

**WSR 10-10-067**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**

(Health and Recovery Services Administration)

[Filed April 30, 2010, 1:47 p.m., effective April 30, 2010, 1:47 p.m.]

Effective Date of Rule: Immediately.

Purpose: These rules develop reimbursement rules and define the requirements that must be met for a reimbursable skilled nursing visit when services are rendered without a face-to-face visit and are assisted by telemedicine.

Citation of Existing Rules Affected by this Order: Amending WAC 388-551-2000, 388-551-2010, 388-551-2020, 388-551-2030, 388-551-2100, 388-551-2110, 388-551-2120, 388-551-2130, 388-551-2200, 388-551-2210, and 388-551-2220.

Statutory Authority for Adoption: RCW 74.08.090, chapter 74.09 RCW, and chapter 326, Laws of 2009 (SHB 1529).

Under RCW 34.05.350 the agency for good cause finds that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this Finding: Amendments to these sections are required to implement chapter 326, Laws of 2009 (SHB 1529) which authorizes delivery of home health care services through telemedicine. This emergency filing is necessary to continue the emergency rules filed as WSR 10-02-041 on December 30, 2009. The permanent rules have been submitted for final adoption.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 1, Amended 11, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 1, Amended 11, Repealed 0.

Date Adopted: April 30, 2010.

Katherine I. Vasquez  
 Rules Coordinator

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2000 Home health services—General.** The purpose of the ((~~medical assistance administration (MAA)~~)) department's home health program is to reduce the costs of health care services by providing equally effective, less restrictive quality care to the client in the client's residence, subject to the restrictions and limitations in this subchapter.

Home health skilled services are provided for acute, intermittent, short-term, and intensive courses of treatment. See chapters 388-515 and 388-71 WAC for programs administered to clients who need chronic, long-term maintenance care.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2010 Home health services—Definitions.** The following definitions and abbreviations and those found in WAC 388-500-0005 apply to this subchapter:

**"Acute care"** means care provided by a home health agency for clients who are not medically stable or have not attained a satisfactory level of rehabilitation. These clients require frequent intervention by a registered nurse or licensed therapist.

**"Brief skilled nursing visit"** means a registered nurse, or a licensed practical nurse under the supervision of a registered nurse, performs only one of the following activities during a visit to a client:

- (1) An injection;
- (2) Blood draw; or
- (3) Placement of medications in containers.

**"Chronic care"** means long-term care for medically stable clients.

**"Full skilled nursing visit"** means a registered nurse, or a licensed practical nurse under the supervision of a registered nurse, performs one or more of the following activities during a visit to a client:

- (1) Observation;
- (2) Assessment;
- (3) Treatment;
- (4) Teaching;
- (5) Training;
- (6) Management; and
- (7) Evaluation.

**"Home health agency"** means an agency or organization certified under medicare to provide comprehensive health care on an intermittent or part-time basis to a patient in the patient's place of residence.

**"Home health aide"** means an individual registered or certified as a nursing assistant under chapter 18.88 RCW who, under the direction and supervision of a registered nurse or licensed therapist, assists in the delivery of nursing or therapy related activities, or both.

**"Home health aide services"** means services provided by a home health aide only when a client has an acute, intermittent, short-term need for the services of a registered nurse, physical therapist, occupational therapist, or speech therapist who is employed by or under contract with a home health agency. Such services are provided under the supervision of the previously identified authorized practitioners and include, but are not limited to, ambulation and exercise, assistance with self-administered medications, reporting changes in a client's condition and needs, and completing appropriate records.

**"Home health skilled services"** means skilled health care (nursing, specialized therapy, and home health aide) services provided in the client's residence on an intermittent or

part-time basis by a medicare-certified home health agency with a current (~~(medical assistance administration (MAA))~~) provider number. See also WAC 388-551-2000.

"**Long-term care**" is a generic term referring to various programs and services, including services provided in home and community settings, administered directly or through contract by the department's aging and (~~(adult))~~ disability services administration ((AASA)) (ADSA) through home and community services (HCS) or the division of developmental disabilities (DDD).

"**Plan of care (POC)**" (also known as "**plan of treatment (POT)**") means a written plan of care that is established and periodically reviewed and signed by both (~~(a physician))~~ an ordering licensed practitioner and a home health agency provider. The plan describes the home health care to be provided at the client's residence. See WAC 388-551-2210.

"**Residence**" means a client's home or place of living. (See WAC 388-551-2030 (2)(g)(ii) for clients in residential facilities whose home health services are not covered through (~~(MAA's))~~ department's home health program.)

"**Review period**" means the three-month period the (~~(medical assistance administration (MAA))~~) department assigns to a home health agency, based on the address of the agency's main office, during which (~~(MAA))~~ the department reviews all claims submitted by that agency.

"**Specialized therapy**" means skilled therapy services provided to clients that include:

- (1) Physical;
- (2) Occupational; or
- (3) Speech/audiology services.

(See WAC 388-551-2110.)

"**Telemedicine**" - For the purposes of WAC 388-551-2000 through 388-551-2220, means the use of telemonitoring to enhance the delivery of certain home health skilled nursing services through:

(1) The collection of clinical data and the transmission of such data between a patient at a distant location and the home health provider through electronic processing technologies. Objective clinical data that may be transmitted includes, but is not limited to, weight, blood pressure, pulse, respirations, blood glucose, and pulse oximetry; or

(2) The provision of certain education related to health care services using audio, video, or data communication instead of a face-to-face visit.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2020 Home health services—Eligible clients.** (1) Clients in the following fee-for-service (~~(MAA))~~ programs are eligible to receive home health services subject to the limitations described in this chapter. Clients enrolled in a (~~(health options))~~ department-contracted managed care (~~(plan))~~ organization (MCO) receive all home health services through their designated plan.

(a) Categorically needy program (CNP);

(b) Limited casualty program - medically needy program (LCP-MNP); and

(c) (~~(General assistance expedited (GA-X) (disability determination pending); and~~

(~~(d))~~) Medical care services (MCS) under the following programs:

(i) General assistance - unemployable (GA-U); and

(ii) Alcoholism and Drug Addiction Treatment and Support Act (ADATSA) (GA-W).

(2) (~~(MAA))~~ The department does not cover home health services under the home health program for clients in the CNP-emergency medical only and LCP-MNP-emergency medical only programs. (~~(MAA))~~ The department evaluates a request for home health skilled nursing visits on a case-by-case basis under the provisions of WAC 388-501-0165, and may cover up to two skilled nursing visits within the eligibility enrollment period if the following criteria are met:

(a) The client requires hospital care due to an emergent medical condition as described in WAC 388-500-0005; and

(b) (~~(MAA))~~ The department authorizes up to two skilled nursing visits for follow-up care related to the emergent medical condition.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2030 Home health skilled services—Requirements.** (1) (~~(MAA))~~ The department reimburses for covered home health skilled services provided to eligible clients, subject to the restrictions or limitations in this section and other applicable published WAC.

(2) Home health skilled services provided to eligible clients must:

(a) Meet the definition of "acute care" in WAC 388-551-2010.

(b) Provide for the treatment of an illness, injury, or disability.

(c) Be medically necessary as defined in WAC 388-500-0005.

(d) Be reasonable, based on the community standard of care, in amount, duration, and frequency.

(e) Be provided under a plan of care (POC), as defined in WAC 388-551-2010 and described in WAC 388-551-2210. Any statement in the POC must be supported by documentation in the client's medical records.

(f) Be used to prevent placement in a more restrictive setting. In addition, the client's medical records must justify the medical reason(s) that the services should be provided in the client's residence instead of (~~(a physician's))~~ an ordering licensed practitioner's office, clinic, or other outpatient setting. This includes justification for services for a client's medical condition that requires teaching that would be most effectively accomplished in the client's home on a short-term basis.

(g) Be provided in the client's residence.

(i) (~~(MAA))~~ The department does not reimburse for services if provided at the workplace, school, child day care, adult day care, skilled nursing facility, or any other place that is not the client's place of residence.

(ii) Clients in residential facilities contracted with the state and paid by other programs such as home and community programs to provide limited skilled nursing services, are

not eligible for ~~((MAA))~~ department-funded limited skilled nursing services unless the services are prior authorized under the provisions of WAC 388-501-0165.

(h) Be provided by:

(i) A home health agency that is Title XVIII (medicare) certified;

(ii) A registered nurse (RN) prior authorized by ~~((MAA))~~ the department when no home health agency exists in the area a client resides; or

(iii) An RN authorized by ~~((MAA))~~ the department when the RN is unable to contract with a medicare-certified home health agency.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2100 ~~((Covered))~~ Home health services—Covered skilled nursing services.** (1) ~~((MAA))~~ The department covers home health acute care skilled nursing services listed in this section when furnished by a qualified provider. ~~((MAA))~~ The department evaluates a request for covered services that are subject to limitations or restrictions, and approves such services beyond those limitations or restrictions when medically necessary, under the standard for covered services in WAC 388-501-0165.

(2) ~~((MAA))~~ The department covers the following home health acute care skilled nursing services, subject to the limitations in this section:

(a) Full skilled nursing services that require the skills of a registered nurse or a licensed practical nurse under the supervision of a registered nurse, if the services involve one or more of the following:

- (i) Observation;
- (ii) Assessment;
- (iii) Treatment;
- (iv) Teaching;
- (v) Training;
- (vi) Management; and
- (vii) Evaluation.

(b) A brief skilled nursing visit if only one of the following activities is performed during the visit:

- (i) An injection;
- (ii) Blood draw; or
- (iii) Placement of medications in containers (e.g., envelopes, cups, medisets).

(c) Home infusion therapy only if the client:

(i) Is willing and capable of learning and managing the client's infusion care; or

(ii) Has a volunteer caregiver willing and capable of learning and managing the client's infusion care.

(d) Infant phototherapy for an infant diagnosed with hyperbilirubinemia:

(i) When provided by ~~((an MAA-approved))~~ a department-approved infant phototherapy agency; and

(ii) For up to five skilled nursing visits per infant.

(e) Limited high-risk obstetrical services:

(i) For a medical diagnosis that complicates pregnancy and may result in a poor outcome for the mother, unborn, or newborn;

(ii) For up to three home health visits per pregnancy if:

(A) Enrollment in or referral to the following providers of first steps has been verified:

(I) Maternity support services (MSS); or

(II) Maternity case management (MCM); and

(B) The visits are provided by a registered nurse who has either:

(I) National perinatal certification; or

(II) A minimum of one year of labor, delivery, and post-partum experience at a hospital within the last five years.

(3) ~~((MAA))~~ The department limits skilled nursing visits provided to eligible clients to two per day.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2110 Home health services—Covered specialized therapy.** (1) ~~((MAA))~~ The department limits specialized therapy visits to one per client, per day, per type of specialized therapy. Specialized therapy is defined in WAC 388-551-2010.

(2) ~~((MAA))~~ The department does not allow duplicate services for any specialized therapy for the same client when both providers are performing the same or similar procedure(s).

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2120 Home health services—Covered aide services.** (1) ~~((MAA limits))~~ The department pays for one home health aide ((visits to one)) visit, per client per day.

(2) ~~((MAA))~~ The department reimburses for home health aide services, as defined in WAC 388-551-2010, only when the services are provided under the supervision of, and in conjunction with, practitioners who provide:

- (a) Skilled nursing services; or
- (b) Specialized therapy services.

(3) ~~((MAA))~~ The department covers home health aide services only when a registered nurse or licensed therapist visits the client's residence at least once every fourteen days to monitor or supervise home health aide services, with or without the presence of the home health aide.

NEW SECTION

**WAC 388-551-2125 Home health services—Delivered through telemedicine.** (1) The department covers the delivery of home health services through telemedicine for clients who have been diagnosed with an unstable condition who may be at risk for hospitalization or a more costly level of care. The client must have a diagnosis(es) where there is a high risk of sudden change in clinical status which could compromise health outcomes.

(2) The department pays for one telemedicine interaction, per eligible client, per day based on the ordering licensed practitioner's home health plan of care.

(3) To receive payment for the delivery of home health services through telemedicine, the services must involve:

(a) An assessment, problem identification, and evaluation which includes:

(i) Assessment and monitoring of clinical data including, but not limited to, vital signs, pain levels and other biometric measures specified in the plan of care. Also includes assessment of response to previous changes in the plan of care; and

(ii) Detection of condition changes based on the telemedicine encounter that may indicate the need for a change in the plan of care; and

(b) Implementation of a management plan through one or more of the following:

(i) Teaching regarding medication management as appropriate based on the telemedicine findings for that encounter;

(ii) Teaching regarding other interventions as appropriate to both the patient and the caregiver;

(iii) Management and evaluation of the plan of care including changes in visit frequency or addition of other skilled services;

(iv) Coordination of care with the ordering licensed practitioner regarding telemedicine findings;

(v) Coordination and referral to other medical providers as needed; and

(vi) Referral to the emergency room as needed.

(4) The department does not require prior authorization for the delivery of home health services through telemedicine.

(5) The department does not pay for the purchase, rental, or repair of telemedicine equipment.

AMENDATORY SECTION (Amending WSR 06-24-036, filed 11/30/06, effective 1/1/07)

**WAC 388-551-2130 (~~Noncovered~~) Home health services—~~Noncovered services.~~** (1) The (~~Health and Recovery Services Administration (HRSA)~~) department does not cover the following home health services under the home health program, unless otherwise specified:

(a) Chronic long-term care skilled nursing visits or specialized therapy visits for a medically stable client when a long-term care skilled nursing plan or specialized therapy plan is in place through the department of social and health services' aging and disability services administration (ADSA).

(i) (~~HRSA~~) The department considers requests for interim chronic long-term care skilled nursing services or specialized therapy services for a client while the client is waiting for ADSA to implement a long-term care skilled nursing plan or specialized therapy plan; and

(ii) On a case-by-case basis, (~~HRSA~~) the department may authorize long-term care skilled nursing visits or specialized therapy visits for a client for a limited time until a long-term care skilled nursing plan or specialized therapy plan is in place. Any services authorized are subject to the restrictions and limitations in this section and other applicable published WACs.

(b) Social work services.

(c) Psychiatric skilled nursing services.

(d) Pre- and postnatal skilled nursing services, except as listed under WAC 388-551-2100 (2)(e).

(e) Well-baby follow-up care.

(f) Services performed in hospitals, correctional facilities, skilled nursing facilities, or a residential facility with skilled nursing services available.

(g) Home health aide services that are not provided in conjunction with skilled nursing or specialized therapy services.

(h) Health care for a medically stable client (e.g., one who does not have an acute episode, a disease exacerbation, or treatment change).

(i) Home health specialized therapies and home health aide visits for clients in the following programs:

(i) CNP - emergency medical only; and

(ii) LCP-MNP - emergency medical only.

(j) Skilled nursing visits for a client when a home health agency cannot safely meet the medical needs of that client within home health services program limitations (e.g., for a client to receive infusion therapy services, the caregiver must be willing and capable of managing the client's care).

(k) More than one of the same type of specialized therapy and/or home health aide visit per day.

(l) HRSA does not reimburse for duplicate services for any specialized therapy for the same client when both providers are performing the same or similar procedure(s).

(m) Home health visits made without a written (~~physician's~~) licensed practitioner's order, unless the verbal order is:

(i) Documented prior to the visit; and

(ii) The document is signed by the (~~physician~~) ordering licensed practitioner within forty-five days of the order being given.

(2) HRSA does not cover additional administrative costs billed above the visit rate (these costs are included in the visit rate and will not be paid separately).

(3) HRSA evaluates a request for any service that is listed as noncovered under the provisions of WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2200 Home health services—Eligible providers.** The following may contract with (~~MAA~~) the department to provide home health services through the home health program, subject to the restrictions or limitations in this section and other applicable published WAC:

(1) A home health agency that:

(a) Is Title XVIII (medicare) certified;

(b) Is department of health (DOH) licensed as a home health agency;

(c) Submits a completed, signed core provider agreement to (~~MAA~~) the department; and

(d) Is assigned a provider number.

(2) A registered nurse (RN) who:

(a) Is prior authorized by (~~MAA~~) the department to provide intermittent nursing services when no home health agency exists in the area a client resides;

(b) Is unable to contract with a medicare-certified home health agency;

(c) Submits a completed, signed core provider agreement to (~~MAA~~) the department; and

- (d) Is assigned a provider number.

**AMENDATORY SECTION** (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2210 Home health services—Provider requirements.** For any delivered home health service to be payable, ~~((MAA))~~ the department requires home health providers to develop and implement an individualized plan of care (POC) for the client.

- (1) The POC must:
- Be documented in writing and be located in the client's home health medical record;
  - Be developed, supervised, and signed by a licensed registered nurse or licensed therapist;
  - Reflect the ~~((physician's))~~ ordering licensed practitioner's orders and client's current health status;
  - Contain specific goals and treatment plans;
  - Be reviewed and revised by ~~((a physician))~~ an ordering licensed practitioner at least every sixty calendar days, signed by ~~((a physician))~~ the ordering licensed practitioner within forty-five days of the verbal order, and returned to the home health agency's file; and
  - Be available to department staff or its designated contractor(s) on request.
- (2) The provider must include in the POC all of the following:
- The client's name, date of birth, and address (to include name of residential care facility, if applicable);
  - The primary diagnosis (the diagnosis that is most related to the reason the client qualifies for home health services) or the diagnosis that is the reason for the visit frequency;
  - All secondary medical diagnoses, including date(s) of onset or exacerbation;
  - The prognosis;
  - The type(s) of equipment required, including telemedicine as appropriate;
  - A description of each planned service and goals related to the services provided;
  - Specific procedures and modalities;
  - A description of the client's mental status;
  - A description of the client's rehabilitation potential;
  - A list of permitted activities;
  - A list of safety measures taken on behalf of the client; and
  - A list of medications which indicates:
    - Any new prescription; and
    - Which medications are changed for dosage or route of administration.
- (3) The provider must include in or attach to the POC:
- A description of the client's functional limits and the effects;
  - Documentation that justifies why the medical services should be provided in the client's residence instead of ~~((a physician's))~~ an ordering licensed practitioner's office, clinic, or other outpatient setting;
  - Significant clinical findings;
  - Dates of recent hospitalization;

- (e) Notification to the DSHS case manager of admittance; ~~((and))~~

(f) A discharge plan, including notification to the DSHS case manager of the planned discharge date and client disposition at time of discharge; and

(g) Order for the delivery of home health services through telemedicine, as appropriate.

(4) The individual client medical record must comply with community standards of practice, and must include documentation of:

- Visit notes for every billed visit;
- Supervisory visits for home health aide services as described in WAC 388-551-2120(3);
- All medications administered and treatments provided;
- All ~~((physician))~~ licensed practitioner's orders, new orders, and change orders, with notation that the order was received prior to treatment;
- Signed ~~((physician))~~ licensed practitioner's new orders and change orders;
- Home health aide services as indicated by a registered nurse or licensed therapist in a home health aide care plan;
- Interdisciplinary and multidisciplinary team communications;
- Inter-agency and intra-agency referrals;
- Medical tests and results;
- Pertinent medical history; and
- Notations and charting with signature and title of writer.

