

WSR 05-22-052
EMERGENCY RULES
DEPARTMENT OF REVENUE

[Filed October 28, 2005, 10:30 a.m., effective October 28, 2005]

Effective Date of Rule: Immediately.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: Emergency rule findings are required; see below.

Purpose: **Background:** WAC 458-20-141 explains the B&O, retail sales, and use tax reporting responsibilities of persons who engage in duplicating activities or who provide mailing bureau services in Washington. WAC 458-20-144 explains the B&O and retail sales tax reporting responsibilities of persons engaged in printing activities. Both rules were revised in January 2005, each with an effective date of July 1, 2005.

One of the major changes in that revision was the removal of language stating that a deduction from the measure of tax for both B&O tax and the retail sales tax was available where a mailing bureau purchases postage for a customer and charges that customer for the postage. This revision explained that amounts received from a customer for postage costs incurred by the seller are, under the law, included in the measures of both taxes. The change to Rule 141 also identified circumstances under which postage charges are not included in the measure of tax because the charges qualify as advances or reimbursements.

WAC 458-20-17803 explains the use tax reporting responsibilities of persons who distribute or cause to be distributed tangible personal property promoting the sale of products or services are subject to use tax on the value of the property. While the January 2005 rule action had a July 1, 2005 effective date, the rule explains a use tax responsibility that resulted from provisions of chapter 367, Laws of 2002 that became effective June 1, 2002.

Current Rule-making Action: Chapter 514, Laws of 2005, provides a B&O tax deduction and retail sales/use tax exemption for delivery charges made for the delivery of direct mail, if the charges are separately stated. These provisions of chapter 514 became effective May 16, 2005, and supercede the instructions regarding charges for postage costs in these rules.

The department is adopting revisions to Rules 141, 144, and 17803 on an emergency basis to reflect this legislative change. The department plans to proceed with rule making for permanent revisions to these rules.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-141 Duplicating activities and mailing bureaus, 458-20-144 Printing industry, and 458-20-17803 Use tax on promotional material.

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

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: An emergency adoption of revised Rules 141, 144, and 17803 is necessary because per-

manent rules cannot be adopted at this time. This rule action will provide needed tax information to taxpayers and department staff about the seller's and buyer's tax-reporting responsibilities relative to delivery costs for direct mail. The rules being adopted are the same as those adopted on an emergency basis on June 30, 2005 (WSR 05-14-091).

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 3, 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 3, 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 3, Repealed 0.

Date Adopted: October 28, 2005.

Janis P. Bianchi, Manager
 Interpretations and
 Technical Advice Unit
 by Roseanna Hodson

AMENDATORY SECTION (Amending WSR 05-03-053, filed 1/11/05, effective 7/1/05)

WAC 458-20-141 Duplicating activities and mailing bureaus. (1) **Introduction.** This (~~((the))~~) section discusses the business and occupation (B&O) tax and retail sales and use tax reporting responsibilities of persons who engage in duplicating activities or who provide mailing bureau services in Washington. Persons engaged in printing activities should refer to WAC 458-20-144 (Printing industry).

Chapter 514, Laws of 2005, changed the taxability of delivery charges associated with direct mail. Refer to subsection (3) of this section for further information.

(2) **Duplicating activities.** Duplicating is the copying of typed, written, drawn, photographed, previously duplicated, or printed materials using a photographic process such as photocopying, color copying, or blueprinting.

(a) **Sales of duplicated products.** Income from the sale of photostats, photocopies, blueprint copies and other duplicated tangible personal property to consumers is subject to the retailing B&O tax. The measure of tax is the gross proceeds of sale. The seller is also responsible for collecting and remitting retail sales tax on the selling price when making sales to consumers, unless a specific exemption applies. The wholesaling B&O tax applies to the gross proceeds of sale when the buyer purchases the duplicated property for resale without intervening use. The seller must obtain a resale certificate from the buyer to document the wholesale nature of any sale as provided in WAC 458-20-102 (Resale certificates).

If the seller is also the manufacturer of the duplicated products, the seller may be eligible for a multiple activities

tax credit. Refer to WAC 458-20-19301 (Multiple activities tax credits) for more information about the credit.

