

## **Concise Explanatory Statement (CES)**

### **Construction, Creation and Maintenance of Roads, Trails, and Structures**

**Rules amended as part of this rulemaking:**

None

**Rules repealed as part of this rulemaking:**

None

**Rules created as part of this rulemaking:**

WAC 220-500-041 Construction, Creation and Maintenance of Roads, Trails, and Structures

**1. Background/Summary of Project:**

The Washington Department of Fish and Wildlife (“department”) has been facing an increasing number of instances where the public has constructed, modified, or caused to create trails and roads or erected structures on department-owned or managed lands without department permission. These trails, roads and structures are often constructed, created, and maintained in locations or in manners that environmentally, culturally, or financially unsustainable. Consequently, the department has created a rule to address this problem and reduce the incidence of these unpermitted actions.

While developing the rule, the department researched the practices of other state and federal agencies who have similar concerns as the department and determined that the regulations utilized by the United States Forest Service and the Washington Department of Natural Resources (DNR) to address illegal road and trail construction and maintenance were the most similar and relevant as models from which to formulate the WDFW rule.

Procedurally, the department filed its CR-101 on July 31, 2023, allowing for public comment through its PublicInput website on this topic. A tribal roundtable to discuss the rulemaking was held on October 3, 2023, and included 35 participants representing 19 tribes or tribal collaboratives. The department communicated with the 200+ participants of the Recreation Responsibly Coalition, which includes many of the state’s conservation and outdoor recreation organizations and land management agencies and conducted meetings with representatives of the Backcountry Horsemen of Washington, Evergreen Mountain Bicycling Alliance, the Washington Trails Alliance, Conservation Northwest, and the Washington Department of Natural Resources from April through September of 2024. The public was invited to engage via media release.

Following extensive outreach and discussion with stakeholders, the department filed its CR-102 on July 3, 2024. The first scheduled briefing and hearing on this rule project was continued to

allow the department additional time to consider recommendations from stakeholders. Recommendations included integration of an “emergency exception” to the rule, and an exception for volunteers operating under volunteer agreements signed with the department.

After filing the CR-102 on July 3, the department gave the public forty-four (44) days to comment on the proposed draft rule. Department staff carefully reviewed submitted comments, sought compromise with stakeholders and the public that would preserve the intent and efficacy of the rule, and modified the draft rule to include reference to voluntary agreements. On August 9, the department filed a CR-102 Continuance to reschedule the briefing and hearing until September 30. At the rule hearing, one individual from the public expressed their opinion about the proposed rule; this individual was generally supportive of the rule but preferred that the department include an emergency exception like the exception offered on DNR-managed lands under WAC 332-52-405.

## **2. Reasons for adopting the rule:**

User created roads and trails often cut through sensitive habitat, interrupt habitat connectivity, and cause direct damage to habitat, fish, wildlife, and tribal resources. These roads and trails lack the necessary planning, design and evaluation of impacts on the land to place or build them appropriately. The department has documented ongoing damage to the natural resources on its managed and owned lands. The department does not have a current rule to address this problem. Without administrative remedies to prevent or cite individuals for the creation of roads, trails and structures without approval, there is a risk that these activities will continue to proliferate and degrade sensitive resources managed by the department.

## **3. Differences between the text of the proposed rule and the rule as adopted:**

There are two changes between the published rule and the rule to be adopted:

- a. The department has identified several written documents that will satisfy the requirement of having express written permission to modify an existing trail or road. These referenced documents must include express written permission from the department to make trail or road modifications.
- b. The department has changed the requirement to have a copy of the written permission at the work site to having a copy of written permission that must be made available upon request from department staff.

## **4. Public comments, response to comments, and consideration of comments**

### **Summary**

Many comments received supported the adoption of the draft rule.

There were some comments that *generally supported the concept of the rule but with some recommendations for changes or additions*, such as enacting stiffer penalties (fines, charges) or restricting violations to uses or on certain types of routes. There was a significant number of comments that suggested that maintenance of trails by volunteers and the public should be allowed on any, or at least on authorized, existing routes. There were several comments that recommended that the agency adopt the exceptions provided in the DNR WAC on the same topic.

Some comments expressed concern that WDFW lacks the management or enforcement capacity for effective enforcement of the rule. Some commenters said the draft rule lacked clarity, which would undermine its efficacy. Other comments recommended that the penalty be an infraction rather than a criminal misdemeanor.

A segment of statements *opposing the rule* suggested that most or all regulations by the department of WDFW-managed lands are undesirable or unwarranted.