(5) The provider must document at least the following in the client's medical record:

- Skilled interventions per the POC;
  - Client response to the POC;
  - Any clinical change in client status;
  - Follow-up interventions specific to a change in status with significant clinical findings; ~~((and))~~
  - Any communications with the attending ~~((physician))~~ ordering licensed practitioner; and
  - Telemedicine findings, as appropriate.
- (6) The provider must include the following documentation in the client's visit notes when appropriate:
- Any teaching, assessment, management, evaluation, client compliance, and client response;
  - Weekly documentation of wound care, size (dimensions), drainage, color, odor, and identification of potential complications and interventions provided;
  - If a client's wound is not healing, the client's ~~((physician))~~ ordering licensed practitioner has been notified, the client's wound management program has been appropriately altered and, if possible, the client has been referred to a wound care specialist; and
  - The client's physical system assessment as identified in the POC.

**AMENDATORY SECTION** (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

**WAC 388-551-2220 Home health services—Provider payments.** (1) In order to be reimbursed, the home health provider must bill ~~((MAA))~~ the department according to the

conditions of payment under WAC 388-502-0150 and other issuances.

(2) Payment to home health providers is:

(a) A set rate per visit for each discipline provided to a client;

(b) Based on the county location of the providing home health agency; and

(c) Updated by general vendor rate changes.

(3) For clients eligible for both medicaid and medicare, ~~((MAA))~~ the department may pay for services described in this chapter only when medicare does not cover those services. The maximum payment for each service is medicaid's maximum payment.

(4) Providers must submit documentation to ~~((MAA))~~ the department during the home health agency's review period. Documentation includes, but is not limited to, the requirements listed in WAC 388-551-2210.

(5) After ~~((MAA))~~ the department receives the documentation, the ~~((MAA))~~ department's medical director or designee reviews the client's medical records for program compliance and quality of care.

(6) ~~((MAA))~~ The department may take back or deny payment for any insufficiently documented home health care service when the ~~((MAA))~~ department's medical director or designee determines that:

(a) The service did not meet the conditions described in WAC 388-550-2030; or

(b) The service was not in compliance with program policy.

(7) Covered home health services for clients enrolled in a Healthy Options managed care plan are paid for by that plan.

**WSR 10-10-112**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
(Economic Services Administration)

[Filed May 4, 2010, 2:43 p.m., effective May 4, 2010, 2:43 p.m.]

Effective Date of Rule: Immediately.

Purpose: The department is amending sections of chapter 388-448 WAC to repeal changes to general assistance incapacity criteria, including how the department uses social and vocational factors to determine eligibility proposed as WSR 10-08-2010. The proposed amendments will repeal changes to the general assistance incapacity criteria, and are required in order for the department to comply with ESSB 6444 as passed by the legislature, April 12, 2010. The bill limits the department's ability to make any changes to the incapacity determination and progressive evaluations process regulations until at least September 30, 2010, except for provisions related to the use of administrative review teams may be amended, and obsolete terminology and functional assessment language may be updated.

Citation of Existing Rules Affected by this Order: Amending WAC 388-448-0050, 388-448-0080, 388-448-0090, 388-448-0100, and 388-448-0110.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.055, 74.04.057, 74.08.090, and 74.04.005.

Other Authority: The Worker, Homeownership, and Business Assistance Act of 2009.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; and that in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this Finding: The bill limits the department's ability to make any changes to the incapacity determination and progressive evaluations process regulations until at least September 30, 2010, except for provisions related to the use of administrative review teams may be amended, and obsolete terminology and functional assessment language may be updated.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 5, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 5, Repealed 0.

Date Adopted: May 1, 2010.

Katherine I. Vasquez  
Rules Coordinator

**Reviser's note:** The typographical error in the above material occurred in the copy filed by the department of social and health services and appears in the Register pursuant to the requirements of RCW 34.08.040.

**AMENDATORY SECTION** (Amending WSR 10-08-036, filed 3/31/10, effective 5/1/10)

**WAC 388-448-0050 PEP step II—How we determine the severity of mental impairments.** If you are diagnosed with a mental impairment by a professional described in WAC 388-448-0020, we use information from the provider to determine ~~((how the))~~ if your impairment ~~((limits work-related activities))~~ prevents you from being able to work.

(1) We review the following psychological evidence to determine the severity of your mental impairment:

(a) Psychosocial and treatment history records;

(b) Clinical findings of specific abnormalities of behavior, mood, thought, orientation, or perception;

- (c) Results of psychological tests; and
- (d) Symptoms observed by the examining practitioner that show how your impairment affects your ability to perform basic work-related activities.

(2) We exclude diagnosis and related symptoms of alcohol or substance abuse or addiction;

(3) ~~((We exclude disorders that don't impair thought, mood, memory, or cognition, such as:~~

- ~~(a) Passive behaviors.~~
- ~~(b) Learning deficits.~~

~~(4))~~ If you are diagnosed with mental retardation, the diagnosis must be based on the Wechsler Adult Intelligence Scale (WAIS). The following test results determine the severity rating:

Intelligence Quotient (IQ) Score	Severity Rating
<del>((76))</del> 85 or above	<del>((None-))</del> 1( <del>(+))</del>
<del>((65))</del> 71 to <del>((75))</del> 84	<del>((Moderate-))</del> 3( <del>(+))</del>
<del>((64))</del> 70 or lower	<del>((Severe-))</del> 5( <del>(+))</del>

~~((5))~~ (4) If you are diagnosed with a mental impairment with physical causes, we assign a severity rating based on the most severe of the following four areas of impairment:

- (a) Short term memory impairment;
- (b) Perceptual or thinking disturbances;
- (c) Disorientation to time and place; or
- (d) Labile, shallow, or coarse affect.

~~((6))~~ (5) We base the severity of ~~((an impairment diagnosed as a mood, thought, memory, or cognitive))~~ a functional disorder on a clinical assessment of the intensity and frequency of symptoms that:

- (a) Affect your ability to perform basic work related activities; and
- (b) Are consistent with a diagnosis of a mental impairment as listed in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).

~~((7))~~ (6) We base the severity rating for a functional mental impairment on accumulated severity ratings for the symptoms in subsection (5)(a) of this section as follows:

Symptom Ratings or Condition	Severity Rating
(a) <del>((You are diagnosed with a))</del> <u>The functional ((disorder)) mental impairment is diagnosed</u> with psychotic features;	<del>((Moderate-))</del> 3( <del>(+))</del>
(b) You have had two or more hospitalizations for psychiatric reasons in the past two years;	
(c) You have had more than six months of continuous psychiatric <del>((inpatient))</del> hospital or residential treatment in the past two years;	

Symptom Ratings or Condition	Severity Rating
(d) The <del>((objective evidence and global assessment of functional score are consistent with a significant limitation on performing work activities))</del> overall assessment of symptoms is rated three; or (e) At least three symptoms are rated three or higher.	
<del>((e))</del> (f) The <del>((objective evidence and global assessment of functioning score are consistent with very significant limitations on ability to perform work activities))</del> overall assessment of symptoms is rated four; or (g) At least three symptoms are rated four or five.	<del>((Marked-))</del> 4( <del>(+))</del>
<del>((f))</del> (h) The <del>((objective evidence and global assessment of functioning score are consistent with the absence of ability to perform work activities))</del> overall assessment of symptoms is rated five; or (i) At least three symptoms are rated five.	<del>((Severe-))</del> 5( <del>(+))</del>

~~((8))~~ (7) If you are diagnosed with any combination of mental retardation, mental impairment with physical causes, or functional mental impairment, we assign a severity rating as follows:

Condition	Severity Rating
(a) Two or more disorders with <del>((moderate severity (3)))</del> ratings of <u>three</u> ; or (b) One or more disorders rated <del>((moderate severity (3)))</del> <u>three</u> ; and one rated <del>((marked severity (4)))</del> <u>four</u> .	<del>((Marked-))</del> 4( <del>(+))</del>
(c) Two or more disorders rated <del>((marked (4) severity))</del> <u>four</u> .	<del>((Severe-))</del> 5( <del>(+))</del>

~~((9))~~ (8) We deny incapacity when you haven't been diagnosed with a significant physical impairment and your overall mental severity rating is one or two;

~~((10))~~ (9) We approve incapacity when you have an overall mental severity rating of ~~((severe-))~~five(~~(+))~~.

**AMENDATORY SECTION** (Amending WSR 10-08-036, filed 3/31/10, effective 5/1/10)

**WAC 388-448-0080 PEP step V—How we determine your ability to function in a work environment if you have a mental impairment.** If you have a mental impairment we evaluate your cognitive and social functioning in a work setting. Functioning means your ability to perform ~~((typical))~~ the tasks that would be required ~~((in a routine))~~ of you on the job ~~((setting))~~ and your ability to ~~((interact effectively))~~ get

along with your coworkers, supervisors and other people you would be in contact with while ~~((working))~~ on the job.

(1) We evaluate cognitive ~~((and social functioning))~~ factors by assessing your ability to:

(a) Understand, remember, and ~~((persist in tasks by following))~~ follow simple, one or two-step instructions ~~((of one or two steps.))~~;

(b) Understand, remember, and ~~((persists in tasks by following))~~ follow complex instructions ~~((of))~~, with three or more steps~~((.))~~;

(c) Learn new tasks~~((.))~~;

(d) ~~((Perform routine tasks without undue supervision.~~

~~(e) Be aware of normal hazards and take appropriate precautions.~~

~~(f) Communicate and perform effectively in a work setting with public contact.~~

~~(g) Communicate and perform effectively in a work setting with limited public contact.)~~ Exercise judgment and make decisions; and

(e) Perform routine tasks without undue supervision.

(2) We approve incapacity when the practitioner's evaluation shows you are:

(a) At least moderately impaired in your ability to understand, remember, and follow simple instructions and at least moderately limited in your ability to:

(i) Learn new tasks, exercise judgment, and make decisions; and

(ii) Perform routine tasks without undue supervision; or

(b) Able to understand, remember, and follow simple instructions, but are:

(i) At least moderately impaired in the ability to understand, remember, and follow instructions with three or more steps; and

(ii) Markedly impaired in the ability to learn new tasks, exercise judgment and make decisions, and perform routine tasks without undue supervision.

(3) The practitioner's evaluation reports your social factors after assessing your ability to:

(a) Relate appropriately to coworkers and supervisors;

(b) Relate appropriately in contacts with the public;

(c) Tolerate the pressures of a work setting;

(d) Perform self-care activities, including personal hygiene; and

(e) Maintain appropriate behavior in a work setting.

(4) We approve incapacity if you are rated at least two in one area of social functioning and at least three in all other areas of social functioning.

AMENDATORY SECTION (Amending WSR 10-08-036, filed 3/31/10, effective 5/1/10)

**WAC 388-448-0090 PEP step V—How we determine your ability to function in a work environment if you have a physical impairment.** In Step V of the PEP we review the medical evidence you provide and make a determination of how your physical impairment prevents you from working. This determination is then used in Steps VI and VII of the PEP to determine your ability to perform either work you have done in the past or other work.

(1) "**Exertion level**" means ~~((having strength, flexibility, and mobility))~~ the ability to lift, carry, stand ~~((of))~~ and walk ~~((as))~~ with strength needed to fulfill job duties in the following work ~~((levels))~~ categories. For this section, "occasionally" means less than one-third of the time and "frequently" means one-third to two-thirds of the time. We only consider your strength, mobility, and flexibility. We review any work limits you have in the following areas, and then assign an exertion level and determine exertional limitations.

The following table is used to determine your exertion level. Included in this table is a strength factor, which is your ability to perform physical activities, as defined in Appendix C of the Dictionary of Occupational Titles (DOT), Revised Edition, published by the U.S. Department of Labor.

If you <del>((are able to))</del> :	Then we assign this exertion level
(a) <del>((Lift no more than))</del> Can not lift at least two pounds or <del>((unable to))</del> stand and/or walk.	Severely limited
(b) Can lift ten pounds maximum and frequently lift or carry lightweight articles. Walking or standing are only required for brief periods.	Sedentary
(c) Can lift twenty pounds maximum and frequently lift and/or carry objects weighing up to ten pounds. Walk six out of eight hours per day or stand during a significant portion of the workday <del>((.))</del> , with sitting and <del>((using))</del> pushing <del>((of))</del> /pulling arm or leg movements most of the day.	Light
(d) Can lift fifty pounds maximum and frequently lift and/or carry up to twenty-five pounds.	Medium
(e) Can lift one hundred pounds maximum and frequently lift and/or carry up to fifty pounds.	Heavy

(2) "**Exertionally related limitation**" means a restriction in mobility, agility or flexibility in the following twelve activities: Balancing, bending, climbing, crawling, crouching, handling, kneeling, pulling, pushing, reaching, sitting, and stooping. If you have exertionally related limitations, we consider them in determining your ability to work.

(3) "**Functional physical capacity**" means the degree of strength, agility, flexibility, and mobility you can apply to work-related activities. We consider the effect of the physical impairment on the ability to perform work-related activities when the physical impairment is assigned an overall severity rating of three or four. We determine functional physical capacity based on your exertional, exertionally related and nonexertional limitations. All limitations must be substantiated by the medical evidence and directly related to the diagnosed impairment(s).

(4) "**Nonexertional physical limitation**" means a restriction on work activities that does not affect strength, mobility, agility, or flexibility. Examples are:

(a) Environmental restrictions which could include, among other things, your inability to work in an area where you would be exposed to chemicals; and

(b) Workplace restrictions, such as impaired hearing or speech, which would limit the types of work environments you could work in.

AMENDATORY SECTION (Amending WSR 10-08-036, filed 3/31/10, effective 5/1/10)

**WAC 388-448-0100 PEP step VI—How we evaluate capacity to perform relevant past work.** If your overall severity rating is ~~((moderate-))~~three((+)) or ~~((marked-))~~four((+)) and we have reached this stage of the PEP and have not approved or denied your application, we decide if you can do the same or similar work as you have done in the past. We look at your current physical and/or mental limitations ~~((from cognitive, social,))~~ and vocational factors to make this decision. Vocational factors are education, relevant work history, and age.

(1) We evaluate education in terms of formal schooling or other training ~~((to acquire skills))~~ that enables you to meet job requirements. We classify education as:

<b>If you</b>	<b>Then your education level is</b>
(a) <del>((Can't))</del> <u>Can not</u> read or write a simple communication, such as two sentences or a list of items.	Illiterate
(b) Have no formal schooling <del>((or vocational training))</del> beyond the <del>((tenth))</del> <u>eleventh</u> grade; or (c) <del>((Had))</del> <u>Have</u> participated in special education <del>((in basic academic classes of reading, writing, or mathematics in high school)).</del>	Limited education
(d) Have received a high school diploma or general equivalency degree (GED); or (e) Have received skills training and were awarded a certificate, degree or license.	High school and above level of education

(2) We evaluate your work experience to determine if you have relevant past work. "Relevant past work" means work that:

(a) ~~((Defined as gainful employment per WAC 388-448-0010.))~~ Is normally done for pay or profit. We exclude work done in a sheltered workshop, a job where you were given special consideration, or activities you may have performed as a student or homemaker;

(b) Has been performed in the past ~~((ten))~~ five years((-));

(c) You ~~((performed))~~ have done long enough for you to ~~((acquire))~~ have acquired the knowledge and skills to continue performing the job. You must meet the specific voca-

tional preparation level as defined in Appendix C of the Dictionary of Occupational Titles.

(3) For each relevant past work situation you have had, we determine:

(a) The exertional or skill requirements of the job((-); and

(b) Current cognitive, social, or nonexertional factors that significantly limit your ability to perform past work.

(4) After considering vocational factors, we approve or deny incapacity ~~((when you have))~~ based on the following:

~~((a) The physical and mental ability to perform past work, and there is no significant cognitive, social or nonexertional limitation that would prevent you from performing past work; or~~

~~((b) Recently acquired specific work skills through completion of schooling or training, for jobs within your current physical or mental capacities))~~

<b>If you</b>	<b>Then we take this action on incapacity</b>
<u>(a) Have a physical or mental ability to perform past work and there is no significant cognitive, social or nonexertional limitation.</u>	<u>Deny</u>
<u>(b) Have recently acquired specific work skills through completion of vocational training, enabling you to work within your current physical or mental capacities.</u>	<u>Deny</u>
<u>(c) Are fifty-five years of age or older and have an impairment that is assigned an overall severity rating of at least three and do not have the physical or mental ability to perform past work or do not have work experience.</u>	<u>Approve</u>

AMENDATORY SECTION (Amending WSR 10-08-036, filed 3/31/10, effective 5/1/10)

**WAC 388-448-0110 PEP step VII—How we evaluate your capacity to perform other work.** If we decide you cannot do work that you've done before, we then decide if you can do any other work.

(1) We approve incapacity if you have a physical impairment and meet the vocational factors below:

<u>Highest work level assigned by the practitioner</u>	<u>Your age</u>	<u>Your education level</u>	<u>((Your education level)) Other vocational factors</u>
Sedentary	<del>((Fifty-five and older))</del> <u>Any age</u>	<u>Any level</u>	<del>((Any level))</del> <u>Does not apply</u>
<del>((Sedentary))</del> <u>Light</u>	<del>((Any age))</del> <u>Fifty and older</u>	<u>Any level</u>	<del>((Limited education or limited English proficiency (LEP))</del> <u>Does not apply</u>
Light	<del>((Fifty))</del> <u>Thirty-five and older</u>	<u>Illiterate or LEP</u>	<del>((Limited education or LEP))</del> <u>Does not apply</u>
<u>Light</u>	<u>Eighteen and older</u>	<u>Limited education</u>	<u>Does not have any past work</u>
Medium	Fifty- <del>((five))</del> and older	<u>Limited education</u>	<del>((Limited education or LEP))</del> <u>Does not have any past work</u>
<u>Medium</u>	<u>Fifty-five and older</u>	<u>Any level</u>	<u>Does not apply</u>
<u>Heavy</u>	<u>Fifty-five and older</u>	<u>Any level</u>	<u>Environmental restrictions apply</u>

(2) We approve incapacity when you have a ~~((moderate three) or marked (four))~~ mental ~~((health))~~ impairment ~~((and we have objective medical evidence, including a mental status exam (MSE) per WAC 388 448 0050, that demonstrates social or cognitive factors described in WAC 388 448 0080, interfere with working as follows))~~ only and meet the age and social functioning limitations below:

- ~~((a))~~ You have a moderate impairment in your ability to:
  - ~~((i))~~ Be aware of normal hazards and take appropriate precautions.
  - ~~((ii))~~ Communicate and perform effectively in a work setting with public contact.
  - ~~((iii))~~ Understand, remember, and persist in tasks by following complex instructions of three or more steps.
- ~~((b))~~ You have marked impairment in your ability to:
  - ~~((i))~~ Be aware of normal hazards and take appropriate precautions.
  - ~~((ii))~~ Communicate and perform effectively in a work setting with limited public contact.
- ~~((c))~~ You have a marked impairment in your ability to:
  - ~~((i))~~ Understand, remember, and persist in tasks by following simple instructions of one or two steps;
  - ~~((ii))~~ Perform routine tasks without undue supervision;
  - ~~((iii))~~ Communicate and perform effectively in a work setting with limited public contact.

