided.*

**8) Key issues/questions, alternatives, impacts and mitigation.**

- a) Identify key issue/question # 1. Include a brief statement of why this is a key issue/question.

Given a legislative mandate to adopt a rule that allows the repair or reconstruction of farmhouses and other residential structures within floodways, reasonable alternatives were limited to the criteria to be used to establish the extent of reconstruction and the areas where such activity would be allowed. Extent of construction is limited by the Federal Emergency Management Agency (FEMA) as not exceeding 50% of fair market value; consequently, any alternatives to this aspect were not investigated. Thus the only issues for which the solution may commit the agency to a particular direction is the establishment of the criteria for determining where repair or reconstruction could occur.

- b) Identify Alternative solutions

Alternatives considered regarding the criteria included:

- 1) **More stringent criteria.** The Pierce County Floodway Criteria: In addition to the FEMA designated floodway restrictions Pierce County regulates development situated outside the FEMA floodway based upon a determination of the potential for deep and fast flowing flood water. The county developed a graph depicting flood water depth vs velocity indicating safe vs unsafe conditions.

**I) How would each alternative solution likely direct, encourage or enable:**

- New Development? None
- Redevelopment? None
- Changes in land use? None
- Changes in density of use? None
- Changes in management practices? Includes land use regulation outside of the FEMA floodway and is therefore beyond the scope of the mandate under ESHB-2934.

**II) What are the likely impacts from the changes?**

This alternative exceeds the authority set forth in ESHB-2934

**III)What are potential mitigation measures for these impacts?**

None are needed

**IV)Will the intent of the proposal still be met if these impacts occur?**

Not applicable

**b) What preliminary decision, if any, was made regarding this key issue?**

Not applicable as it included land outside the FEMA designated floodway

**c) Which alternatives will be carried forward for further analysis?**

None

**d) For those alternatives not carried forward please describe why not?**

Not applicable

2) **Best Professional Judgement:** This alternative was discussed and rejected as vague due to lack of criteria to be considered in each site specific evaluation.

**How would each alternative direct or encourage or enable:**

- New Development – None
- Redevelopment – Could be considered within strict criteria set forth in ESHB-2934
- Changes in Land Use – None
- Changes in Density of use – None
- Changes in Management Practices – If applied would require establishing strict criteria to the considered for each site evaluation.

**II)Likely impacts from the changes**

Lack of consistency in implementing intent due to absence of criteria

**III)Potential Mitigation Measures**

None are needed

**IV)Will the intent of the proposal still be met if these impacts occur ?**

Not applicable

3) **U. S. Bureau of Reclamation Guidelines:** The USBR Engineering and Research Center published guidelines for evaluating hazard classifications related to flood water depth and velocity. Flood danger was evaluated for houses built on foundations; mobile homes; passenger vehicles; adults; and children. A graph was prepared for each category illustrating the range of flood hazard for low danger zone, judgement zone and high danger zone based upon flood water depth vs velocity.

**How would each alternative direct or encourage or enable:**

- New Development – Not allowed
- Redevelopment – May be authorized under strict criteria set forth in WAC 173-158 revision under ESHB-2934
- Changes in Land Use – None
- Changes in Density of Use – None

- Changes in Management Practices – Ecology, at the request of local government, is authorized to assess the risk of harm to life and property posed by the specific condition of the floodway and based on the criteria contained in the proposal may exercise best professional judgement in recommending to the local permitting authority the repair, replacement or relocation of a substantially damaged structure. The department will prepare a report of findings and recommendation to the requesting local government for their concurrence on repair, replacement, relocation or denial of such damaged residential structures.

**II) Likely impacts from the changes**

The rule will not allow any additional structures to be constructed than now exist, therefore, there are no impacts likely from this rule, except for minor impacts associated with authorized reconstruction.

**III) Potential Mitigation Measures**

None are needed

**IV) Will the intent of the proposal still be met if these impacts occur ?**

Not applicable

**C) What preliminary decision was made, if any, regarding this key issue?**

To proceed with the U. S. Bureau of Reclamation Guidelines for the hazard classification for adoption as the preferred alternative.

Identify key issue/question # 2. Include a brief statement of why this is a key issue/question.

**The Endangered Species Act (ESA)** and its potential implications related to future activities within a Federal Emergency Management Agency (FEMA) designated floodway are unknown at this time. Until such time as there is a statute or rule adopted to address this issue there is no way to adequately evaluate its impact on floodway activities as proposed by this rule revision mandated by ESHB – 2934.

**How would each alternative direct or encourage or enable:**

- New Development – Not allowed
- Redevelopment – Could be considered within strict criteria set forth in ESHB-2934
- Changes in Land Use – None
- Changes in Density of use – None
- Changes in Management Practices – Depending on ultimate decisions and changes in statutes and rules it could preclude activities along any water way identified as habitat for an endangered species.