(b) **Duplicating as a manufacturing activity.** A person duplicating tangible personal property for sale or commercial or industrial use (the use of manufactured property as a consumer) is subject to the manufacturing B&O tax classification. For further information about manufacturing activities, refer to WAC 458-20-112 (Value of products), WAC 458-20-134 (Commercial or industrial use), and WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(c) **Self-service copying.** Some persons provide consumers with access to duplicating equipment to make their own copies (frequently referred to "self-service copying"). These customers are generally charged on a per page basis. The gross proceeds of sales made to consumers for self-service copying is subject to the retailing B&O tax. The seller is also responsible for collecting retail sales tax, unless a specific exemption applies. In such cases, the person providing access to duplicating equipment is not engaged in a manufacturing activity and charges for self-service copying are not subject to the manufacturing B&O tax.

(d) **Potential litter tax liability.** Chapter 82.19 RCW imposes a litter tax on manufacturers (including duplicators), wholesalers, and retailers of certain products. These products include, but are not limited to, newspapers, magazines, and household paper and paper products. Thus, persons who duplicate tangible personal property for sale or who provide facilities for self-service copying may incur a litter tax liability. The measure of the litter tax is the gross proceeds of sale. For further information about the litter tax, refer to chapter 82.19 RCW and WAC 458-20-243 (Litter tax).

(e) **Purchases for resale.** The purchase of tangible personal property for resale as tangible personal property or as a component or ingredient of duplicated property is a purchase at wholesale. Examples of items that may be purchased at wholesale include paper, ink, toner, and staples. Refer to WAC 458-20-113 (Ingredients or components, chemicals used in processing new articles for sale). Wholesale purchases are not subject to retail sales tax when the buyer provides a resale certificate to the seller as provided by WAC 458-20-102 (Resale certificates).

(f) **Purchases subject to retail sales or use tax.** A person who engages in duplicating activities and acquires tangible personal property for use as a consumer must pay retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department when the seller fails to collect retail sales tax. Examples of purchases by a person engaged in duplicating activities that are subject to retail sales tax or use tax include photocopiers, cutting boards, computers, cash registers, and office furniture. For further information about the use tax, refer to WAC 458-20-178 (Use tax).

Persons who engage in duplicating products for sale should refer to WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment) for information about the sales and use tax exemptions for certain machinery and equipment used directly in a manufacturing operation.

(g) **Example.** Copy Company provides a public area with photocopying equipment and materials (paper, toner,

and staples) to allow customers to make their own copies. Copy Company has a separate area where Copy Company employees make copies for customers. The income attributable to copies made both by the customers and by Copy Company employees is subject to the retailing B&O and retail sales taxes. The value of the copies made by Copy Company employees is also subject to the manufacturing B&O tax, and Copy Company may claim a multiple activities tax credit as described above in subsection (2)(a). Litter tax may be due as explained above in subsection (2)(d).

Copy Company may purchase the paper, toner, and staples that are used or provided in both areas at wholesale, if the seller receives a resale certificate. Retail sales or use tax applies to the purchase of photocopying equipment in both areas. The purchase and/or use of the equipment where Copy Company employees make copies may qualify for the machinery and equipment exemption described in WAC 458-20-13601.

(3) **Mailing bureau services.** Mailing bureaus, also referred to as mail houses, prepare for distribution mail pieces such as bulletins, form letters, advertising material, political publications, and flyers as directed by their customers. The customer may provide the mail pieces to be prepared for distribution or the mailing bureau itself may sell the material to the customer. Mailing bureaus that duplicate the material being prepared should also refer to subsection (2), above. Mailing bureaus that print the material being prepared should also refer to WAC 458-20-144.

(a) **Mailing bureau activities.** Activities conducted by mailing bureaus include, but are not limited to, picking up, addressing, labeling, binding, folding, enclosing, sealing, tabbing, and mailing the mail pieces. The mailing bureau generally charges the customer on a per-piece basis for each separate service provided plus the actual cost of any postage.

Charges for labor and services rendered in respect to altering, imprinting, or improving tangible personal property of or for consumers are retail sales. RCW 82.04.050 (2)(a). Thus, the retailing B&O tax applies to income received from consumers for services that include addressing, labeling, binding, folding, enclosing, sealing, and/or tabbing. Mailing bureau businesses are also responsible for collecting and remitting retail sales tax when making sales to consumers, unless a specific exemption applies.