### **Comments supporting the rule:**

- There is an overwhelming amount of public research noting the importance of keeping trails and recreational use out of critical areas for wildlife.
- Unsanctioned roads and trails can cause deleterious environmental impacts, including excessive sedimentation, fish passage barriers, further loss of biodiversity,
- Building and/or using unsanctioned trails is having a negative impact on department-managed resources.
- Undisturbed functional habitat is needed for survival and reproductive sustainability of flora and fauna.
- Careful planning is needed to ensure that the location of new routes minimizes negative impacts to wildlife and habitat. User created routes don't go through the rigorous process to evaluate their location and potential impacts.
- The WDFW road and trail evaluation process will bring together the best data and perspective and its important that this process not be circumvented.
- The proposed rule is needed to protect the safety of the users, directing them to routes that are safe for their use.
- Motorized use of roads and trails is pushing out non-motorized use and exploiting these areas. This activity turns trails into wide vehicular routes and has ruined some historical routes.

**Response:** The creation and presence of roads and trails on the landscape and the resulting habitat fragmentation can have significant negative impacts on habitat, fish, wildlife, and tribal resources. The appropriate location, density and character of road and trail systems needs to be thoughtfully

planned, constructed, and maintained to minimize direct or indirect impacts. This rule will help to curtail the continued resource damage that unplanned construction, creation or maintenance of roads and trails can cause.

**Comments suggesting that WDFW should *go beyond the scope of this rule*:**

- Rule should go further to address altering, defacing, removing, or otherwise damaging any place or structure administered by WDFW.
- All motorized use and livestock use should be banned on WDFW roads and trails.
- Fees for violations should be even higher, perpetrators should be liable for all the costs of repairing the damage.
- Bicycle use should be limited to motorized routes.
- Department should get adequate funding to support enforcement of this rule.

**Response:** This rule addresses the construction, creation and maintenance of roads, trails, and structures without written permission. It is beyond the scope of the rule to specifically address certain uses or how the enforcement will be funded. The violation fees will not be determined by WDFW staff. Comments directed at banning current activities such as motorized bike use would require a separate rule making.

**Comments opposing the rule:**

- Users should be able to construct roads and trails if current routes aren't being maintained by the agency.
- Existing roads provide important access for the sake of firefighting and public safety.
- WDFW should keep the creation or maintenance of trails out of the rule.
- Public needs additional trails for emotional health.
- Users should be able to maintain existing authorized roads and trails without written permission.
- Trimming back vegetation and clearing out fallen trees should be permissible on existing routes.
- People trying to do the right thing in clearing a trail for safety will get punished.
- WDFW doesn't have funding for managing trails, so let those people that want to maintain them take care of them.
- Planning, design, and evaluation of impacts from routes happens far away from the rural communities. Residents lack the knowledge and skills to appropriately build roads and trails, yet WDFW lands aren't accessible without them. They also do not know how to wade through the bureaucratic processes.

- This rule is being used as another way to restrict public access.
- Public does not need more rules and laws.
- Concern that DFW Enforcement will aggressively enforce this rule as it relates to certain communities.

**Response:** WDFW has recognized that the continued creation of *both* roads and trails has had deleterious effects on natural, tribal and cultural resources. For this reason, this rule will apply to all routes.

The agency is in the process of developing policies and procedures through which all existing roads and trails can be evaluated for designation. Once routes are designated as open to the public and for which uses, “express written permission” in the form of volunteer agreements, grant contracts, etc. will allow for maintenance on routes that have been determined to be safe and appropriate.

The department’s Enforcement Program engages in proactive policing and first attempts to educate the public about fish and wildlife laws and regulations before citing individuals for rule or law violations.

**Comment: Mixed (support some elements but not others, would support if some elements were changed).**

- The department needs to include the exceptions provided in WAC 332-52-405, a similar rule prohibiting unpermitted trail and road creation and maintenance on DNR-managed lands, which give allowances to maintain roads and trails if done under a volunteer agreement and/or when there are safety or natural resource damage concerns.
- This rule will be a way for law enforcement officers to selectively enforce against certain groups and populations. Staff and officers should be trained to enforce this rule in a thoughtful and equitable manner.

**Response:** The inclusion of an emergency exception would make the rule difficult to enforce because there is no clear definition for what constitutes an emergency or emergencies that would trigger the exception. Or what scale or scope of actions would be reasonable under specific emergency circumstances.

WDFW Officers routinely encounter people from diverse cultures and backgrounds. They do not “target” or focus their law enforcement efforts on certain groups or populations. Rather, Officers treat all members the of the public the same in the application of both Fish and Wildlife laws and rules. Officers have been successfully educating the public for decades about fish and wildlife

regulations and laws regardless of everyone's background. All law enforcement in Washington, including WDFW officers, receive regular cultural diversity and implicit and explicit bias training.