<u>Social limitation</u>	<u>Age</u>
<del>((a))</del> <u>Can not appropriately relate to coworkers and supervisors (rated three); and</u> <del>((b))</del> <u>Can not tolerate the pressures of a work setting (rated four).</u>	<u>Fifty years and older</u>
<del>((c))</del> <u>Can not tolerate the pressures for a work setting (rated five).</u>	<u>Eighteen to fifty-four</u>

<u>Social limitation</u>	<u>Age</u>
<del>((d))</del> <u>A mental disorder severity rated four;</u> <del>((e))</del> <u>One or more symptoms from WAC 388-448-0050 (4) (rated five);</u> <del>((f))</del> <u>Can not appropriately relate to coworkers and supervisors (rated three); and</u> <del>((g))</del> <u>Can not tolerate the pressures of a work setting (rated four).</u>	<u>Eighteen to forty-nine</u>

(3) We approve incapacity when you have ~~((at least a moderate (three) mental health impairment, a moderate (three) physical impairment and we have objective medical evidence, including a mental status exam (MSE) per WAC 388 448 0050, that demonstrate social or cognitive factors, as described in WAC 388 448 0080;))~~ both mental and physical impairments and vocational factors interfere with working as follows:

<u>((Work Level)) Your age</u>	<u>Your education</u>	<u>Your other restrictions</u>
<del>((Sedentary))</del> <u>Any age</u>	<u>Any level</u>	<del>((a))</del> <u>((You are moderately impaired in your ability to:</u> <del>((i))</del> <u>Understand, remember, and persist in tasks by following complex instructions of three or more steps;</u> <del>((ii))</del> <u>Learn new tasks;</u>

<del>((Work Level))</del> <u>Your age</u>	<u>Your education</u>	<u>Your other restrictions</u>
		<del>((iii) Perform routine tasks without undue supervision))</del> <u>Can not appropriately relate to coworkers and supervisors (rated three); and</u> <del>(b) Can not tolerate pressures of a work setting</del> <u>(rated four).</u>
<del>((Sedentary))</del> <u>Fifty or older</u>	<u>Limited education</u>	<del>((b) You are moderately impaired in your ability to:</del> <del>(i) Communicate and perform effectively in a work setting with public contact))</del> <u>(c) Restricted to medium work level or less.</u>
<del>((Light))</del> <u>Eigh-</u> <u>teen to forty-</u> <u>nine</u>	<u>Limited education</u>	<del>((e) You are markedly impaired in your ability to:</del> <del>(i) Understand, remember, and persist in tasks by following complex instructions of three or more steps;</del> <del>(ii) Learn new tasks;</del> <del>(iii) Perform routine tasks without undue supervision))</del> <u>(d) Restricted to light work level.</u>
<del>((Light))</del>		<del>((d) You are markedly impaired in your ability to:</del>

<del>((Work Level))</del> <u>Your age</u>	<u>Your education</u>	<u>Your other restrictions</u>
		<del>(i) Communicate and perform effectively in a work setting with public contact:))</del>
<del>((Medium))</del>		<del>((e) You are markedly impaired in your ability to:</del> <del>(i) Understand, remember, and persist in tasks by following simple instructions of one or two steps.</del> <del>(ii) Learn new tasks.</del> <del>(iii) Perform routine tasks without undue supervision:))</del>

(4) ~~((We deny incapacity if we decide you don't meet the criteria listed above))~~ If we do not find that you are incapacitated by the end of Step VII of the PEP, an administrative review team (ART) makes the incapacity decision. The review team consists of two or more persons within the community service office (CSO) who are not in the position of providing direct eligibility or incapacity services to you. The ART reviews the medical evidence and your vocational factors.

**WSR 10-11-006**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-108—Filed May 6, 2010, 2:13 p.m., effective May 8, 2010]

Effective Date of Rule: May 8, 2010.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order:  
Repealing WAC 232-28-61900S; and amending WAC 232-28-619.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Through April 30, 2010, over five hundred spring chinook have been trucked to Lake

Scanewa for sport fishing opportunity and reintroduction efforts. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 6, 2010.

Lori Preuss  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 232-28-61900S Exceptions to statewide rules—Lake Scanewa.** Notwithstanding the provisions of WAC 232-28-619, effective May 8 through May 31, 2010, a person may fish for salmon in waters of Lake Scanewa (Cowlitz Falls Reservoir) from Cowlitz Falls Dam to the listed boundaries in the Cispus and Cowlitz arms. Daily limit 6 fish, of which 2 may be adults. Minimum size 8 inches. Release wild Chinook and cutthroat.

#### REPEALER

The following section of the Washington Administrative Code is repealed effective June 1, 2010:

WAC 232-28-61900S Exceptions to statewide rules—Lake Scanewa.

**WSR 10-11-008  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-107—Filed May 6, 2010, 4:18 p.m., effective May 14, 2010, 12:01 a.m.]

Effective Date of Rule: May 14, 2010, 12:01 a.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900Q; and amending WAC 232-28-619.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or

general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: This rule change is necessary to assure a safe and successful event. The reason for closing the lake is to ensure safety for the public as well as the event participants. There is expected to be over six hundred people participating in the safety day program. Boats will be used for teaching safety classes to kids and adults. Closing the lake will alleviate any boat traffic from anglers. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 6, 2010.

Lori Preuss  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 232-28-61900Q Exceptions to statewide rules—Kress Lake (Cowlitz Co.)** Notwithstanding the provisions of WAC 232-28-619, effective 12:01 a.m. May 14 through 6:00 p.m. May 15, 2010, it is unlawful to fish in those waters of Kress Lake, except open to fishing 10:00 a.m. through 3:00 p.m. May 15, 2010, to juvenile anglers participating in the Safety Day Event.

#### REPEALER

The following section of the Washington Administrative Code is repealed effective 6:01 p.m. May 15, 2010:

WAC 232-28-61900Q Exceptions to statewide rules—Kress Lake (Cowlitz Co.)

**WSR 10-11-018  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-106—Filed May 7, 2010, 2:08 p.m., effective May 8, 2010]

Effective Date of Rule: May 8, 2010.

Purpose: The purpose of this rule making is to allow nontreaty recreational fishing opportunity in the Columbia River while protecting fish listed as threatened or endangered under the Endangered Species Act (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes, federal law governing Washington's relationship with Oregon, and Washington fish and wildlife commission policy guidance for Columbia River fisheries.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900C and 232-28-61900W; and amending WAC 232-28-619.

Statutory Authority for Adoption: RCW 77.04.130, 77.12.045, and 77.12.047.

Other Authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546); *Northwest Gillnetters Ass'n v. Sandison*, 95 Wn.2d 638, 628 P.2d 800 (1981); Washington fish and wildlife commission policies concerning Columbia River fisheries; 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

Closes the recreational salmon fishery from Bonneville Dam to McNary Dam prior to the May 30 scheduled closure date. Catch of chinook in this area has met expectation. Removes the closure for salmon fishing in Deep River; upriver chinook are not expected to stray in this area at this point in the run. Fisheries are being managed conservatively so as not to exceed the preseason guidelines. Regulation is consistent with guidance from Washington fish and wildlife commission and director, and compact/joint state action of May 7, 2010. The fishery is consistent with the *U.S. v. Oregon* Management Agreement and the associated biological opinion. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 0, Repealed 2; Federal Rules or Standards: New 1, Amended 0, Repealed 2; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 7, 2010.

Lori Preuss  
for Philip Anderson  
Director

## NEW SECTION

**WAC 232-28-61900W Exceptions to statewide rules—Columbia River.** Notwithstanding the provisions of WAC 232-28-619, it is unlawful to violate the following provisions, provided that unless otherwise amended, all permanent rules remain in effect:

### 1. **Columbia River:**

i. From Tower Island power lines in Bonneville Pool upstream to McNary Dam, plus Washington bank between Bonneville Dam and the Tower Island power lines located approximately 6 miles below The Dalles Dam (except for those waters closed under permanent regulations): Effective immediately through May 9, 2010, daily salmonid limit 6 fish, (hatchery Chinook or hatchery steelhead), of which no more than 2 can be adult Chinook salmon or hatchery steelhead or one of each. Release all wild Chinook.

ii. Effective immediately through May 9, 2010: For the mainstem Columbia River salmon and steelhead fishery from the Rocky Point/Tongue Point line upstream to McNary Dam, it is unlawful when fishing from vessels which are less than 30 feet in length, substantiated by Coast Guard documentation or Marine Board registration, to totally remove from the water any salmon or steelhead required to be released.

REPEALER

The following section of the Washington Administrative Code is repealed effective May 8, 2010:

WAC 232-28-61900C Exceptions to statewide rules—Columbia River. (10-97)

The following section of the Washington Administrative Code is repealed effective May 10, 2010:

WAC 232-28-61900W Exceptions to statewide rules—Columbia River.

**WSR 10-11-019  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-109—Filed May 7, 2010, 2:23 p.m., effective May 7, 2010, 2:23 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Amending WAC 220-48-015.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: This change was requested by the trawl fishing industry to improve the economic efficiency of the fishery. The fish processing plant that processes the catch from this fishery no longer processes fish on Fridays. Under permanent regulations, the catch made on Friday would be held until the following Monday before processing, decreasing the quality of the catch. Allowing fishing on Wednesday instead of Friday would eliminate this problem. The fishery is governed by quota, so the overall harvest is not affected by this request. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative

Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 7, 2010.

Lori Preuss  
for Philip Anderson  
Director

NEW SECTION

**WAC 220-48-01500A Beam trawl and bottom trawl—Seasons.** Notwithstanding the provisions of WAC 220-48-015, effective immediately until further notice, it is unlawful to fish for or possess bottomfish for commercial purposes with otter trawl gear in Marine Fish-Shellfish Management and Catch Reporting Area 23C on Fridays, Saturdays and Sundays.

**WSR 10-11-024  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-110—Filed May 10, 2010, 10:37 a.m., effective May 10, 2010, 10:37 a.m.]

Effective Date of Rule: Immediately.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-25500V; and amending WAC 220-56-255.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: This rule conforms to federal action taken by the Pacific Fisheries Management Council. The recreational halibut quota is sufficient to provide for these seasons. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 10, 2010.

Lori Preuss  
for Philip Anderson  
Director

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-56-25500V Halibut—Areas and seasons. (10-80)

NEW SECTION

**WAC 220-56-25500W Halibut—Seasons—Daily and possession limits.** Notwithstanding the provisions of WAC 220-56-250 and WAC 220-56-255, effective immediately until further notice, it is unlawful to fish for or possess halibut taken for personal use, except as provided in this section:

(1) **Catch Record Card Area 1** - Open until further notice, Thursdays through Saturdays only. It is unlawful during any vessel trip to bring into port or land bottomfish except sablefish or Pacific Cod when halibut are on board.

(2) **Catch Record Card Area 2** - Open until further notice, Sundays and Tuesdays only, except closed Tuesday May 25, 2010; see (i) and (ii) below for additional details.

(i) **Catch Record Card Area 2 (Northern Nearshore fishery)** Those waters from 47°31.70'N. latitude south to 46°58.00'N latitude and east of a line approximating the 30 fathom depth contour as defined by the following coordinates, open seven days per week until further notice:

47°31.70 N. lat, 124°37.03 W. long  
47°25.67 N. lat, 124°34.79 W. long  
47°12.82 N. lat, 124°29.12 W. long  
46°58.00 N. lat, 124°24.24 W. long

(ii) Lingcod may be taken, retained and possessed seaward of the 30 fathom line on any day open to the primary halibut fishery as described in (2) above.

(3) **Catch Record Card Areas 3 and 4** - Open May 13 through May 22, 2010, Thursdays and Saturdays only. The following area southwest of Cape Flattery is closed to fishing for halibut at all times:

Beginning at 48°18' N., 125°18' W.; thence to 48°18'N., 124°59'W.; thence to 48°11'N., 124°59'W.; thence to 48°11'N., 125°11'W.; thence to 48°04'N., 125°11'W.; thence to 48°04'N., 124°59'W.; thence to 48°N., 124°59'W.; thence to 48°N., 125°18'W.; thence to point of origin.

(4) **Catch Record Card Area 5** - Open May 28 through May 30, 2010, Friday through Sunday only. Open June 3 through June 19, 2010, Thursdays through Saturdays only.

(5) **Catch Record Card Areas 6, 7, 8, 9 and 10** - Open through May 22, 2010, Thursdays through Saturdays only. Open May 28 through May 30, 2010, Friday through Sunday only.

(6) Daily limit one halibut, no minimum size limit. The possession limit is two daily limits of halibut in any form, except the possession limit aboard the fishing vessel is one daily limit.

(7) All other permanent rules remain in effect.

**WSR 10-11-027  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-115—Filed May 10, 2010, 3:13 p.m., effective May 11, 2010, 6:00 a.m.]

Effective Date of Rule: May 11, 2010, 6:00 a.m.

Purpose: The purpose of this rule making is to provide for treaty Indian fishing opportunity in the Columbia River while protecting salmon listed as threatened or endangered under the Endangered Species Act (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes and federal law governing Washington's relationship with Oregon.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-32-05100E; and amending WAC 220-32-051.

Statutory Authority for Adoption: RCW 77.04.130, 77.12.045, and 77.12.047.

Other Authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546); *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979); *State v. James*, 72 Wn.2d 746, 435 P.2d 521 (1967); 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Adopts the second weekly treaty commercial fishing period. Fisheries are consistent with the 2008-2017 management agreement. Allows sales of fish caught in platform and hook and line fisheries above and below Bonneville Dam. Allows sale of fish caught in Yakama Nation tributary fisheries by Yakama Nation members. Impact limits to ESA-listed chinook are available for treaty Indian fisheries. Rule is consistent with action of the Columbia River compact on May 10, 2010. Conforms state rules with tribal rules.

The Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the congressionally ratified Columbia River compact. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The tribes and the states adopt parallel regulations for treaty Indian fisheries under the supervision

of the federal courts. Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal ESA.

Columbia River fisheries are monitored very closely to ensure consistency with court orders and ESA guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. As required by court order, the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and invite tribal participation when considering proposals for new emergency rules affecting treaty fishing rights. *Sohappy*, 302 F. Supp. at 912. WDFW and ODFW then adopt regulations reflecting agreements reached. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 0, Repealed 1; Federal Rules or Standards: New 1, Amended 0, Repealed 1; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 1, Amended 0, Repealed 1.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 10, 2010.

Lori Preuss  
for Philip Anderson  
Director

## NEW SECTION

**WAC 220-32-05100F Columbia River salmon seasons above Bonneville Dam.** Notwithstanding the provisions of WAC 220-32-050, WAC 220-32-051, WAC 220-32-052, and WAC 220-32-058, effective immediately until further notice, it is unlawful for a person to take or possess salmon, steelhead, shad, carp, walleye or sturgeon for commercial purposes in Columbia River Salmon Management Catch Reporting Areas (SMCRA) 1E, 1F, 1G, and 1H, and in the Wind River, White Salmon River, Klickitat River, and Drano Lake, except as provided in the following subsections, and except that individuals possessing treaty fishing rights under the Yakima, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, walleye, shad, carp, yellow perch, catfish, bass, or sturgeon under the following provisions, pursuant to lawfully enacted tribal rules:

**1. Mainstem Columbia River above Bonneville Dam**

a) SEASON: 6:00 a.m. May 11 through 6:00 p.m. May 14, 2010

b) AREA: SMCRA 1F, 1G, 1H (Zone 6)

c) GEAR: No mesh restriction on gillnets.

**2. Mainstem Columbia River above Bonneville Dam**

a) SEASON: Immediately until further notice.

b) AREA: SMCRA 1F, 1G, 1H (Zone 6)

c) GEAR: Hoop nets, dip nets, and rod and reel with hook-and-line.

**3. Columbia River Tributaries above Bonneville Dam**

a) SEASON: Immediately until further notice and only during those days and hours when the tributaries listed below are open under lawfully enacted Yakama Nation tribal subsistence fishery regulations for enrolled Yakama Nation members.

b) AREA: Drano Lake, White Salmon, and Klickitat and Wind rivers.

c) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line. Gill nets may only be used in Drano Lake (no mesh restriction, 150-foot length restriction).

**4. Mainstem Columbia River below Bonneville Dam**

a) PARTICIPANTS: Tribal members may participate under the conditions described in the 2007 Memo of Agreement (MOA) with the Yakama Nation (YN), in the 2010 MOU (Memo of Understanding) with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the 2010 MOU with the Confederated Tribes of the Warm Spring Reservation (CTWS). Tribal members fishing below Bonneville Dam must carry an official tribal enrollment card.

b) SEASON: Immediately until further notice, except closed Thursdays through Saturdays for the CTUIR and the CTWS when non-tribal salmon fishing is open in the MOU area.

c) AREA: SMCRA 1E, Yakama Nation MOA: on the Washington shoreline from 600 feet below the fish ladder at the Bonneville Dam North shore powerhouse, downstream to Beacon Rock (bank fishing only). Umatilla and Warm Springs MOU: Covers the banks of the Columbia River bounded by a deadline marker on the Oregon bank approximately four miles downstream of Bonneville Dam Powerhouse #1 in a straight line through the western tip of Pierce Island, to a deadline marker on the Washington bank at Beacon Rock up the river to a point 600 feet below the Bonneville Dam, but excluding the following four areas:

1. Between the markers located 150 feet upstream and 450 feet downstream from the mouth of Tanner Creel out to the center of the Columbia river during the period from August 16, 2010, until further notice.

2. Inside the south navigation lock at Bonneville Dam from a marker on the western-most tip of Robins Island to a marker on the Oregon mainland shore.

3. From Bradford Island below Bonneville Dam from the south shore between the dam and a line perpendicular to the shore marker at the west end of riprap and from the north shore between the fishway entrance and a line perpendicular to the shoreline marker 850 feet downstream.

4. From Robins Island below Bonneville Dam downstream to a line perpendicular to the shoreline marker on the mooring cell.

d) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line, consistent with tribal regulations.

5. SANCTUARIES: Standard river mouth and dam sanctuaries are applicable to these gear types, except that the Spring Creek Hatchery sanctuary is not in effect.

6. ALLOWABLE SALES: Chinook, coho, sockeye, steelhead, walleye, shad, carp, yellow perch, catfish and bass. Sturgeon may not be sold. Sturgeon between 43-54 inches in

fork length in The Dalles and John Day pools (SMCRA 1G, 1H) may be retained for subsistence. Sturgeon between 38-54 inches in fork length in the Bonneville pool (SMCRA 1F) may also be retained for subsistence. Fish may NOT be sold on USACE Property below Bonneville Dam, but may be caught and transported off USACE Property for sale. **Sturgeon below Bonneville Dam may NOT be retained and may NOT be sold.**

**7. ADDITIONAL REGULATIONS:** 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240.

**Reviser's note:** The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

**Reviser's note:** The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

### REPEALER

The following section of the Washington Administrative Code is repealed effective 6:00 a.m. May 11, 2010:

WAC 220-32-05100E Columbia River above Bonneville (10-104)

### **WSR 10-11-028 EMERGENCY RULES GROWTH MANAGEMENT HEARINGS BOARDS**

[Filed May 11, 2010, 9:32 a.m., effective July 1, 2010]

Effective Date of Rule: July 1, 2010.