(b) **Measure of tax.** The measure of the B&O and retail sales taxes is the gross proceeds of sale and selling price, respectively. These terms include all consideration paid by the buyer, however identified, without any deduction for costs of doing business, such as material, ~~and labor~~. Except as noted below, the measure of tax also includes delivery costs. RCW 82.04.070 and 82.08.010.

For purposes of computing the B&O tax, chapter 514, Laws of 2005, provides a deduction from the measure of tax for amounts derived from delivery charges for direct mail. Similarly, the law provides retail sales and use tax exemptions for delivery charges made for the delivery of direct mail.

~~(i) ((Postage—Charges for postage or other delivery costs are included in the measure of tax for both B&O tax and retail sales tax if the costs are part of the consideration paid by the customer. It is immaterial if the amounts charged for postage~~

are stated or shown separately on the sales invoice or reflect actual mailing costs to the mailing bureau. Amounts charged for postage and other delivery costs are not included in the measure of tax only if the amounts are not part of the consideration paid by the customer.

~~(A) When is postage part of the consideration paid? Charges for postage costs are considered part of the consideration paid if the permit to use precancelled stamps, a postage meter, or an imprint account for bulk mailings is in the name of the mailing bureau. The mailing bureau is liable to the post office for payment and the customer's payment of such amounts represents a payment on the sale of tangible personal property or the services provided. For further information, refer to WAC 458-20-111 (Advances and reimbursements):~~

~~(B) When is postage not part of the consideration paid? Charges for postage are not considered part of the consideration paid if the permit to use precancelled stamps or a permit imprint account for bulk mailings is in the customer's name. The mailing bureau in these cases has no primary or secondary liability for payment of the postage costs. (Refer to WAC 458-20-111 for information about advances and reimbursements.)~~

~~(ii) Examples. The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of any situation must be determined after a review of all facts and circumstances. For purposes of the following examples, sales invoices to the customer separately identify charges for postage:~~

~~(A) Example 1. Mailing Bureau receives mail pieces from Department Store to prepare and mail. Mailing Bureau advises Department Store of the estimated amount of postage. Department Store deposits an amount equal to the estimated cost of postage in its own permit imprint account. The estimated postage is not part of the total consideration paid because the Department Store is personally liable to the post office for postage. The total charge, excluding postage, is the consideration paid by Department Store and subject to tax.~~

~~(B) Example 2. Assume facts as described above in Example 1. The post office determines that the actual cost of postage exceeds the estimated amount deposited by Department Store in its permit imprint account. Post office transfers the additional amount for postage from Mailing Bureau's account. Mailing Bureau invoices Department Store for the additional amount. The additional amount for postage is not part of the consideration paid and is not included in the measure of tax because Mailing Bureau's liability for payment of the additional postage is limited to that of an agent.~~

~~(C) Example 3. Mailing Bureau receives from Political Candidate B mail pieces to prepare and mail. Mailing Bureau uses its own postage meter to apply metered postage. Postage is a part of the consideration paid by Candidate B and is included in the measure of tax.~~

~~(D) Example 4. Mailing Bureau receives pre-stamped mail pieces from Medical Clinic to prepare and mail. The mail pieces qualify for the lower bulk mail rates after Mailing Bureau prepares the mail pieces. The post office refunds the difference between the single piece rate and the bulk mail rate to Mailing Bureau. Mailing Bureau retains the amount due~~

~~for services rendered and in turn remits the balance of the refunded postage to Medical Clinic. Postage is not a part of the consideration paid and is not included in the measure of tax.~~

~~(E) Example 5. Mailing Bureau prints, prepares, and mails mail pieces for Non-Profit Organization's fundraising drive. Mailing Bureau applies metered postage using its own postage meter. The charge for postage is a part of the consideration paid and included in the measure of tax.~~

~~(F) Example 6. Mailing Bureau duplicates, prepares, and mails advertising for Restaurant. Mailing Bureau applies precancelled stamps that it purchases from the post office. The charge for postage is a part of the consideration paid and included in the measure of tax.~~

~~(G) Example 7. Mailing Bureau picks up mail pieces from Washington City to prepare and mail. Mailing Bureau applies metered postage using its own postage meter. The charge for postage is a part of the consideration paid by Washington City and included in the measure of tax.~~