**II) Likely impact from the changes**

Can not be determined at this time

**III) Potential Mitigation Measures**

Unknown at this time

**IV) Will the intent of the proposal still be met if these impacts occur**

Depending on the decisions resulting from the ESA it may preclude those activities proposed in the rule.

**9) Total Proposal Evaluation**

If there is a preferred alternative (draft proposal) or alternative packages, describe any additional impacts and mitigation (over and above those addressed in key issue analysis) when considering the total proposal.

The selection of the U.S. Bureau of Reclamation Guidelines as the preferred alternative provides specific criteria to be used in evaluating site specific conditions for the repair, replacement, relocation or denial of a non-farm residential structure. The environmental impacts resulting from this rule change will be positive in nature as it will limit or reduce the number of structures in floodway areas. Furthermore, structures that are allowed will be sited in the safest locations, which also corresponds to the least environmentally sensitive areas. Those structures that are allowed will have to meet construction standards that reduce the potential for flood damage and consequently reduce the threat of environmental damage. Therefore, this rule change should have beneficial affects on the environment, especially directly and cumulatively. Indirectly, there may be minor impacts to floodplain areas adjacent to the floodway as some structures may be relocated to these areas, but the compensatory impact of their removal from the more environmentally sensitive floodway areas should provide a positive balance.

Another issue is that of FEMA floodplain/floodway map irregularities. Some of the mapped floodways may actually encompass areas that are less hazardous than adjacent floodplain areas. This rule change should assist in addressing this deficiency on an individual parcel basis as it will require more detailed site-specific analysis than may have been done in preparation for the maps. It will not, however, address those areas that should have been mapped as floodways but were not.

**10) Consistency of the proposal with other plans, policies and laws.**

a) Internal consistency

(1) Is the proposal internally consistent with your agency's previously adopted or ongoing plans and regulations?

This action, mandated by ESHB – 2934, amends WAC 173-158. This WAC implements the requirements of RCW 86.16 which addresses development within a designated floodway, therefore, this action is internally consistent with the departments current statutes and regulations. This rule amendment does not require amendments to any of the documents set forth in item 3 (a) with the exception of the local floodplain ordinance. Each local government must amend their respective ordinance to adopt the requirements under ESHB-2934.

(2) If there are internal inconsistencies, how does the proposal deal with them? Identify any strategies or ideas for resolving inconsistencies with existing, and /or, anticipated future laws, rules, or plans.

N/A

b) External consistency

(1) Is the proposal consistent with adopted or ongoing plans and regulations of adjacent jurisdictions and/or other agencies, if applicable?

Yes – this action is consistent with federal regulations, CFR 44, Part 60 and state statute RCW 86.16 which address activities located within a FEMA designated floodway. Local government must adopt the minimum

state and federal regulations to maintain eligibility in the National Flood Insurance Program.

- (2) If there are external inconsistencies, how does the proposal deal with them? Identify any strategies or ideas for resolving inconsistencies with existing, and /or, anticipated future laws, rules, or plans.  
At such time as the amended wording for WAC 173-158 is adopted local government must amend their local flood ordinance to comply with the revised wording of WAC 173-158.

**11) Unavoidable impacts and impacts to be addressed later.**

- a) Identify what impacts have been left to be addressed at the project level (i.e., thresholds which trigger further environmental analysis at the project level).  
At such time as a project is proposed within a designated floodway a permit for development must be applied for through local government. This action will trigger compliance with environmental analysis requirements.
- b) For GMA actions, what impacts from the proposal have been designated as acceptable under chapter 36.70A RCW?

**12) Monitoring and Follow-up**

- a) How will the completion of and compliance with mitigation measures be monitored and enforced? Who will do the tracking, how will it be done, etc.?  
Following adoption of the proposed wording for WAC 173-158, as mandated by ESHB-2934, local government must issue a permit for the proposed activity and will have the responsibility to monitor and ensure compliance with conditions set forth in the permit. Each local floodplain ordinance contains a penalty provision for non-compliance with permit requirements. Permit conditions and citizen vigilance assure compliance.
- b) How will the impacts of the proposal be measured in relation to any benchmarks, performance standards and/or thresholds identified in the proposal?  
Local government will maintain permitting authority and monitor effects of any permitted activity. For those residential structures replaced and elevated there will not be any flood damage from a base flood event. If a residential structure is not allowed to be replaced the former site will be returned to open space.
- c) What other non-project actions will be necessary to achieve the objectives of this action?  
Unknown at this time. It may be necessary for local government to amend their administrative procedures in the local flood ordinance to implement the effect of the revised wording of WAC 173-158.