Purpose: To amend various provisions of the rules of practice and procedures (chapter 242-02 WAC) and public records (chapter 242-04 WAC) related to the growth management hearings board to reflect the consolidation of the boards into a single entity. These emergency rules also establish the procedures by which regional panels, which will hear matters coming before the board, will be structured. This restructuring was performed via SHB [SSB] 6214, adopted during the 2010 regular session of the legislature.

Citation of Existing Rules Affected by this Order: Amending chapters 242-02 and 242-04 WAC.

Statutory Authority for Adoption: RCW 36.70A.270(7).

Under RCW 34.05.350 the agency for good cause finds that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; and that in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this Finding: With the 2010 regular session, the legislature adopted SHB [SSB] 6214 which changed the existing structure of the growth management hearings board in two regards: (1) Consolidation of three boards into a sin-

gle entity and (2) regional panel structure to hear and decide cases. SHB [SSB] 6214 becomes effective on July 1, 2010, and without rules addressing how panels are constituted, the growth management hearings board would not be able to perform its statutorily required functions. In addition, without modification to rules which see the board as three individual boards, the newly established single board would not be able to perform daily functions or provide necessary public records assistance. Part of this reconfiguration is based on budgetary concerns and related to SHB 2935.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: April 29, 2010.

James J. McNamara  
Chair, Rules Committee

AMENDATORY SECTION (Amending WSR 03-15-047, filed 7/11/03, effective 8/11/03)

**WAC 242-02-010 Organization.** ~~((Three))~~ The growth management hearings board ~~((s were))~~ was established pursuant to chapter 36.70A RCW. ~~((Each))~~ The board is an independent quasi-judicial agency of the state of Washington with ~~((three))~~ seven members appointed by the governor who are qualified by experience or training in matters pertaining to land use planning. These rules were developed, adopted, and amended ~~((jointly))~~ by ~~((all three))~~ the board ~~((s))~~ pursuant to RCW 36.70A.270(7). They should be read in conjunction with the act and the Administrative Procedure Act, chapter 34.05 RCW.

### NEW SECTION

**WAC 242-02-015 Regional panels.** (1) Each petition for review that is filed with the growth management hearings board shall be heard and decided by a regional panel of growth management hearings board members. Regional panels shall be constituted as follows:

(a) Central Puget Sound region. A three-member Central Puget Sound panel shall be selected to hear matters pertaining to cities and counties located within the region comprised of King, Pierce, Snohomish, and Kitsap counties.

(b) Eastern Washington region. A three-member Eastern Washington panel shall be selected to hear matters pertaining to cities and thirty-two counties that are required or choose to

plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains.

(c) Western Washington region. A three-member Western Washington panel shall be selected to hear matters pertaining to cities and counties that are required or choose to plan under RCW 36.70A.040, are located west of the crest of the Cascade mountains, and are not included in the Central Puget Sound region. Skamania County, if it is required or chooses to plan under RCW 36.70A.040, may elect to be included within either the Western Washington region or the Eastern Washington region.

(2)(a) Each regional panel selected to hear and decide cases shall consist of three board members, at least a majority of whom shall reside within the region in which the case arose, unless such members cannot sit on a particular case because of recusal or disqualification, or unless the board administrative officer determines that there is an emergency including, but not limited to, the unavailability of a board member due to illness, absence, vacancy, or significant workload imbalance. The presiding officer of each case shall reside within the region in which the case arose, unless the board administrative officer determines that there is an emergency.

(b) Except as provided otherwise in (b) of this subsection, each regional panel must:

(i) Include one member admitted to practice law in this state;

(ii) Include one member who has been a city or county elected official; and

(iii) Reflect the political composition of the board. The requirements of (b) of this subsection may be waived by the board administrative officer due to member unavailability, significant workload imbalances, or other reasons.

**AMENDATORY SECTION** (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-020 Function—Local deference.** (1)

The function of ~~((a))~~ the board is to make informed decisions on appeals arising from implementation of the Growth Management Act in a clear, consistent, timely, and impartial manner that recognizes regional diversity.

(2) The legislature requires growth management planning to occur in compliance with the goals and requirements of the act. The responsibility for managing local growth and shaping a county's or city's future rests with the local community. The board~~((s))~~ will grant deference to counties and cities in how they plan for and manage growth.

**AMENDATORY SECTION** (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-030 Jurisdiction.** This section is intended to be general and informational only, and failure to list matters over which ~~((a))~~ the board has jurisdiction at law shall not constitute any waiver of or withdrawal from such jurisdiction.

(1) Geographic jurisdiction. Each ~~((board))~~ panel shall hear only those matters pertaining to the cities and counties located within its jurisdictional boundaries. The boundaries are as follows:

(a) The Eastern Washington ~~((board))~~ regional panel includes all counties and the cities now or subsequently located within these counties that are required or choose to plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains;

(b) The Central Puget Sound ~~((board))~~ regional panel includes and is limited to King, Pierce, Snohomish and Kitsap counties, and the cities now or subsequently located within those counties; and

(c) The Western Washington ~~((board))~~ regional panel includes all counties and the cities now or subsequently located within those counties that are required or choose to plan under RCW 36.70A.040 and are located west of the crest of the Cascade mountains and are not included in the Central Puget Sound ~~((board))~~ regional panel boundaries;

(d) Skamania County, should it be required or choose to plan under RCW 36.70A.040, may elect to be included within the jurisdictional boundaries of the Western or Eastern Washington ~~((boards))~~ regional panels.

(2) Subject matter jurisdiction. ~~((Each))~~ The board shall hear and determine petitions alleging that a state agency, county, or city is not in compliance with the requirements of the act, or chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to plans, development regulations, and amendments adopted under the act or chapter 90.58 RCW; or, petitions from cities or the governor relating to an adopted county-wide planning policy; or, that the twenty-year growth management planning projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

(3) Jurisdictional issues. Any party to a proceeding before ~~((a))~~ the board and its regional panel may, by motion, challenge the jurisdiction of ~~((that board))~~ the panel in any petition for review. ~~((A))~~ The board may, upon its own motion, raise such an issue.

**AMENDATORY SECTION** (Amending WSR 09-21-039, filed 10/13/09, effective 11/13/09)

**WAC 242-02-040 Definitions.** As used in this title, the following terms shall have the following meaning:

(1) "Act" means the Growth Management Act, chapter 36.70A RCW, and subsequent amendments.

(2) "Board" means ~~((the Eastern Washington, Western Washington or Central Puget Sound))~~ the growth management hearings board or a panel of the board hearing a matter.

(3) "Final decision" means:

(a) Any final order as provided in RCW 36.70A.300; or

(b) Any other written finding, determination or order of the board which finally determines a legal right, duty, or other legal interest of the parties in the case and which clearly states such written finding, determination or order that it is a final decision subject to appeal to superior court.

(4) "Hearing examiner" means an authorized agent of a board who has a demonstrated knowledge of land use planning and law, appointed to assist the board in the performance of its hearing function as delegated by the board as provided by the act.

~~((5))~~ ~~("Joint boards" means the three independent boards meeting or acting jointly.~~

~~((6))~~ "Office of the growth management hearings board~~((s))~~" means the administrative office of the ~~((three growth management hearings))~~ board~~((s))~~ established ~~((in RCW 36.70A.250))~~ pursuant to RCW 36.70A.270(2).

~~((7))~~ ~~(6)~~ "Participant" means any person with standing to challenge a legislative action as set forth in RCW 36.70A.-330(2).

~~((8))~~ ~~(7)~~ "Party" means any person named in the caption of a case before ~~((a))~~ ~~the~~ board.

~~((9))~~ ~~(8)~~ "Person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit, or public or private organization or entity of any character.

~~((10))~~ ~~(9)~~ "Petitioner" means a person who appeals any matter or who brings a petition for rule making to the board. A petitioner is a party to a case before the board.

~~((11))~~ ~~(10)~~ "Presiding officer" means any member of ~~((a))~~ ~~the~~ board, or a hearing examiner, who is assigned to conduct a conference or hearing as directed by ~~((a))~~ ~~the~~ board. The presiding officer shall be designated pursuant to WAC 242-02-521 and have authority as provided by WAC 242-02-522.

~~((12))~~ ~~(11)~~ "Publication" means:

(a) For a city, the date the city publishes the ordinance or summary of the ordinance adopting a comprehensive plan, development regulations or subsequent amendment, as is required to be published, or the date the city publishes notice that the shoreline master program or amendment has been approved or disapproved by the department of ecology;

(b) For a county, the date the county publishes the notice that it has adopted a comprehensive plan, development regulations or other enactments, or subsequent amendments pursuant to RCW 36.70A.290(2), or the date the county publishes notice that the shoreline master program or amendment has been approved or disapproved by the department of ecology.

~~((13))~~ ~~(12)~~ "Respondent" means a person who is named as a responding party in any petition for review before ~~((a))~~ ~~the~~ board.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-050 Rules.** These rules shall govern the ~~((joint boards'))~~ board's adoption or amendment of ~~((joint))~~ rules, and all practice and procedure for hearings before ~~((a))~~ ~~the~~ board. Where a time frame is different in these rules from those in chapter 10-08 WAC, it is because ~~((a))~~ ~~the~~ board is required to act pursuant to the time frames set forth in the act.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-052 Petition for rule making.** (1) Right to petition for rule making. Any person may petition the ~~((joint))~~ board~~((s))~~ for the adoption, amendment, or repeal of any rule. Said petition shall be filed with the ~~((joint boards in care of the))~~ board at its office ~~((of growth management hearings boards)).~~

(2) Form of petition. The form of the petition for adoption, amendment, or repeal of any rule shall generally adhere to the following:

(a) A caption in the following form:

BEFORE THE JOINT GROWTH MANAGEMENT  
HEARINGS BOARD~~((s))~~  
STATE OF WASHINGTON

No.

In the matter of  
the Petition of  
(Name of Petitioner)  
for Rule Making

PETITION FOR RULE MAKING

(b) The body of the petition shall be set out in numbered paragraphs. The first paragraph shall state the name and address of the petitioning party and whether the petitioner seeks the adoption of a new rule or rules, or amendment or repeal of an existing rule or rules. The second paragraph, in case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety. Where the petition is for repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by board rule number. The third paragraph shall set forth concisely the reasons for the proposal of the petitioner and shall contain a statement as to the interests of the petitioner and the subject matter of the rule. Additional numbered paragraphs may be used to give full explanation of petitioner's reason for the action sought.

(c) The petition shall be dated and signed by the party named in the first paragraph or by the petitioner's attorney or other authorized representative. The original and nine copies shall be filed with the ~~((appropriate))~~ board ~~((at its office)).~~

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-054 Petition for rule making—Consideration and disposition.** (1) Each petition for the adoption, amendment, or repeal of a rule shall be considered by the ~~((joint))~~ board~~((s))~~, and the ~~((joint))~~ board~~((s))~~ may, in ~~((their))~~ its discretion, solicit comments or invite discussion concerning the matter prior to disposition of the petition.

(2) Consideration of petitions. All petitions shall be considered by the ~~((joint))~~ board~~((s or representatives designated by each board,))~~ and the ~~((joint))~~ board~~((s))~~ may, in ~~((their))~~ its discretion, hold meetings for the further consideration and discussion of the requested adoption, amendment, or repeal of any rule.

(3) Notification of disposition of petition. The ~~((joint))~~ board~~((s))~~ or designated representatives shall notify the petitioner within a reasonable time of the disposition, if any, of the petition.

AMENDATORY SECTION (Amending WSR 09-21-041, filed 10/13/09, effective 11/13/09)

**WAC 242-02-070 Quorum.** ~~((1) Joint boards. For the purpose of adopting, amending, or repealing these rules or transacting other administrative business, at least two mem-~~

bers of each board shall constitute a quorum of the joint boards. A quorum being present, any action may be taken upon the vote of the majority of the joint board members.

~~(2) Individual board. For purposes of making orders or decisions or transacting other official administrative business for an individual board, two members of a board shall constitute a quorum and may act even though one position on the board is vacant. One member or designated hearing examiner may hold hearings and take testimony. The findings of such member or hearing examiner shall not become final until approved by a majority of the board. A board member who does not attend a hearing shall review a transcript or recording of the hearing before signing the decision.)~~ Board quorum. For the purpose of adopting, amending, or repealing these rules or transacting other administrative business, at least four members of the board shall constitute a quorum of the board. A quorum being present, any action may be taken upon the vote of the majority of the board members.

Panel quorum. For purposes of making orders or decisions in a case, two members of a panel shall constitute a quorum and may act even though one panel member is absent. One member or designated hearing examiner may hold hearings and take testimony. The findings of such member or hearing examiner shall not become final until approved by a majority of the panel. A panel member who does not attend a hearing shall review a transcript or recording of the hearing before signing the decision.

AMENDATORY SECTION (Amending WSR 09-21-039, filed 10/13/09, effective 11/13/09)

**WAC 242-02-072 Board office.** (1) The administration of the ~~((three))~~ board((s)) is consolidated in one office - the office of the growth management hearings board((s)):

~~((Office of the))~~  
Growth Management Hearings Board((s))  
319 - 7th Avenue S.E., Suite 103  
Olympia, WA 98501  
P.O. Box 40953  
Olympia, WA 98504-0953  
360-586-0260  
360-664-8975 Fax  
e-mail: eastern@ew.gmhb.wa.gov  
e-mail: western@wvwmhb.wa.gov  
e-mail: central@cps.gmhb.wa.gov  
web site: www.gmhb.wa.gov

(2) The filing of all petitions, briefs, exhibits, and other documents related to any proceeding before an individual board shall be made to the office of the growth management hearings board((s)), with specific indication of the appropriate ~~((board's))~~ regional panel's name - Eastern, Western, or Central Puget Sound.

AMENDATORY SECTION (Amending WSR 09-21-041, filed 10/13/09, effective 11/13/09)

**WAC 242-02-074 Regular meetings.** (1) Regular meetings of ~~((each))~~ the board will be held at the office of the growth management hearings board((s)), or a designated location ~~((at the following times:~~

~~(a) Eastern Washington board — on the first Wednesday of each month at 10:00 a.m. or following any scheduled hearing on that date.~~

~~(b) Western Washington board — on the second Wednesday of each month at 11:00 a.m. or following any scheduled hearing on that date.~~

~~(c) Central Puget Sound board — on the first Monday of each month at 10:00 a.m. or following any scheduled hearing on that date))~~ on the first Wednesday of each month at 10:00 a.m. or following any scheduled hearing on that date. Meetings may be held telephonically.

(2) The ~~((joint))~~ board((s)) shall meet annually at a time and location to be announced.

~~((3) An individual board shall make available the location of such a meeting if it is not to be held at the office of the growth management hearings boards.))~~

AMENDATORY SECTION (Amending WSR 09-21-041, filed 10/13/09, effective 11/13/09)

**WAC 242-02-075 Special meeting.** (1) A special meeting of the ~~((joint))~~ board((s)) may be called at the request of any ~~((three))~~ two of the ~~((nine))~~ board members. To call a special meeting, a written notice of the meeting shall be posted on the ~~((boards'))~~ board's web site and personally e-mailed to:

(a) Each member of the board((s)); and

(b) Each general circulation newspaper, television or radio station which has on file with the board((s)) a written request to be notified of special meetings.

(2) The written notice shall state the date and time of the meeting, and shall specify the business to be transacted by the board((s)). The board((s)) will not take final action on any matter that is not specified in the written notice.

(3) Notices of special meetings shall be sent by e-mail:

(a) One day (twenty-four hours) before the scheduled meeting; except

(b) When a special meeting is called to consider rule changes pursuant to chapter 34.05 RCW, the notice shall be sent at least twenty days prior to the meeting; and except

(c) In the event of an emergency requiring board action, the notice and timing requirements may be waived as provided in RCW 42.30.080.

(4) The special meeting shall be chaired by ~~((one of the board members who called the meeting))~~ the administrative officer.

(5) A special meeting may be held by telephone conference call.

~~((Two members of each board will constitute a quorum for a special meeting.~~

~~((7))~~ Members of the public may attend a special meeting by appearing at ~~((any of))~~ the ~~((three))~~ board office((s)), or the location of the special meeting, at the date and time set for the meeting.

AMENDATORY SECTION (Amending WSR 03-15-047, filed 7/11/03, effective 8/11/03)

**WAC 242-02-076 Annual and semiannual ~~((joint))~~ board((s)) meetings.** (1) The annual ~~((joint))~~ board((s)) meeting will be held on the first Thursday and first Friday of

October of each year. The annual meeting will be held in person.

(a) In odd-numbered years the annual ((~~joint~~)) board((s)) meeting will be held within the Central Puget Sound ((~~board's~~)) region.

(b) In even-numbered years the annual ((~~joint~~)) board((s)) meeting will be held within the Eastern Washington ((~~board's~~)) region.

(c) The location, time and agenda for the annual ((~~joint~~)) board((s)) meeting will be posted on the ((~~boards'~~)) board's web site (www.gmhb.wa.gov) in September of each year.

(2) The semiannual ((~~joint~~)) board((s)) meeting will be held on the last Thursday in April each year. The semiannual meeting will be held in person.

(a) Each year the semiannual ((~~joint~~)) board((s)) meeting will be held within the Western Washington ((~~board's~~)) region.

(b) The location, time and agenda for the semiannual ((~~joint~~)) board((s)) meeting will be posted on the ((~~boards'~~)) board's web site (www.gmhb.wa.gov) in March of each year.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-080 Form and size of documents.** Documents, other than exhibits, shall be provided in the manner indicated in ((~~the~~)) the board's prehearing order.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-090 Case numbering.** ((~~Each~~)) The board shall assign a case number to each petition for review which shall be the official reference number for purposes of identification. The first two digits of the case number shall correspond to the last two digits of the calendar year in which the petition was filed. The third digit shall designate which ((~~board~~)) regional panel has jurisdiction over the matter. The Eastern Washington ((~~board~~)) panel shall use the digit "1"; the Western Washington ((~~board~~)) panel shall use the digit "2"; and the Central Puget Sound ((~~board~~)) panel shall use the digit "3." The last four digits shall be numbered sequentially in order of receipt.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-110 Appearance and practice before ((~~the~~)) the board—Who may appear.** Practice before ((~~the~~)) the board shall be open to the following persons who have met the standing requirements of chapter 36.70A RCW:

(1) A party or participant to a case before the board may appear personally or, by a duly authorized representative;

(2) Attorneys at law practicing before the board must be duly qualified and entitled to practice in the courts of the state of Washington; and

(3) Other persons permitted by law.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-120 Rules of professional conduct.** All persons appearing in proceedings before ((~~the~~)) the board in a representative capacity shall conform to the rules of professional conduct required of attorneys before the courts of Washington. If any such person does not conform to such rules, the board may decline to permit such person to appear in a representative capacity in any current or future proceeding before ((~~that~~)) the board or impose other appropriate sanctions.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-150 Teleconference proceeding.** (1) At the discretion of ((~~the~~)) the board or a presiding officer, or where the parties agree and where the rights of the parties will not be prejudiced, all or part of any hearing, prehearing, or motion hearing may be conducted by telephone, television, or other electronic means. Each party in the proceeding must have an opportunity to participate effectively in, to hear, and if technically and economically feasible, to see the entire proceeding while it is taking place.