~~(H) Example 8. Mailing Bureau prepares and mails advertising for Insurance Company. To apply postage, Mailing Bureau uses a postage meter leased by Insurance Company from a third party vendor. Insurance Company is liable to the third party vendor for payment of postage. The consideration does not include charges for postage.~~

~~(I) Example 9. Assume same facts as described in Example 8 above. The postage meter account contains insufficient funds required for mailing pieces. Mailing Bureau advances sufficient funds to Insurance Company's metering account. Mailing Bureau invoices Insurance Company for the additional amount. The consideration does not include postage because Mailing Bureau's liability for payment is limited to that of an agent.) **Requirement to separately state delivery charges.** To claim the B&O tax deduction and the retail sales tax exemption, the seller must separately state the delivery charges on an invoice or similar billing invoice provided to the buyer.~~

~~(ii) **What is direct mail?** "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address. RCW 82.08.010 and chapter 514, Laws of 2005.~~

~~(iii) **What are delivery charges?** "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.08.010.~~

~~(c) **Retail sales tax exemptions.** Certain sales tax exemptions may apply to the sale of tangible personal property or labor and services rendered to tangible personal property.~~

~~(i) **Interstate sales of tangible personal property.** The sale of tangible personal property is not subject to retail sales~~

tax when the seller agrees to and does deliver the property outside the state. Refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property) for further information about interstate sales.

(ii) **Labor and services rendered in respect to tangible personal property of or for a nonresident.** RCW 82.08.-0265 provides a retail sales tax exemption for charges made for labor and services rendered in respect to any installing, repairing, cleaning, altering, or improving tangible personal property of or for a nonresident when the seller agrees to and does deliver the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state. For further information about this exemption, refer to WAC 458-20-173 (Installing, cleaning, repairing or otherwise altering or improving personal property of consumers).

(d) **Purchases for resale.** The purchase of tangible personal property for resale as tangible personal property or to become a component or ingredient of property upon which mailing bureau services will be performed is a purchase at wholesale. Examples of items that may be purchased at wholesale include paper, printing ink, envelopes, and staples. Wholesale purchases are not subject to retail sales tax when the buyer provides a resale certificate to the seller as provided by WAC 458-20-102 (Resale certificates). Refer to WAC 458-20-113 (Ingredients or components, chemicals used in processing new articles for sale) for further information regarding ingredients and components.

(e) **Purchases subject to retail sales or use tax.** A mailing bureau business that purchases, leases, or otherwise acquires tangible personal property for use as a consumer must pay retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department when the seller fails to collect the retail sales tax. Examples of such property include photocopiers, cutting boards, computers, office furniture, and equipment to address, label, fold, seal, insert, meter, stamp, or sort. For further information about the use tax, refer to WAC 458-20-178 (Use tax).

(f) **Purchases of mailing lists.** Persons acquiring mailing lists are purchasing an information service regardless of the medium used to provide or transfer the information. Thus, the purchase of a mailing list by a mailing bureau business is not subject to either retail sales or use tax.

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.

AMENDATORY SECTION (Amending WSR 05-03-052, filed 1/11/05, effective 7/1/05)

WAC 458-20-144 Printing industry. (1) **Introduction.** This ((rule)) discusses the taxability of the printing industry. For information on the taxability of mailing bureau services, refer to WAC 458-20-141, Duplicating industry and mailing bureaus.

Chapter 514, Laws of 2005, changed the taxability of delivery charges associated with direct mail. Refer to subsection (4) of this section for further information.

(2) **Definition.** The phrase "printing industry" includes letterpress, offset-lithography, and gravure processes as well

as multigraph, mimeograph, autotyping, addressographing and similar activities.

(3) **Business and occupation tax.** Printers are subject to the business and occupation tax under the printing and publishing classification upon the gross income of the business.

(4) **Retail sales tax.** The printing or imprinting of advertising circulars, books, briefs, envelopes, folders, posters, racing forms, tickets, and other printed matter, whether upon special order or upon materials furnished either directly or indirectly by the customer is a retail sale and subject to the retail sales tax, providing the customer either consumes, or distributes such articles free of charge, and does not resell such articles in the regular course of business. The retail sales tax is computed upon the total charge for printing, and the printer may not deduct the cost of labor, author's alterations, or other service charges in performing the printing, even though such charges may be stated or shown separately on invoices.