(2) The board may require documentary evidence, motions, and briefs to be submitted sufficiently in advance of the teleconference proceeding to insure fair consideration and presentation of the issues. All such material shall also be served on other parties at the time of filing with ((~~the~~)) the board.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-220 Petition for review—Time for filing.** (1) A petition relating to whether or not an adopted comprehensive plan, development regulation, shoreline master program or subsequent amendments, is in compliance with the goals and requirements of the act or chapter 90.58 or 43.21C RCW shall be filed with ((~~the~~)) the board within sixty days from the date of publication by the legislative body of the county or city as specified by RCW 36.70A.290(2).

(2) A petition relating to an adopted county-wide planning policy shall be filed within sixty days of its adoption as specified in RCW 36.70A.210(6).

(3) A petition alleging that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted can be filed at any time.

(4) For all other matters, a petition must be filed with ((~~the~~)) the board within sixty days of the final written decision, order, determination, publication, or action being entered.

(5) A petition relating to the failure of a state agency, city or county to take an action by a deadline specified in the act may be brought at any time after the deadline for action has passed.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-230 Petition for review—Service and filing.** (1) At least one copy of the petition for review shall be filed with the board by electronic mail, as provided in WAC 242-02-240, unless a petitioner does not have the technological capacity to do so. The original and four copies of the petition for review shall be filed with ((a)) the board personally, or by first class, certified, or registered mail. Filings may also be made with ((a)) the board by telefacsimile transmission as provided in WAC 242-02-240. A copy of the petition for review shall be personally served upon all other named parties or deposited in the mail and postmarked on or before the date filed with the board. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340.

(2) ((A)) The board may dismiss a case for failure to substantially comply with subsection (1) of this section.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-240 Date of filing—Facsimile and electronic mail.** (1) The date of filing shall be the date of actual receipt by ((a)) the board at ((the)) its office ((of the growth management hearings boards)). The date stamp placed on the petition shall be presumptive evidence of the date of receipt.

(2) Filing of any documents with ((a)) the board by electronic mail or telefacsimile transmission is at the risk of the sender and shall not be deemed complete unless the following procedures are strictly observed:

(a) An electronic mail or telefacsimile document will only be stamped "received" by the board between the hours of 8:00 a.m. and 5:00 p.m. excluding Saturdays, Sundays, and legal holidays. Any transmission not completed before 5:00 p.m. will be stamped received on the following business day. The date and time indicated by the board's telefacsimile machine or receiving computer shall be presumptive evidence of the date and time of receipt of transmission.

(b) The original document and four copies shall be mailed and postmarked or otherwise transmitted to the board on or before the date of sending the telefacsimile transmission or electronic mail.

(c) Documents over fifteen pages in length may not be filed by telefacsimile without prior approval of the presiding officer.

(3) A telefacsimile or electronic mail copy shall constitute an original solely for the purpose of establishing the date a document was filed.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-260 Amendments to petitions for review and answers.** (1) A petition for review or answer may be amended as a matter of right until thirty days after its date of filing.

(2) Thereafter any amendments shall be requested in writing by motion, and will be made only after approval by ((a)) the board or presiding officer. Amendments shall not be freely granted and may be denied upon a showing by the adverse party of unreasonable and unavoidable hardship, or by ((a)) the board's finding that granting the same would adversely impact ((a)) the board's ability to meet the time requirements of RCW 36.70A.300 for issuing a final order. The board may, upon motion of a party or upon its own motion, require a more complete statement of the nature of the claim or defense or any other matter stated in a pleading.

AMENDATORY SECTION (Amending WSR 04-21-046, filed 10/15/04, effective 11/15/04)

**WAC 242-02-280 Amicus.** (1) Any person whose interest may be substantially affected by a proceeding before ((a)) the board may, by motion, request status as an amicus in the case.

(2) A motion to file an amicus curiae brief must include a statement of:

(a) Applicant's interest and the person or group applicant represents;

(b) Applicant's familiarity with the issues involved in the matter and with the scope of the argument presented or to be presented by the parties;

(c) Specific issues to which the amicus curiae brief will be directed; and

(d) Applicant's reason for believing that additional argument is necessary on these specific issues. The brief of amicus curiae may be filed with the motion but must be filed no later than the time set for the filing of the brief for the party whose position the amicus supports.

(3) If the person qualifies for amicus, the presiding officer may impose conditions upon the amicus's participation in the proceedings, either at the time that amicus status is granted or at any subsequent time.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-290 Direct review by superior court—Procedures.** RCW 36.70A.295 provides for direct review by superior court of a petition for review filed with ((a)) the board if:

(1) All parties to the board proceeding agree to direct review by superior court;

(2) The parties file a direct review agreement, signed by all parties, or their designated representatives, with the ((appropriate)) board;

(3) The direct review agreement includes agreement to proper venue; and

(4) The direct review agreement is filed with the ((appropriate)) board within ten days after the petition for review is

filed, or if multiple petitions have been filed and the board has consolidated the petitions, within ten days after the board serves notice of consolidation.

AMENDATORY SECTION (Amending WSR 04-21-046, filed 10/15/04, effective 11/15/04)

**WAC 242-02-310 Service of papers.** (1) Parties filing pleadings, briefs, exhibits and other documents or papers with ((a)) the board shall also serve copies upon all other parties no later than the date upon which they were filed with the board. Parties served shall be those included on the declaration of service list attached to the board's prehearing order, or amended prehearing order.

(2) Service upon a party's attorney or other authorized representative shall be considered valid service for all purposes upon the party represented.

(3) Final decisions of the board shall be served upon the parties and their attorney or representative of record, if any.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-320 Method of service.** Service of papers, specified in WAC 242-02-310(1), shall be made by electronic mail unless the party does not have the technological capacity to do so. Service may also be made personally, by first class, registered or certified mail, or by telefacsimile transmission. If service is by electronic mail or telefacsimile, an original and four copies shall be properly addressed to ((a)) the board, deposited in the mail, and postmarked no later than the same day. Exhibits shall not be served electronically but shall be deemed timely filed if included in the mailed copies.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-330 Service of papers—When complete.** (1) Papers required to be filed with ((a)) the board shall be deemed filed upon actual receipt during office hours at the board's office.

(2) All facsimile and electronic mail transmissions are sent at the risk of the sender and only pursuant to the procedures specified in WAC 242-02-240.

(3) This section shall not extend any applicable time for appeal to ((a)) the board nor extend the time for providing notice of appeal to any named party.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-340 Proof of service—Declaration.** Where proof of service is required by this chapter, by statute, or upon ((a)) the board's request, filing the original document with the board and serving copies upon all attorneys or other authorized representatives of record and upon parties not represented together with one of the following documents shall constitute proof of service:

(1) An acknowledgment of service;

(2) A certificate that the person signing the certificate did on the date of the certificate serve the papers upon each party or the party's attorney or other authorized representative of record in the proceeding by delivering a copy thereof in person to the named individuals;

(3) A certificate that the person signing the certificate did on the date of the certificate serve the papers upon all parties of record in the case by:

(a) Mailing a copy, properly addressed with postage prepaid, to each party or that party's attorney or other authorized representative; or

(b) Transmitting a copy by electronic mail or telefacsimile, and on the same day mailing a copy to each party in the case or that party's attorney, or other authorized representative; or

(c) Depositing a copy, properly addressed with charges prepaid, with a commercial parcel delivery company or courier service.

AMENDATORY SECTION (Amending WSR 94-07-033, filed 3/9/94, effective 4/9/94)

**WAC 242-02-410 Discovery—Limitation.** (1) Discovery shall not be permitted except upon an order of ((a)) the board or its presiding officer.

(2) Insofar as applicable and not in conflict with this chapter, when discovery has been authorized by ((a)) the board or presiding officer, the statutes and court rules regarding pretrial procedures in civil cases in superior courts of the state of Washington shall be used. Such statutes and rules shall include but shall not be limited to those rules pertaining to discovery of evidence by parties to civil actions.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-420 Subpoena—Issuance.** (1) Subpoenas shall be issued and enforced, and witness fees paid, as provided in RCW 34.05.446 and court rules.

(2) Every subpoena shall identify the party causing its issuance. Subpoenas may be issued by ((a)) the board or by an attorney of record. The person issuing shall sign the subpoena. Parties desiring subpoenas to be signed by ((a)) the board shall make a showing of relevance and reasonable scope of the testimony or evidence sought and shall prepare the subpoenas for issuance, send them to the board's office for signature, and, upon return, shall make arrangements for service.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-510 Notice of hearing—Setting of time and place.** (1) Within ten days of the filing of a petition for review, unless a petition for review has been removed to superior court, pursuant to WAC 242-02-290 through 242-02-295, ((a)) the board or presiding officer will schedule a hearing date and notify the parties of the date.

(2) The board or presiding officer will thereafter schedule a place for the hearing.

(3) A written notice of the date and location of the hearing shall be sent to all parties not less than twenty days prior to the hearing date.

(4) The notice shall identify the appeal to be heard, the names of the parties to the appeal and their attorneys or other authorized representatives, if any, and shall specify the time and place of hearing. The notice shall include the information specified in RCW 34.05.434 and if the hearing is to be conducted by teleconference call the notice shall so state.

(5) The notice shall state that if a limited-English-speaking or hearing impaired party or witness needs an interpreter, a qualified interpreter will be appointed and that there will be no cost to the party or witness. The notice shall include a form for a party to indicate if an interpreter is needed and identification of the primary language, or if a participant is hearing impaired.

(6) The notice may also include an order fixing the pre-hearing date and/or deadlines as provided in these rules.

(7) Defects in notice may be waived if the waiver is knowing and voluntary.

**AMENDATORY SECTION** (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-520 Record.** Within thirty days of service of a petition for review, the respondent shall file with the board and serve a copy on the parties of an index of all material used in taking the action which is the subject of the petition for review. The index shall contain sufficient identifying information to enable unique documents to be distinguished. In addition, the written or tape-recorded record of the legislative proceedings where action was taken shall be available to the parties for inspection.

**AMENDATORY SECTION** (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-521 Designation of presiding officer.** ((A)) The board shall designate the presiding officer for each case at the time it issues its notice of hearing pursuant to WAC 242-02-510. In the event the presiding officer subsequently changes, the board shall promptly notify the parties.

**AMENDATORY SECTION** (Amending WSR 00-09-094, filed 4/19/00, effective 5/20/00)

**WAC 242-02-522 Presiding officer—Powers and duties.** It shall be the duty of the presiding officer to conduct conferences or hearings as directed by ((a)) the board in an impartial and orderly manner. The presiding officer shall have the authority, subject to the other provisions of the act or these rules to:

(1) Inspect the petition for review to determine whether, on its face, compliance with the jurisdictional and standing requirements of the act is shown, and if compliance is not shown, to recommend an action or to refer the issue to the full board for resolution;

(2) Take appropriate action with respect to the qualifications of the parties or the parties' attorney(s) or other authorized representative(s) to appear before ((a)) the board;

(3) Administer oaths and affirmations if witnesses are permitted to testify;

(4) Issue subpoenas as provided in RCW 34.05.446;

(5) Rule on all procedural matters, objections and motions unless a board determination is required;

(6) Rule on all evidentiary matters including offers of proof;

(7) When applicable, question witnesses called by the parties in an impartial manner as needed to develop any facts deemed necessary to fairly and adequately decide the issue;

(8) Issue orders joining other parties, on motion of any party, when it appears that such other parties may have an interest in, or may be affected by the case;

(9) Consolidate cases for hearing when such consolidation will expedite disposition and avoid duplication of testimony and when consolidation will not unduly prejudice the rights of any party;

(10) Hold conferences for the settlement or amplification of the issues;

(11) Regulate the course of the case;

(12) Encourage the parties to stipulate to the admissibility of documents in advance of a hearing and to rule on issues concerning the content of the record;

(13) Limit the length of a brief or impose format restrictions;

(14) Sign and file certificates of agreement acknowledging receipt of timely, complete, executed agreements for direct review by superior court;

(15) Rule on requests for settlement extensions;

(16) Waive any requirement of these rules unless a party shows that it would be prejudiced by such a waiver; and

(17) Take any other action necessary and authorized by these rules, the act, or the Administrative Procedure Act, chapter 34.05 RCW.

**AMENDATORY SECTION** (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-530 Motions—Requirements.** (1) A motion is an application for an order or ruling. Every motion shall be in writing, unless made during a hearing; shall state with particularity the grounds; and shall set forth the relief or order sought. An original and four copies of the motion shall be filed with ((a)) the board and a copy served on each opposing party or that party's attorney or other authorized representative.

(2) All motions shall be properly captioned and signed by the moving party or that party's attorney or other authorized representative.

(3) The motion shall specify the amount of time required for argument, whether appearance by telecommunication is requested, and the names, telephone numbers, and electronic mail addresses of all parties served with the motion.

(4) Dispositive motions on a limited record, similar to a motion for summary judgment in superior court or a motion on the merits in the appellate courts, are permitted. Time frames for making and responding to such a motion shall be established by the presiding officer.

(5) Motions to disqualify a hearing examiner acting as the presiding officer, or a board member, for bias, prejudice,

interest or other cause, with supporting affidavit(s), may be filed with ((a)) the board.

(6) Any party may bring a motion for the board to decide a challenge to compliance with the notice and public participation requirements of the act raised in the petition for review, provided that the evidence relevant to the challenge is limited. If such a motion is timely brought, the presiding officer or the board shall determine whether to decide the notice and public participation issue(s) on motion or whether to continue those issues to the hearing on the merits.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-532 Motions—Time for filing and hearing.** (1) A motion can be filed at any time unless otherwise specified in these rules or by ((a)) the board or presiding officer.

(2) After prehearing or other order. If a prehearing order or other order has been entered establishing a deadline for filing motions, no written motion may be filed after the date specified in the order without written permission of the board or presiding officer.

(3) ((A)) The board or presiding officer, after taking into consideration when the motion was received and the complexity of the issues raised, may, in its discretion, schedule a hearing for argument of a motion at the time of a prehearing conference or at a separate hearing time, or may defer consideration of the motion until commencement of the hearing on the petition for review. ((A)) The board or presiding officer may also limit argument on a motion to briefs.

(4) A motion, other than a dispositive motion or a motion to supplement the record, is deemed denied unless the board takes action within twenty days of filing of the motion.

AMENDATORY SECTION (Amending WSR 09-23-009, filed 11/5/09, effective 12/6/09)

**WAC 242-02-534 Response to motions.** (1) A party served with a motion shall have ten days from the date of service of the motion to respond to it, unless otherwise directed by the presiding officer. A response to the motion shall be filed with ((a)) the board and a copy served on the opposing party/parties.

(2) The response shall specify the amount of time required for argument, whether appearance by telecommunication is requested, and the names, telephone numbers, and electronic mail addresses of all parties served with the response.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-540 New or supplemental evidence.** Generally, ((a)) the board will review only the record developed by the city, county, or state in taking the action that is the subject of review by the board. A party by motion may request that ((a)) the board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons. ((A)) The

board may order, at any time, that new or supplemental evidence be provided.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-550 Prehearing conference.** A prehearing conference is optional at the discretion of the presiding officer. The purpose of a prehearing conference is to:

(1) Determine the feasibility of and encourage settlement of the matter or any portion thereof;

(2) Obtain a stipulation of relevant facts including ((a)) the board's jurisdiction and the party's standing in the matter;

(3) Obtain agreement as to the issues of law and fact presented and their simplification, limitation, or resolution;

(4) Determine the qualifications of expert witnesses, if they are permitted to testify;

(5) Receive any motions concerning qualification of individual board members to hear the matter;

(6) Obtain information as to the number of expert and/or lay witnesses expected to be called by the parties and their names, addresses and telephone numbers;

(7) Set subsequent deadlines, if and when appropriate, for filing final exhibit and witness lists, filing motions, and completing discovery; establish a briefing schedule, limit the length of briefs; and decide other matters related to the conduct of the hearing;

(8) Determine the approximate time necessary for the presentation of evidence and/or argument of the respective parties; and

(9) Obtain all other information which may aid in the prompt disposition of the matter.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-552 Prehearing conference—When held.** (1) ((A)) The board or presiding officer may order a prehearing conference on not less than seven days notice mailed to each party at a time and place fixed by ((a)) the board or presiding officer.

(2) At any time prior to a hearing on a petition for review, any party may file a written application with ((a)) the board requesting a prehearing conference.

AMENDATORY SECTION (Amending WSR 94-07-033, filed 3/9/94, effective 4/9/94)

**WAC 242-02-558 Prehearing conference—Agreements.** At the conclusion of a prehearing conference, the presiding officer may require the parties to submit a proposed prehearing order. The presiding officer will issue an order reciting the action taken at the conference and any agreements of the parties or decisions of the presiding officer. The order may include provisions pertaining to:

(1) Jurisdiction and standing;

(2) Issues;

(3) Admissions;

(4) Witnesses, if permitted;

(5) Time, location and length of hearings;

(6) Authenticity and/or admissibility of exhibits;

- (7) Qualification of witnesses, if permitted;
  - (8) Rulings of the board prior to the prehearing conference;
  - (9) Rulings of the presiding officer; and
  - (10) Any other matters that may expedite the hearing.
- Any objection to such order shall be made in writing within seven days after the date the order is dated. ((A)) The board shall serve its prehearing order on the same day that the order is dated. The order shall control ensuing proceedings unless modified for good cause by a subsequent order.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-560 Settlement extensions—Continuances.** (1) If additional time is necessary to achieve settlement of a dispute that is an issue in a petition before ((a)) the board, ((a)) the board may extend the one hundred eighty-day time limit for issuing a final decision and order, as provided in RCW 36.70A.300 (2)(b). ((A)) The board may authorize one, or more, extensions of up to ninety days each.

(2) A request for a settlement extension must be filed with ((a)) the board not later than seven days before the date scheduled for the hearing on the merits of the petition.

(3) ((A)) The board may grant a request for a settlement extension if:

- (a) The request was timely filed; and
- (b)(i) All parties named in the caption of the petition, agree to and sign the request; or
- (ii) A petitioner and respondent agree to and sign the request and the board determines that a negotiated settlement between the remaining parties could resolve significant issues in dispute.

(4) Continuances of hearings will be granted only on ((a)) the board's initiative or upon timely request of a party setting forth in detail the reasons for such a request and a date by which such reason will no longer apply. The board will continue the matter only upon a finding of good cause and in order to prevent manifest injustice.

AMENDATORY SECTION (Amending WSR 08-10-029, filed 4/28/08, effective 5/29/08)

**WAC 242-02-570 Briefs.** (1) A petitioner, or a moving party when a motion has been filed, shall submit a brief on each legal issue it expects ((a)) the board to determine. Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

(2) The original and four copies of briefs and exhibits not previously filed with the board in the pending case and that are cited in the brief shall be filed with ((a)) the board at least five business days prior to the hearing unless otherwise provided by ((a)) the board or presiding officer. When briefs and exhibits are filed, a copy shall also be served on each party, unless otherwise directed by ((a)) the board or presiding officer. ((A)) The board or presiding officer may permit or require the filing of additional briefs.

(3) Clarity and brevity are expected to assist ((a)) the board in meeting its statutorily imposed time limits. A presid-

ing officer may limit the length of a brief and impose format restrictions.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-582 Waiver of parties' appearance.** Upon stipulation by all parties, or upon order of the board, a matter may be submitted to ((a)) the board or presiding officer without oral argument or appearance. The board or presiding officer, in its discretion, may require appearance for oral argument.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-610 Hearing—Testimony under oath—Interpreters.** (1) All testimony to be considered by ((a)) the board or presiding officer shall be sworn, and each person shall swear or affirm that the testimony to be given shall be the truth, the whole truth, and nothing but the truth, or according to the provisions of RCW 5.28.020 through 5.28.060.

(2) Every interpreter shall, before beginning to interpret, take an oath that a true interpretation will be made to the person being examined of all the proceedings in a language or in a manner which the person understands, and that the interpreter will repeat the statements of the person being examined to the presiding officer, in the English language, to the best of the interpreter's skill and judgment.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-634 Standard of proof.** Where a petition for review alleges a lack of compliance with the Growth Management Act, ((a)) the board shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the act.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-650 Rules of evidence—Admissibility criteria.** (1) All relevant evidence, including hearsay evidence, is admissible if, in the opinion of the presiding officer, the offered evidence is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) ((A)) The board's experience, technical knowledge, competency, and specialized knowledge may be used in evaluation of evidence.

(3) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to, but shall not be bound by, the Washington rules of evidence.

(4) Documentary evidence may be submitted in the form of copies or excerpts, or by incorporation by reference.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-660 Official notice—Matters of law.**

((A)) The board or presiding officer may officially notice:

(1) Federal law. The Constitution; congressional acts, resolutions, records, journals, and committee reports; decisions of federal courts and administrative agencies; executive orders and proclamations; and all rules, orders, and notices published in the Federal Register.

(2) Washington state law. The Constitution of the state of Washington; decisions of the state courts; acts, resolutions, records, journals, and committee reports of the legislature; decisions of administrative agencies of the state of Washington; executive orders and proclamations by the governor; all rules, orders, and notices filed with the code reviser; and codes or standards that have been adopted by an agency of this state or by a nationally recognized organization or association.

(3) Laws of other states. The constitutions of other states; decisions of state courts; acts, resolutions, records, journals and committee reports of other state legislatures; decisions of other states administrative agencies; executive orders and proclamations issued by a governor of another state; and codes or standards that have been adopted by an agency of another state.

(4) Counties and cities. Ordinances, resolutions, and motions enacted by cities, counties, or other municipal subdivisions of the state of Washington.

(5) Federally recognized Indian tribes, Constitutions, ordinances, resolutions and motions enacted by federally recognized Indian tribes.

(6) Growth management hearings board((s)). Orders and decisions of ((any)) the board((-

(7) ~~Joint boards.))~~ and the board's rules of practice and procedure.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-670 Official notice—Material facts.**

In the absence of conflicting evidence, ((A)) the board or presiding officer, upon request made before or during a hearing, may officially notice:

(1) Business customs. General customs and practices followed in the transaction of business.

(2) Notorious facts. Facts so generally and widely known to all well-informed persons as not to be subject to reasonable dispute or specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including, but not exclusively, facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department, or agency.

(3) Technical or scientific facts. Technical or scientific facts within ((A)) the board's specialized knowledge.

(4) Request. Any party may request, orally or in writing, that official notice be taken of a material fact. The board or

presiding officer may take official notice of a material fact on its own initiative.

(5) Notice. Parties shall be notified either before or during a hearing of the material fact(s) proposed to be officially noticed, and shall be afforded the opportunity to contest such facts and materials.

(6) Statement.

(a) In determining whether to take official notice of material facts, the presiding officer may consult any source of pertinent information, whether or not furnished by any party and whether or not admissible under the rules of evidence.

(b) If official notice of a material fact is taken, it shall be clearly and precisely stated and made part of the record.

(c) Where a decision of ((A)) the board rests in whole or in part upon official notice of a material fact, such fact shall be clearly and precisely stated in such decision.

AMENDATORY SECTION (Amending WSR 94-07-033, filed 3/9/94, effective 4/9/94)

**WAC 242-02-680 Hearings—Board questions.** A hearing examiner or any member of ((A)) the board may, at any time during the hearing, ask clarifying questions as necessary to understand the evidence or argument.

AMENDATORY SECTION (Amending WSR 97-04-008, filed 1/24/97, effective 3/1/97)

**WAC 242-02-710 Failure to attend—Default or dismissal—Setting aside.** (1) When a party to a proceeding has, after proper notice, failed to attend a hearing or any other matter before ((A)) the board or presiding officer, a motion for default or dismissal may be sought by any party to the case or raised by ((A)) the board upon its own motion or by a presiding officer. Any order granting the motion shall include a statement of the grounds for the order and shall be served upon all parties to the case.

(2) Within seven days after service of the default order or dismissal under subsection (1) of this section, the party against whom the order was entered may file a written objection requesting that the order be vacated and stating the specific grounds relied upon. The board may, for good cause, set aside an order of dismissal or default.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-720 Dismissal of action.** Any action may be dismissed by ((A)) the board:

(1) When all parties stipulate;

(2) Upon motion of the petitioner or respondent prior to the presentation of the respondent's case;

(3) Upon motion by the respondent alleging that the petitioner has failed to prosecute the case, failed to comply with these rules, or failed to follow any order of the board; or

(4) Upon ((A)) the board's own motion for failure by the parties to comply with these rules or any order of the board.

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-02-810 Presentation of post hearing matters.** Unless requested by or authorized by ((a)) the board, no post hearing evidence, documents, briefs, or motions will be accepted. ((A)) The board may request submission of proposed findings of fact, conclusions of law, and final order from any or all parties.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-830 Final decision and order—Basis.** (1) When the hearing on the petition for review has been held and the record reviewed by a majority of ((a board)) the panel hearing the matter, a written final decision and order shall be issued that contains appropriate findings and conclusions, and articulates the basis for the final decision and order.

(2) The board will not issue advisory opinions on issues not presented to the board in the petition for review's statement of the issues, as modified by any prehearing order.

(3) Except as provided in RCW 36.70A.300 (2)(b) and WAC 242-02-560, the final decision and order shall be issued by ((a)) the board within one hundred eighty days of receipt of the petition for review, or if multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated.

AMENDATORY SECTION (Amending WSR 06-12-019, filed 5/26/06, effective 6/26/06)

**WAC 242-02-831 Final decision and order—Compliance, noncompliance, invalidity.** (1) In its final decision and order, ((a)) the board shall either:

(a) Find that the state agency, county or city is in compliance with the requirements of chapter 36.70A RCW, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) Find that the state agency, county or city is not in compliance with the requirements of chapter 36.70A RCW, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the board shall remand the matter to the state agency, county or city and specify a time for compliance. The period of remand shall extend to the date the board issues its next order on compliance.

(2) In its final decision and order, ((a)) the board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand;

(b) Includes in its final decision and order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or reg-

ulation would substantially interfere with the fulfillment of the goals of the act; and

(c) Specifies the part or parts, if applicable, of the plan or regulation that are determined to be invalid and the reasons for invalidity.

(3) The effect of a determination of invalidity is as set forth in RCW 36.70A.302.

AMENDATORY SECTION (Amending WSR 08-10-029, filed 4/28/08, effective 5/29/08)

**WAC 242-02-832 Reconsideration.** (1) After issuance of a final decision any party may file a motion for reconsideration with ((a)) the board in accordance with subsection (2) of this section. Such motion must be filed within ten days of service of the final decision. The original and four copies of the motion for reconsideration shall be filed with the board. At the same time, copies shall be served on all parties of record. Within five days of filing the motion for reconsideration, a party may file an answer to the motion for reconsideration without direction or request from the board. ((A)) The board may require other parties to supply an answer. All answers to motions for reconsideration shall be served on all parties of record.

(2) A motion for reconsideration shall be based on at least one of the following grounds:

(a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;

(b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or

(c) Clerical mistakes in the final decision and order.

(3) In response to a motion for reconsideration, the board may deny the motion, modify its decision, or reopen the hearing. A motion is deemed denied unless the board takes action within twenty days of filing the motion for reconsideration. A board order on a motion for reconsideration is not subject to a motion for reconsideration.

(4) A decision in response to the petition for reconsideration shall constitute a final decision and order for purposes of judicial review. Copies of the final decision and order shall be served by the board on each party or the party's attorney or other authorized representative of record.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-833 Invalidity—Hearing pursuant to motion to clarify, modify or rescind.** If a motion to clarify, modify or rescind a determination of invalidity order has been filed by a county or city subject to a determination of invalidity, pursuant to RCW 36.70A.302, and the jurisdiction has not enacted legislation in response to the board's remand order, ((a)) the board shall schedule and conduct a hearing to address clarifying, modifying or rescinding the determination of invalidity. Within thirty days of the hearing the board shall continue, clarify, modify, or rescind the determination of invalidity. The board may rescind a determination of invalidity but find continuing noncompliance, in which case the board may establish a compliance schedule or new compliance date.

AMENDATORY SECTION (Amending WSR 09-21-039, filed 10/13/09, effective 11/13/09)

**WAC 242-02-834 Publication of final decision and orders.** Copies of all final decisions and orders are available ~~((for an individual board that entered the decision and order))~~ from the office of the growth management hearings board~~(s)~~. The growth management hearings board's web site is [www.gmh.wa.gov](http://www.gmh.wa.gov). Each board panel posts its decisions within its individual portion of the web site and maintains a digest of its decisions.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-880 Transcripts.** The following shall be the policy of ~~((each))~~ the board with regard to transcription of the record:

(1) ~~((A))~~ The board, in its discretion, may at any time cause a transcript to be printed. Any person may obtain a copy upon payment of the reasonable costs thereof.

(2) In any case when ~~((a))~~ the board shall not cause the transcript to be printed, it shall be the obligation of the party wishing a transcript, or portions of it, to assume the cost of producing it.

(3) When an appeal is taken from any final decision and order of a board to a reviewing court, the appealing party is responsible for ordering and paying for the transcript of the hearing.

AMENDATORY SECTION (Amending WSR 06-12-019, filed 5/26/06, effective 6/26/06)

**WAC 242-02-890 Determination of noncompliance—Compliance schedule.** In those cases where ~~((a))~~ the board finds that a state agency, county, or city is not in compliance with the requirements of the act, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, the board shall remand the matter to the affected state agency, county, or city. The board's final decision and order shall specify a reasonable time not in excess of one hundred eighty days, or such longer time as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply. In its order the board shall establish a compliance schedule and may require periodic reports on the progress the jurisdiction is making toward compliance.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-891 Compliance—Notice of hearing.** (1) After the compliance deadline specified in the final decision and order passes, or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.302, ~~((a))~~ the board shall issue a notice of compliance hearing setting a hearing date for the purpose of determining whether compliance has been achieved. The

compliance hearing shall be given the highest priority of business.

(2) The presiding officer shall set the format of the compliance hearing in the notice of compliance hearing. At the compliance hearing the presumption of validity and burden of proof are as set forth in WAC 242-02-630 and 242-02-632. The parties to the original case, and a person with standing to challenge the legislation enacted in response to ~~((a))~~ the board's final decision and order, may participate in the compliance hearing. The notice of compliance hearing shall set the scope of, and procedures for participation.

AMENDATORY SECTION (Amending WSR 06-12-019, filed 5/26/06, effective 6/26/06)

**WAC 242-02-89201 Intent to participate in compliance hearings.** Any person eligible to participate in a compliance proceeding based upon his or her participation in the proceedings to enact legislation in response to ~~((a board))~~ the board's order shall abide by any briefing schedule set in the board's compliance order, as amended or extended, and provide the board and the parties of record with written notice of intent to participate no later than two weeks prior to the compliance hearing date set in that order.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-894 Compliance—Hearing pursuant to motion—Rescinding invalidity.** If a motion for a compliance hearing has been filed by a county or city subject to a determination of invalidity, pursuant to RCW 36.70A.330(1), and the jurisdiction has enacted legislation amending the invalidated plan, regulation or part thereof, ~~((a))~~ the board shall schedule and conduct a hearing to address rescinding the determination of invalidity. Within forty-five days of the filing of the motion, the board shall issue an order continuing, modifying, or rescinding the determination of invalidity depending upon whether the jurisdiction's legislative action has removed the basis for invalidity so that it no longer substantially interferes with the goals of the act. The board may rescind a determination of invalidity but find continuing non-compliance, in which case the board may establish a compliance schedule or new compliance date.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-896 Continued noncompliance—Recommendation to the governor.** If the board finds that the county or city continues to be in noncompliance with the act, the board shall transmit its findings to the governor. ~~((A))~~ The board may recommend that sanctions authorized by the act be imposed. A jurisdiction's efforts to meet a compliance schedule shall be considered by the board in making a recommendation on sanctions to the governor.

AMENDATORY SECTION (Amending WSR 98-01-144, filed 12/19/97, effective 1/20/98)

**WAC 242-02-898 Appeals of a board's final decision.**

(1) Any party aggrieved by a final decision of ~~((a))~~ the board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of service of the final decision of the board.

(2) ~~((A))~~ The board shall follow the procedures established in RCW 34.05.518 in the event that direct appellate review is sought.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-010 Purpose.** The purpose of this chapter is to ensure compliance by ~~((each individual board, the joint boards, and the office of))~~ the growth management hearings board~~(s)~~ with the provisions of chapter 42.17 RCW, and in particular with RCW 42.17.250 through 42.17.340, dealing with public records.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-020 Definitions.** (1) "Board" means the ~~((Eastern Washington, Western Washington, or Central Puget Sound))~~ growth management hearings board~~((Each is))~~, a quasi-judicial body created pursuant to chapter 36.70A RCW. Where appropriate the term board also refers to the staff and employees of ~~((each))~~ the board.

(2) ~~(("Joint boards" means the three independent boards meeting or acting jointly.))~~ "Administrative officer" means the board member elected pursuant to RCW 36.70A.270(10).

(3) "Office of the growth management hearings board~~(s)~~" means the administrative office of the ~~((three))~~ growth management hearings board~~(s)~~ established in RCW 36.70A.250.

(4) "Public record" means any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

(5) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation~~(s)~~ including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion pictures, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents, including existing data compilations from which information may be obtained or translated.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-030 Description of organization and public meetings.** (1) ~~((Each))~~ The board is an independent agency of the state of Washington, composed of ~~((three))~~ seven members appointed by the governor. ~~((Each))~~ The

board ~~((elects an administrative chairperson from its members at least annually.~~

~~(2) The administrative chairpersons constitute the administrative committee of the joint boards.~~

~~(3) Regular meetings of each board will be held at the office of the growth management hearings boards or other designated location at the following times:~~

~~(a) Eastern Washington board — on the first Wednesday of each month at 10:00 a.m.~~

~~(b) Western Washington board — on the second Wednesday of each month at 11:00 a.m.~~

~~(c) Central Puget Sound board — on the first Monday of each month at 10:00 a.m.~~

~~(4))~~ shall annually elect one of its members to be the board administrative officer. The duties and responsibilities of the administrative officer include handling day-to-day administrative, budget, and personnel matters on behalf of the board, together with making case assignments to board members in accordance with the board's rules of procedure in order to achieve a fair and balanced workload among all board members. The administrative officer of the board may carry a reduced caseload to allow time for performing the administrative work functions.

(2) Regular meetings of the board will be held at the office, telephonically if desired, of the growth management hearings board, or a designated location on the first Wednesday of each month at 10:00 a.m. or following any scheduled hearing on that date.

(3) The ((joint)) board((s, comprised of the members of the three individual boards,)) shall meet at least annually at a time and location to be announced.

~~((5))~~ (4) The office of the growth management hearings board((s)) provides for the administrative operations of the ((three individual boards and the joint)) board((s)).

AMENDATORY SECTION (Amending WSR 92-21-034, filed 10/15/92, effective 10/15/92)

**WAC 242-04-040 Public records available.** All public records of ~~((each board and of))~~ the ~~((joint))~~ board~~(s)~~ are available for public inspection and copying pursuant to these rules, except as otherwise provided by RCW 42.17.310 and other laws.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-050 Communications with ~~((each))~~ the board ~~((or the joint boards)).~~** (1) All communications with ~~((a))~~ the board, including but not limited to the submission of materials pertaining to its operations and/or administration or enforcement of chapter 42.17 RCW and these rules, requests for copies of ~~((each))~~ the board~~(s)~~ decisions and other matters, by including identification of the appropriate regional panel, shall be addressed to the ~~((appropriate))~~ board as follows:

~~((The))~~ Office of the Growth Management Hearings Board~~(s)~~

~~((Insert name of appropriate board))~~

319 - 7th Avenue S.E.

Olympia, WA 98501  
 P.O. Box 40953  
 Olympia, WA 98504-0953  
 360-586-0260  
 360-664-6975 fax  
 e-mail: eastern@ew.gmhb.wa.gov  
 western@wwgmhb.wa.gov  
 central@cps.gmhb.wa.gov  
 web site: ((www.gmhba.wa.gov)) www.gmhb.wa.gov

(2) All communications with the ((joint)) board((s)) shall be addressed as noted in subsection (1) of this section.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-060 Public records officer.** (1) The administrative ((chairperson responsible for management of the office of the growth management hearings boards)) officer, or his/her designee, shall be in charge of the public records for ((all three boards and for the joint)) board((s)).

(2) Such person shall be responsible for implementation of these rules and regulations regarding release of public records, and generally assuring compliance with the public records disclosure requirements of chapter 42.17 RCW, and in particular RCW 42.17.250 through 42.17.340.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-070 Office hours.** Public records shall be available for inspection and copying during the customary office hours of the ((office of the)) growth management hearings board((s)). For the purposes of this chapter, the customary office hours shall be from 8:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday, excluding legal holidays.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-080 Requests for public records.** In accordance with the provisions of chapter 42.17 RCW, that agencies prevent unreasonable invasions of privacy, protect public records from damage or disorganization, and prevent excessive interference with essential functions of the agency, public records may be inspected or copied, or copies of such records may be obtained, by members of the public upon compliance with the following procedures:

(1) A request shall be made in writing upon a form prescribed by the ((joint)) board((s)) which shall be available at the office of the growth management hearings board((s)). A completed form shall be presented to the public records officer or to any staff member at the office of the growth management hearings board((s)) during customary office hours. The request shall include the following information:

- (a) The name and address of the person requesting the record and the organization represented, if any;
- (b) The time of day and calendar date on which the request was made;
- (c) A description of the material requested;

(d) If the matter requested is referenced within the current index maintained by the public records officer, a reference to the requested record as it is described in such current index;

(e) If the requested matter is not identifiable by reference to a current index, an appropriate identification of the record requested.

(2) In all cases in which a member of the public is making a request, it shall be the obligation of the public records officer or staff member to whom the request is made to assist the member of the public in appropriately identifying the public record requested.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-090 Responses to requests for public records.** Within five business days of receiving a public record request, the public records officer must respond by either:

- (1) Providing the record;
- (2) Acknowledging that the public records officer has received the request for ((an individual)) the board ((or the joint boards)) and providing a reasonable estimate of the time that the public records officer will require to respond to the request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, the public records officer may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the public records officer need not respond to it; or
- (3) Denying the public record request.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-100 Copying.** No fee shall be charged for the inspection of public records. The public records officer, on behalf of ((either an individual)) the board ((or the joint boards)), shall charge a reasonable fee for providing copies of public records and for use of the office of the growth management hearings ((boards')) board's photocopy equipment. The public records officer may charge a reasonable fee for electronic facsimile transmissions (fax). The charge is the amount necessary to reimburse the office of the growth management hearings board((s)) for its actual costs incident to such copying or transmission.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-110 Exemptions.** (1) The public records officer, on behalf of ((each individual)) the board ((or the joint boards)), reserves the right to determine that a public record requested in accordance with the procedures outlined

in WAC 242-04-080 is exempt under the provisions of RCW 42.17.310 including but not limited to the following:

(a) Personal information in files maintained for members and employees of ~~((an individual))~~ the board, ~~((the joint boards,))~~ or the office of the growth management hearings board~~((s))~~, to the extent that disclosure would violate their right to privacy;

(b) Preliminary drafts, notes, recommendations, and intra-agency memoranda in which opinions are expressed or policies formulated or recommended, except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action;

(c) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;

(d) The residential addresses and residential telephone numbers of employees or volunteers of a public agency which are held by the agency in personnel records, employment or volunteer rosters, or mailing lists of employees or volunteers.

(2) Pursuant to RCW 42.17.260, the public records officer reserves the right to delete identifying details when he/she makes available or publishes any public records, in all cases when there is reason to believe that disclosure of such details would be an invasion of personal privacy protected by chapter 42.17 RCW. The public records officer will fully justify such deletion in writing.

(3) All public records otherwise exempt by law shall be considered exempt under the provision of these rules.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-130 Protection of public records.** In order to protect the public records in the custody of ~~((each individual))~~ the board, ~~((the joint boards,))~~ or the office of the growth management hearings boards, the following guidelines shall be followed by any person inspecting such public records:

(1) No public records shall be removed from the office;

(2) Inspection of any public record shall be conducted in the presence of the public records officer or his/her designee;

(3) No public record may be marked or defaced in any manner during inspection;

(4) Public records which are maintained in the file jacket, or in chronological order, may not be dismantled except for purpose of copying, and then only by the public records officer or his/her designee;

(5) Access to file cabinets, shelves, vaults, and other storage locations is restricted to the public records officer, board members, and staff.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-140 Records index.** (1) Index. The public records officer has available to all persons a current index which provides identifying information as to records which have been issued, adopted, or promulgated since May 15, 1992, as follows:

(a) Final orders, including concurring and dissenting opinions, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by ~~((an individual))~~ the board ~~((and/or the joint boards,))~~;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) ~~((Individual board and joint))~~ Board planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, a consultant's factual reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with ~~((an individual))~~ a board, ~~((the joint boards,))~~ or the office of the growth management hearings boards relating to any regulations, supervisory or enforcement responsibilities of the growth management hearings board~~((s))~~, where ~~((an individual))~~ the board determines or is asked to determine the rights of the state, the public, a subdivision of state government, or of any private party.

(2) Availability. The current index promulgated by the public records officer shall be available for inspection by all persons under the same rules and on the same conditions as are applied to public records available for inspection.

AMENDATORY SECTION (Amending WSR 09-21-040, filed 10/13/09, effective 11/13/09)

**WAC 242-04-150 Adoption of form.** ~~((Each individual))~~ The board ~~((and the joint boards,))~~ adopts the use by all persons requesting inspection and/or copies of records the form set out below, entitled "Request for inspecting and/or copying public records."

We have received your request for inspection of and/or copies of our public records. Please complete this form and return it with the amount required, if applicable. We will forward the requested copies to you as soon as we receive this completed form with payment.

Return to:

PUBLIC RECORDS OFFICER

OFFICE OF THE GROWTH MANAGEMENT HEARINGS BOARD~~((S-(INSERT APPROPRIATE BOARD'S NAME)))~~

REGIONAL PANEL:

REQUEST FOR INSPECTING AND/OR COPYING PUBLIC RECORDS

Date:

Name:

Address:

Day Phone Number:

Description of Record(s) Requested, including case number and document identification and date, if known:

I certify that the information obtained through this request for public records will be used in compliance with chapter 42.17 RCW.

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 Signature

Number of Copies  
 Number of Pages  
 Per Page Cost \$  
 Total Charge \$

**WSR 10-11-031**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-112—Filed May 11, 2010, 1:36 p.m., effective May 11, 2010, 7:00 p.m.]

Effective Date of Rule: May 11, 2010, 7:00 p.m.

Purpose: The purpose of this rule making is to allow nontreaty commercial fishing opportunity in the Columbia River while protecting fish listed as threatened or endangered under the Endangered Species Act (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes, federal law governing Washington's relationship with Oregon, and Washington fish and wildlife commission policy guidance for Columbia River fisheries.

Citation of Existing Rules Affected by this Order: Amending WAC 220-33-010.

Statutory Authority for Adoption: RCW 77.04.130, 77.12.045, and 77.12.047.

Other Authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546); *Northwest Gillnetters Ass'n v. Sandison*, 95 Wn.2d 638, 628 P.2d 800 (1981); Washington fish and wildlife commission policies concerning Columbia River fisheries; 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536

that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

Reopens the 2010 spring select area fishing season consistent with compact action of May 10, 2010. The fishery is consistent with the *U.S. v. Oregon* Management Agreement and the associated biological opinion. Conforms Washington state rules with Oregon state rules. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 0, Repealed 0; Federal Rules or Standards: New 1, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 11, 2010.

Philip Anderson  
 Director

NEW SECTION

**WAC 220-33-01000C Columbia River seasons below Bonneville.** Notwithstanding the provisions of WAC 220-33-010, WAC 220-33-020, and WAC 220-33-030, it is unlawful for a person to take or possess salmon, sturgeon, and shad for commercial purposes from Columbia River Salmon Management and Catch Reporting Areas 1A, 1B, 1C, 1D, 1E and Select Areas, except during the times and conditions listed as follows:

**1. Blind Slough/Knappa Slough Select Area**

a) Area: The lower boundary of the Knappa Slough fishing area is extended downstream to boundary lines defined by markers on the west end of Minaker Island to markers on Karlson Island and the Oregon Shore (boundary used in fall season).

b) Dates: 7 PM Tuesday, May 11, through 7 AM Wednesday, May 12, AND Monday and Thursday nights from

May 13 through June 11, 2010. Open hours are 7 PM to 7 AM.

c) Gear: Nets are restricted to 100 fathoms in length, with no weight restriction on leadline. Use of additional weights or anchors attached directly to the leadline is allowed. 9 3/4-inch maximum mesh size.

d) Allowable sales: Salmon, shad, and white sturgeon (43-54 inch fork length). A maximum of five white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open.

e) 24-hour quick reporting in effect for Washington buyers.

### 2. Deep River Select Area

a) Area: From the markers at USCG navigation marker #16, upstream to the Highway 4 Bridge.

b) Dates: Sunday and Wednesday nights from May 12 through June 10, 2010. Open hours are 7 PM to 7 AM.

c) Gear: Nets are restricted to 100 fathoms in length, with no weight restriction on leadline. Use of additional weights or anchors attached directly to the leadline is allowed. Nets cannot be tied off to any stationary structures. Nets may not fully cross the navigation channel. 9 3/4-inch maximum mesh size.

d) Allowable sale: Salmon, shad, and white sturgeon (43-54 inch fork length). A maximum of five white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open.

e) Miscellaneous: Transportation or possession of fish outside the fishing area (except to the sampling station) is unlawful until department staff has biologically sampled individual catches. After sampling, fishers will be issued a transportation permit by agency staff.

f) 24-hour quick reporting in effect for Washington buyers.

### 3. Tongue Point

a) Area: Tongue Point fishing area includes all waters bounded by a line extended from the upstream (southern most) pier (#1) at the Tongue Point Job Corps facility, through navigation marker #6 to Mott Island (new spring lower deadline); a line from a marker at the southeast end of Mott Island northeasterly to a marker on the northwest tip of Lois Island, and a line from a marker on the southwest end of Lois Island, westerly to a marker on the Oregon shore. The South Channel area includes all waters bounded by a line from a marker on John Day Point through the green USCG buoy #7 to a marker on the southwest end of Lois Island, upstream to an upper boundary line from a marker on Settler Point, northwesterly to the flashing red USCG marker #10, and northwesterly to a marker on Burnside Island defining the upstream terminus of South Channel.

b) Dates: 7 PM Tuesday, May 11 through 7 AM Wednesday, May 12, and Monday and Thursday nights from May 13 through June 11, 2010. Open hours are 7 PM to 7 AM,

c) Gear: In the Tongue Point fishing area, gear restricted to 9 3/4-inch maximum mesh size, maximum net length of 250 fathoms, and weight not to exceed two pounds on any one fathom. In the South Channel fishing area, gear

restricted to 9 3/4-inch maximum mesh size, maximum net length of 100 fathoms, no weight restriction on leadline, and use of additional weights or anchors attached directly to the leadline is allowed.

d) Allowable sale: Salmon, shad, and white sturgeon (43-54 inch fork length). A maximum of five white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open.

e) Miscellaneous: Through May 14, transportation or possession of fish outside the fishing area is unlawful until ODFW staff has biologically sampled individual catches at a sampling station established at the MERTS dock. After sampling, fishers will be issued a transportation permit by agency staff. Beginning May 17, fishers are required to call 503-428-0518 and leave a message including name, catch, and where and when the fish will be sold.

f) 24-hour quick reporting in effect for Washington buyers.

**Reviser's note:** The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

**Reviser's note:** The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

## WSR 10-11-035

### EMERGENCY RULES

### DEPARTMENT OF

### FISH AND WILDLIFE

[Order 10-111—Filed May 11, 2010, 1:44 p.m., effective May 15, 2010, 12:01 a.m.]

Effective Date of Rule: May 15, 2010, 12:01 a.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-36000H; and amending WAC 220-56-360.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Survey results show that adequate clams are available for harvest in Razor Clam Areas 1, 2 and those portions of Razor Clam Area 3 opened for harvest. Washington department of health has certified clams from these beaches to be safe for human consumption. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 11, 2010.

Philip Anderson  
Director

#### NEW SECTION

**WAC 220-56-36000H Razor clams—Areas and seasons.** Notwithstanding the provisions of WAC 220-56-360, it is unlawful to dig for or possess razor clams taken for personal use from any beach in Razor Clam Areas 1, 2, or 3, except as provided for in this section:

1. Effective 12:01 a.m. May 15, 2010, through 11:59 a.m. May 16, 2010, razor clam digging is allowed in Razor Clam Area 1 and Razor Clam Area 2. Digging is allowed from 12:01 a.m. to 11:59 a.m. each day only.

2. Effective 12:01 a.m. May 15, 2010, through 11:59 a.m. May 15, 2010, razor clam digging is allowed in that portion of Razor Clam Area 3 that is between the Grays Harbor North Jetty and the southern boundary of the Quinault Indian Nation Reservation (Grays Harbor County). Digging is allowed from 12:01 a.m. to 11:59 a.m. each day only.

3. It is unlawful to dig for razor clams at any time in Long Beach, Twin Harbors Beach, or Copalis Beach Clam sanctuaries defined in WAC 220-56-372.

#### REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 p.m. May 16, 2010:

WAC 220-56-36000H Razor clams—Areas and seasons.

**WSR 10-11-039  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-113—Filed May 11, 2010, 1:50 p.m., effective May 13, 2010]

Effective Date of Rule: May 13, 2010.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900Y; and amending WAC 232-28-619.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of

notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: In-season run analyses predict that about 11,000 salmon are currently enroute to the Icicle River. Although upper Columbia River spring chinook have been listed as endangered under the Endangered Species Act (ESA), the salmon returning to the Icicle River are not listed under the ESA. About 1,000 salmon are needed to meet hatchery broodstock. The 2010 return ensures that the hatchery will meet its escapement needs; the remaining fish will be available for harvest. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 11, 2010.

Philip Anderson  
Director

#### NEW SECTION

**WAC 232-28-61900Y Exceptions to statewide rules—Icicle River (Chelan Co.)** Notwithstanding the provisions of WAC 232-28-619, effective May 13 through July 31, 2010, a person may fish for salmon in those waters of the Icicle River from the closure signs located 800 feet upstream of the mouth to 500 feet downstream of the Leavenworth National Fish Hatchery Rack. Daily limit, two salmon; minimum size, 12 inches. Night closure in effect. All fish with one or more holes punched in the tail must be released.

#### REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. August 1, 2010:

WAC 232-28-61900Y Exceptions to statewide rules—Icicle River (Chelan Co.)

**WSR 10-11-048**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-114—Filed May 12, 2010, 2:25 p.m., effective May 12, 2010,  
2:25 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order:  
Repealing WAC 232-28-61900L and 232-28-61900B; and  
amending WAC 232-28-619.

Statutory Authority for Adoption: RCW 77.12.047 and  
77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Yakama Nation (YN) and Washington department of fish and wildlife fishery managers are forecasting a large return of 16,570 adult spring chinook to the Yakima River in 2010, of which seventy-two percent (11,900) are predicted to be hatchery salmon from the Yakima/Klickitat Fisheries Project research hatchery at Cle Elum operated by the YN. The comanagers estimate that only seven percent will be wild Naches River chinook. Twenty-one percent of the run is expected to be naturally produced upper Yakima River fish needed for Cle Elum Hatchery broodstock and natural spawning above Roza Dam. The abundant hatchery component can support increased harvest, while all wild or natural origin chinook need to be protected. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 12, 2010.

Philip Anderson  
Director

**[NEW SECTION]**

**WAC 232-28-61900B Exceptions to statewide rules—Yakima River.** Notwithstanding the provisions of WAC 232-28-619:

(1) Effective immediately through May 31, 2010, a person may fish for salmon in waters of the Yakima River from the Interstate 182 bridge in Richland (river mile 4.5) to 400 feet downstream of Horn Rapids (Wanawish) Dam (river

mile 18.0). Daily limit of two hatchery Chinook, minimum size 12 inches in length. Terminal gear is restricted to one, single (point), barbless hook with a hook gap from point to shank of 3/4-inch or less when fishing for salmon. Use of bait is allowed.

(2) Effective immediately through June 30, 2010, a person may fish for salmon in waters of the Yakima River from the Interstate 82 bridge at Union Gap (river mile 107.1) to the BNR bridge approximately 500 feet downstream of Roza Dam (river mile 127.8). Daily limit of two hatchery Chinook, minimum size 12 inches in length. Only one, single (point), barbless hook with a hook gap from point to shank of 3/4-inch or less is permitted. During the salmon fishery, the Selective Gear Rules requirement prohibiting use of bait and knotted nets is temporarily suspended for all species only in the river section open to salmon fishing. Use of boats equipped with an internal combustion engine is allowed only in the river section open to salmon fishing. Night closure in effect.

(a) The upper "closed water" boundary line for Area 2 is moved upstream to the railroad bridge downstream of Roza Dam.

**Reviser's note:** The bracketed material preceding the section above was supplied by the code reviser's office.

**REPEALER**

The following section of the Washington Administrative Code is repealed:

WAC 232-28-61900L      Exceptions to statewide rules—Yakima River.

The following section of the Washington Administrative Code is repealed effective July 1, 2010:

WAC 232-28-61900B      Exceptions to statewide rules—Yakima River.

**WSR 10-11-052**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-119—Filed May 12, 2010, 2:41 p.m., effective May 20, 2010,  
7:00 a.m.]

Effective Date of Rule: May 20, 2010, 7:00 a.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order:  
Repealing WAC 220-56-32500R; and amending WAC 220-56-325.

Statutory Authority for Adoption: RCW 77.12.047 and  
77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: This regulation is needed to ensure an orderly fishery, manage within court-ordered sharing requirements, and to ensure conservation. Harvestable amounts of spot shrimp are available in Marine Area 11 and the Discovery Bay Shrimp District. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 12, 2010.

Philip Anderson  
Director

#### NEW SECTION

##### **WAC 220-56-32500S Shrimp—Areas and seasons.**

Notwithstanding the provisions of WAC 220-56-325:

1) Effective immediately until further notice, it is unlawful to fish for or possess shrimp taken for personal use in all waters of Marine Areas 7, 8-1, 8-2, 9, 10, 11, 12 and the Discovery Bay Shrimp District, except as provided for in this section;

a. Effective 7:00 a.m. until 3:00 p.m. May 20, 2010, Marine Area 11 is open to the harvest of all shrimp species.

b. Effective 7:00 a.m. until 3:00 p.m. May 20, 2010, and 7:00 a.m. until 3:00 p.m. May 22, 2010, the Discovery Bay Shrimp District is open to the harvest of all shrimp species.

c. Effective 4:00 a.m. May 21, 2010, until 10:00 p.m. May 22, 2010, Marine Area 7 is open to the harvest of all shrimp species.

#### REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-56-32500R      Shrimp—Areas and seasons  
(10-91)

#### **WSR 10-11-053**

##### **EMERGENCY RULES**

##### **DEPARTMENT OF**

##### **SOCIAL AND HEALTH SERVICES**

(Aging and Disability Services Administration)

[Filed May 12, 2010, 2:41 p.m., effective May 12, 2010, 2:41 p.m.]

Effective Date of Rule: Immediately.

Purpose: This emergency rule is necessary to revise the county funding formula to comply with state budget appropriations. The division of developmental disabilities is amending WAC 388-831-0010 and 388-831-0030 to include individuals who have a history of violent behavior which demonstrates the likelihood to commit a violent act. This amendment reflects the legislation contained in RCW 71A.12.210. The department is proceeding to adopt these rules on a permanent basis.

Citation of Existing Rules Affected by this Order: Amending WAC 388-831-0010 and 388-831-0030.

Statutory Authority for Adoption: RCW 71A.12.030, 71A.12.210.

Other Authority: Title 71A RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: This rule is necessary for the preservation of public health, safety or general welfare by expanding the population who have community protection issues and may be eligible for services. This group of individuals was inadvertently omitted from the permanent rule filed previously. This emergency rule extends the emergency rule filed as WSR 10-07-160 while the department completes the permanent rule-making process. The department has filed a CR-103P and this is to extend the rule in emergency status until the rule becomes permanent.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 2, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 2, Repealed 0.

Date Adopted: May 12, 2010.

Katherine I. Vasquez  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 08-20-118, filed 9/30/08, effective 10/31/08)

**WAC 388-831-0010 Definitions.** The definitions in this section apply throughout the chapter unless the context clearly requires otherwise.

**"Certified community protection program residential services"** means access to twenty-four hour supervision, instruction, and support services as identified in the person's individual support plan.

**"Community protection program"** See WAC 388-831-0020.

**"Constitutes a risk to others"** means a determination of a person's risk and/or dangerousness based upon a thorough assessment by a qualified professional. Actuarial risk assessment instruments should be used to supplement clinical judgment whenever appropriate.

**"Department"** means the department of social and health services.

**"Developmental disability"** means that condition defined in WAC 388-823-0040 and RCW 71A.10.020(3).

**"Disclosure"** means providing copies of professional assessments, incident reports, legal documents, and other information pertaining to community protection issues to ensure the provider has all relevant information. Polygraph and plethysmograph reports are excluded from disclosure.

**"Division"** means the division of developmental disabilities (DDD).

**"Managed successfully"** means that a person supported by a community protection program does not engage in the behavior identified in WAC 388-831-0030 and RCW 71A.12.210.

**"Opportunistic behavior"** means an act committed on impulse, which is not premeditated. In determining whether an act is opportunistic, the original motive or intent of the offense or crime will be considered.

**"Predatory"** means acts directed toward strangers, individuals with whom a relationship has been established or promoted for the primary purpose of victimization, or casual acquaintances with whom no substantial personal relationship exists. Predatory behavior may be characterized by planning and/or rehearsing the act, stalking, and/or grooming the victim.

**"Program participant"** means a person who has agreed to and is receiving services and supports in the community protection program.

**"Qualified professional"** means a licensed psychologist, psychiatrist, or a certified or affiliate sex offender treatment provider with at least three years prior experience working with individuals with developmental disabilities, and:

- If the person being assessed has demonstrated sexually aggressive or sexually violent behavior, that person must be assessed by a certified sex offender treatment provider, or affiliate sex offender treatment provider working under the supervision of a certified sex offender treatment provider; or

- If the person being assessed has demonstrated violent, dangerous, or aggressive behavior, that person must be assessed by a licensed psychologist or psychiatrist who has received specialized training in the treatment of or has at least three years prior experience treating violent or aggressive behavior.

**"Restrictive procedures" or "Restrictions"** means procedures that restrict a client's freedom of movement, restrict access to client property, prevent a client from doing something the client wants to do, require a client to do something the client does not want to do, or remove something the client owns or has earned.

**"Risk assessment"** means the written opinion of a qualified professional stating, at a minimum:

- Whether a person meets the criteria in WAC 388-831-0030 and RCW 71A.12.210; and
- What restrictions are necessary to keep people safe.

**"Service provider"** means a person or agency contracted with the department or a sub-contractor who delivers services and supports to a community protection program participant.

**"Specialized environment"** means a place where the program participant has agreed to supervision in a safe, structured manner specifying rules, requirements, restrictions, and expectations for personal responsibility in order to maximize community safety.

**"Treatment team"** means the program participant and the group of people responsible for the development, implementation, and monitoring of the person's individual supports and services. This group may include, but is not limited to, the case resource manager, therapist, residential provider, employment/day program provider, and the person's legal representative and/or family, provided the person agrees to the family member's involvement.

~~("Violent offense" means any felony defined as a violent offense in RCW 9.94A.030-)~~

**"Violent" or "violence"** means acts that meet the criteria for crimes listed in RCW 9.94A.030(32), 9.94A.030(45), 9.94A.030(46), 9.94A.030(54), or 9A.48.040, whether or not the person who committed the acts has been charged with or convicted of the crime.

**"Waiver"** means the community-based program funded under section 1915(c) of Title XIX of the federal social security act and chapter 388-845 WAC.

AMENDATORY SECTION (Amending WSR 08-20-118, filed 9/30/08, effective 10/31/08)

**WAC 388-831-0030 Who are individuals with community protection issues?** You are considered an individual with community protection issues if:

(1) You have been determined to have a developmental disability as defined in WAC 388-823-0040 and RCW 71A.10.020(3); and

(2) You have been identified by DDD as a person who meets one or more of the following:

(a) You have been charged with or convicted of a crime of sexual violence as defined in chapter 9A.44 or 71.09 RCW;

(b) You have been charged with or convicted of a crime involving sexual acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization, or persons of casual acquaintance with whom no substantial personal relationship exists;

(c) You have been charged with or convicted of one or more violent crimes as defined in RCW 9.94A.030(45);

(d) You have not been charged with or convicted of a crime identified in (2)(a), (b), or (c) above, but you have a history of violent, stalking, sexually violent, predatory and/or opportunistic behavior which a qualified professional has determined demonstrates a likelihood to commit a violent, sexually violent and/or predatory act (~~based on current behaviors that may escalate to violence, as determined by a qualified professional~~); and

(3) You constitute a current risk to others as determined by a qualified professional.

(4) Charges or crimes that result in acquittal are excluded.

**WSR 10-11-065**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-122—Filed May 13, 2010, 4:21 p.m., effective May 13, 2010,  
4:21 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order:  
Repealing WAC 220-52-03000F and 220-55-03000G; and amending WAC 220-52-030.

Statutory Authority for Adoption: RCW 77.12.047, 77.04.020, and 77.70.430.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The closure is needed to avoid the confusion and potential for illegal activity that could result from having this area open concurrently to both recreational and commercial razor clam harvesters. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 13, 2010.

Lori Preuss  
for Philip Anderson  
Director

NEW SECTION

**WAC 220-52-03000G Commercial razor clams** Notwithstanding the provisions of WAC 220-52-030, effective immediately through 11:59 p.m. May 14, and then from 12:01 a.m. May 17 through 11:59 p.m. July 3, 2010, a person may dig for and possess razor clams for commercial purposes only in those waters and detached beaches of Razor Clam Area 1, lying south of the Willapa Bay Ship Channel, west of Ellen Sands, and north of the tip of Leadbetter point; and in those waters and attached beaches north of the line of boundary markers consisting of four fluorescent orange posts near the northern tip of Leadbetter Point; all other areas remain closed.

**Reviser's note:** The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-52-03000F      Commercial razor clams.  
(10-103)

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. July 4, 2010:

WAC 220-52-03000G      Commercial razor clams.

**WSR 10-11-089**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-118—Filed May 17, 2010, 4:37 p.m., effective June 1, 2010]

Effective Date of Rule: June 1, 2010.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order:  
Repealing WAC 232-28-61900G and 232-28-61900P; and amending WAC 232-28-619.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Preseason salmon management discussions during the North of Falcon process proposed a June 1 recreational opening in the Skykomish River. The reopening does not adversely impact game fish in the Skykomish River. The reopening of the Stillaguamish River

below Marine Drive to recreational angling will not adversely impact game fish or food fish in this portion of the river. This emergency rule will also alleviate confusion for recreational anglers, since the current emergency rule will not cross into the new permanent rule.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 17, 2010.

Philip Anderson  
Director

**REPEALER**

The following sections of the Washington Administrative Code are repealed effective June 1, 2010:

WAC 232-28-61900G Exceptions to statewide rules—Snohomish, Snoqualmie, Skykomish, North Fork Skykomish, South Fork Skykomish, Pilchuck, Sultan, Tolt and Raging rivers. (10-61)

WAC 232-28-61900P Exceptions to statewide rules—Stillaguamish, North Fork Stillaguamish, South Fork Stillaguamish and Canyon Creek. (10-23)

**WSR 10-11-104**

**EMERGENCY RULES**

**DEPARTMENT OF**

**FISH AND WILDLIFE**

[Order 10-121—Filed May 18, 2010, 10:40 a.m., effective May 21, 2010, 9:30 p.m.]

Effective Date of Rule: May 21, 2010, 9:30 p.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900F and 232-28-61900K.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is

necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The upriver spring chinook run size is now expected to be 340,000 compared to the pre-season forecast of 470,000. Based on the current run size projection, the allowable catch of salmon has been achieved. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 18, 2010.

Lori Preuss  
for Philip Anderson  
Director

**REPEALER**

The following section of the Washington Administrative Code is repealed effective May 22, 2010:

WAC 232-28-61900F Exceptions to statewide rules—Snake River. (10-101)

The following section of the Washington Administrative Code is repealed effective 9:30 p.m. May 21, 2010:

WAC 232-28-61900K Exceptions to statewide rules—Columbia River (Ringold) (10-84)

**WSR 10-11-113**

**EMERGENCY RULES**

**DEPARTMENT OF**

**FISH AND WILDLIFE**

[Order 10-123—Filed May 18, 2010, 2:38 p.m., effective May 18, 2010, 7:00 p.m.]

Effective Date of Rule: May 18, 2010, 7:00 p.m.

Purpose: The purpose of this rule making is to allow nontreaty commercial fishing opportunity in the Columbia River while protecting fish listed as threatened or endangered under the Endangered Species Act (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes, federal law governing

Washington's relationship with Oregon, and Washington fish and wildlife commission policy guidance for Columbia River fisheries.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-33-01000C; and amending WAC 220-33-010.

Statutory Authority for Adoption: RCW 77.04.130, 77.12.045, and 77.12.047.

Other Authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546); *Northwest Gillnetters Ass'n v. Sandison*, 95 Wn.2d 638, 628 P.2d 800 (1981); Washington fish and wildlife commission policies concerning Columbia River fisheries; 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

Prohibits the sales of sturgeon in select area commercial fisheries. Requires fishers to contact agency staff to have Deep River catch sampled. The fishery is consistent with the *U.S. v. Oregon* Management Agreement and the associated biological opinion. Rule is consistent with action of the Columbia River compact on May 17, 2010. Conforms Wash-

ington state rules with Oregon state rules. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 0, Repealed 0; Federal Rules or Standards: New 1, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 1.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 18, 2010.

Joe Stohr  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 220-33-01000D Columbia River seasons below Bonneville.** Notwithstanding the provisions of WAC 220-33-010, WAC 220-33-020, and WAC 220-33-030, it is unlawful for a person to take or possess salmon, sturgeon, and shad for commercial purposes from Columbia River Salmon Management and Catch Reporting Areas 1A, 1B, 1C, 1D, 1E and Select Areas, except during the times and conditions listed as follows:

##### **1. Blind Slough/Knappa Slough Select Area**

a) Area: The lower boundary of the Knappa Slough fishing area is extended downstream to boundary lines defined by markers on the west end of Minaker Island to markers on Karlson Island and the Oregon Shore (boundary used in fall season).

b) Dates: Monday and Thursday nights immediately through June 11, 2010. Open hours are 7 PM to 7 AM.

c) Gear: Nets are restricted to 100 fathoms in length, with no weight restriction on headline. Use of additional weights or anchors attached directly to the headline is allowed. 9 3/4-inch maximum mesh size.

d) Allowable sales: Salmon, shad.

e) 24-hour quick reporting in effect for Washington buyers.

##### **2. Deep River Select Area**

a) Area: From the markers at USCG navigation marker #16, upstream to the Highway 4 Bridge.

b) Dates: Sunday and Wednesday nights immediately through June 10, 2010. Open hours are 7 PM to 7 AM.

c) Gear: Nets are restricted to 100 fathoms in length, with no weight restriction on headline. Use of additional weights or anchors attached directly to the headline is allowed. Nets cannot be tied off to any stationary structures. Nets may not fully cross the navigation channel. 9 3/4-inch maximum mesh size.

d) Allowable sale: Salmon, shad.

e) Miscellaneous: Effective 7 PM Wednesday May 19, 2010, fishers are required to phone 360-795-0319 within one hour after the closing of a nightly fishing period to notify staff of any landed catch. Fishers will make arrangements to have the catch biologically sampled. After sampling, fishers will be issued a transportation permit by agency staff. A sampling station will be set up at the boat ramp off of Miller Point Road on the east bank of Deep River slough.

f) 24-hour quick reporting in effect for Washington buyers.

### 3. Tongue Point

a) Area: Tongue Point fishing area includes all waters bounded by a line extended from the upstream (southern most) pier (#1) at the Tongue Point Job Corps facility, through navigation marker #6 to Mott Island, (new spring lower deadline); a line from a marker at the southeast end of Mott Island northeasterly to a marker on the northwest tip of Lois Island; and a line from a marker on the southwest end of Lois Island, westerly to a marker on the Oregon shore. The South Channel area includes all waters bounded by a line from a marker on John Day Point through the green USCG buoy #7 to a marker on the southwest end of Lois Island, upstream to an upper boundary line from a marker on Settler Point, northwesterly to the flashing red USCG marker #10, and northwesterly to a marker on Burnside Island defining the upstream terminus of South Channel.

b) Dates: Monday and Thursday nights immediately through June 11, 2010. Open hours are 7 PM to 7 AM,

c) Gear: In the Tongue Point fishing area, gear restricted to 9 3/4-inch maximum mesh size, maximum net length of 250 fathoms, and weight not to exceed two pounds on any one fathom. In the South Channel fishing area, gear restricted to 9 3/4-inch maximum mesh size, maximum net length of 100 fathoms, no weight restriction on leadline, and use of additional weights or anchors attached directly to the leadline is allowed.

d) Allowable sale: Salmon, shad.

e) Miscellaneous: Fishers are required to call 503-428-0518 and leave a message including name, catch, and where and when the fish will be sold.

f) 24-hour quick reporting in effect for Washington buyers.

**Reviser's note:** The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

**Reviser's note:** The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

### REPEALER

The following section of the Washington Administrative Code is repealed effective 7:00 p.m. May 18, 2010:

WAC 220-33-01000C      Columbia River seasons  
below Bonneville. (10-112)

### WSR 10-11-114 EMERGENCY RULES DEPARTMENT OF FISH AND WILDLIFE

[Order 10-124—Filed May 18, 2010, 2:40 p.m., effective May 18, 2010, 2:40 p.m.]

Effective Date of Rule: Immediately.

Purpose: The purpose of this rule making is to provide for treaty Indian fishing opportunity in the Columbia River while protecting salmon listed as threatened or endangered under the Endangered Species Act (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes and federal law governing Washington's relationship with Oregon.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-32-05100F; and amending WAC 220-32-051.

Statutory Authority for Adoption: RCW 77.04.130, 77.12.045, and 77.12.047.

Other Authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546); *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979); *State v. James*, 72 Wn.2d 746, 435 P.2d 521 (1967); 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Closes the fishery below Bonneville Dam for the remainder of the spring season. Continues to allow the sale of fish caught in platform and hook-and-line fisheries above Bonneville Dam. Continues to allow the sale of fish caught in Yakama Nation tributary fisheries by Yakama Nation members. Fisheries are consistent with the 2008-2017 management agreement. Impact limits to ESA-listed chinook are available for treaty Indian fisheries. Rule is consistent with action of the Columbia River compact on May 17, 2010. Conforms state rules with tribal rules.

The Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the congressionally ratified Columbia River compact. *Shappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The tribes and the states adopt parallel regulations for treaty Indian fisheries under the supervision of the federal courts. Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal ESA.

Columbia River fisheries are monitored very closely to ensure consistency with court orders and ESA guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. As required by court order, the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and invite tribal participation when considering proposals for new

emergency rules affecting treaty fishing rights. *Sohappy*, 302 F. Supp. at 912. WDFW and ODFW then adopt regulations reflecting agreements reached. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 0, Repealed 1; Federal Rules or Standards: New 1, Amended 0, Repealed 1; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 1, Amended 0, Repealed 1.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 18, 2010.

Joe Stohr  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 220-32-05100G Columbia River salmon seasons above Bonneville Dam.** Notwithstanding the provisions of WAC 220-32-050, WAC 220-32-051, WAC 220-32-052, and WAC 220-32-058, effective immediately until further notice, it is unlawful for a person to take or possess salmon, steelhead, shad, carp, walleye or sturgeon for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas (SMCRA) 1E, 1F, 1G, and 1H, and in the Wind River, White Salmon River, Klickitat River, and Drano Lake, except as provided in the following subsections, and except that individuals possessing treaty fishing rights under the Yakima, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, walleye, shad, carp, yellow perch, catfish, bass, or sturgeon under the following provisions, pursuant to lawfully enacted tribal rules:

**1. Mainstem Columbia River above Bonneville Dam**

- a) SEASON: Immediately until further notice.
- b) AREA: SMCRA 1F, 1G, 1H (Zone 6)
- c) GEAR: Hoop nets, dip nets, and rod and reel with hook-and-line.

**2. Columbia River Tributaries above Bonneville Dam**

- a) SEASON: Immediately until further notice and only during those days and hours when the tributaries listed below are open under lawfully enacted Yakama Nation tribal subsistence fishery regulations for enrolled Yakama Nation members.

- b) AREA: Drano Lake, White Salmon, and Klickitat and Wind rivers.

- c) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line. Gill nets may only be used in Drano Lake (no mesh restriction, 150-foot length restriction).

**3. Mainstem Columbia River below Bonneville Dam**

- a) PARTICIPANTS: Tribal members may participate under the conditions described in the 2007 Memo of Agreement (MOA) with the Yakama Nation (YN), in the 2010 MOU (Memo of Understanding) with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the 2010 MOU with the Confederated Tribes of the Warm Springs Reservation (CTWS). Tribal members fishing below Bonneville Dam must carry an official tribal enrollment card.

- b) SEASON: 6:00 AM June 16, 2010, until further notice. However, closed Thursdays through Saturdays for the CTUIR and the CTWS when non-tribal salmon fishing is open in the MOU area.

- c) AREA: SMCRA 1E, Yakama Nation MOA: on the Washington shoreline from 600 feet below the fish ladder at the Bonneville Dam north shore powerhouse, downstream to Beacon Rock (bank fishing only). Umatilla and Warm Springs MOU: Covers the banks of the Columbia River bounded by a deadline marker on the Oregon bank approximately four miles downstream of Bonneville Dam Powerhouse #1 in a straight line thorough the western tip of Pierce Island, to a deadline marker on the Washington bank at Beacon Rock up the river to a point 600 feet below the Bonneville Dam, but excluding the following four areas:

1. Between the markers located 150 feet upstream and 450 feet downstream from the mouth of Tanner Creel out to the center of the Columbia river, during the period from August 16, 2010, until further notice.

2. Inside the south navigation lock at Bonneville Dam from a marker on the western-most tip of Robins Island to a marker on the Oregon mainland shore.

3. From Bradford Island below Bonneville Dam from the south shore between the dam and a line perpendicular to the shore marker at the west end of riprap, and from the north shore between the fishway entrance and a line perpendicular to the shoreline marker 850 feet downstream.

4. From Robins Island below Bonneville Dam downstream to a line perpendicular to the shoreline marker on the mooring cell.

- d) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line, consistent with tribal regulations.

- 4. SANCTUARIES: Standard river mouth and dam sanctuaries are applicable to these gear types, except that the Spring Creek Hatchery sanctuary is not in effect.

5. ALLOWABLE SALES: Chinook, coho, sockeye, steelhead, walleye, shad, carp, yellow perch, catfish and bass. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools (SMCRA 1G, 1H) may be retained for subsistence. Sturgeon between 38-54 inches in fork length in the Bonneville pool (SMCRA 1F) may also be retained for subsistence. Fish may NOT be sold on USACE Property below Bonneville Dam, but may be caught and transported off USACE Property for sale. **Sturgeon below Bonneville Dam may NOT be retained and may NOT be sold.**

6. ADDITIONAL REGULATIONS: 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240.

**Reviser's note:** The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

**Reviser's note:** The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-32-05100F      Columbia River above Bonneville (10-115)