RCW 82.04.070 and 82.08.010, respectively, define "gross proceeds of sales" and "selling price." These definitions provide that there is no deduction for "delivery costs." RCW 82.08.010 further provides that there is no deduction for "delivery charges," a term also defined by the statute to include postage. ((If a printer purchases stamps, applies metered postage using its meter account, or applies its permit imprint, and also charges the customer for the postage, the charge is included in the measure of B&O and/or retail sales tax, unless excluded by another provision of chapters 82.04 and 82.08 RCW. See also WAC 458-20-111 for information about nontaxable advances and reimbursements.)) Effective May 17, 2005, chapter 514, Laws of 2005, provides a B&O tax deduction and retail sales and use tax exemption from the measure of tax for amounts derived from delivery charges for direct mail when the delivery charges are separately stated on an invoice or similar billing invoice provided to the buyer.

"Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address. RCW 82.08.010 and chapter 514, Laws of 2005.

"Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.08.-010.

Sales of printed matter to advertising agencies who purchase for their own use or for the use of their clients, and not for resale in the regular course of business, are sales for consumption and subject to the retail sales tax.

Sales of tickets to theater owners, amusement operators, transportation companies and others are sales for consumption and subject to the retail sales tax. Such tickets are not resold by the theater owners or amusement proprietors as tan-

gible personal property but are used merely as a receipt to the patrons for payment and as evidence of the right to admission or transportation.

Sales of school annuals and similar publications by printers to school districts, private schools or student organizations therein are subject to the retail sales tax.

Sales by printers of books, envelopes, folders, posters, racing forms, stationery, tickets and other printed matter to dealers for resale in the regular course of business are wholesale sales and are not subject to the retail sales tax.

Charges made by bookbinders or printers for imprinting, binding or rebinding of materials for consumers are subject to the retail sales tax.

Sales to printers of equipment, supplies and materials which do not become a component part or ingredient of the finished printed matter sold or which are put to "intervening use" before being resold are subject to the retail sales tax. This includes, among others, sales of fuel, furniture, lubricants, machinery, type, lead, slugs and mats.

Sales to printers of paper stock and ink which become a part of the printed matter sold are sales for resale and are not subject to retail sales tax.

(5) **Commissions and discounts.** There is a general trade practice in the printing industry of making allowances to advertising agencies of a certain percentage of the gross charge made for printed matter ordered by the agency either in its own name or in the name of the advertiser. This allowance may be a "commission" or may be a "discount."

A "commission" paid by a seller constitutes an expense of doing business and is not deductible from the measure of tax under either business and occupation tax or retail sales tax. On the other hand, a "discount" is a deduction from an established selling price allowed to buyers, and a bona fide discount is deductible under both these classifications.

In order that there may be a definite understanding, printers, advertising agencies and advertisers are advised that tax liability in such cases is as follows:

(a) The allowance taken by an advertising agency will be deductible as a discount in the computation of the printer's liability only in the event that the printer bills the charge on a net basis; i.e., less the discount.

(b) Where the printer bills the gross charge to the agency, and the advertiser pays the sales tax measured by the gross charge, no deduction will be allowed, irrespective of the fact that in payment of the account the printer actually receives from the agency the net amount only; i.e., the gross billing, less the commission retained by the agency. In all cases the commission received is taxable to the agency.

AMENDATORY SECTION (Amending WSR 05-03-051, filed 1/11/05, effective 7/1/05)

WAC 458-20-17803 Use tax on promotional material. (1) **Introduction.** Persons who distribute or cause to be distributed any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services, are subject to use tax on the value of the property. RCW 82.12.010, 82.12.020, and chapter 367, Laws of 2002. This ((~~rule~~)) section explains the use tax reporting responsibilities of consumers when such property is

delivered directly to persons other than the consumer from outside Washington. For the purposes of this ((~~rule~~)) section, the term "promotional material" is used in describing such property where applicable.

This ((~~rule~~)) section provides numerous examples that identify a number of facts and then state a conclusion. These examples should only be used as a general guide. Similar determinations for other situations can be made only after a review of all facts and circumstances. For purposes of these examples, presume the promotional material is delivered to persons within Washington.

Chapter 514, Laws of 2005, changed the taxability of delivery charges associated with direct mail. Refer to subsection (5) of this section for further information.

(2) **What is the use tax?** The use tax complements the retail sales tax by imposing a tax of a like amount when a consumer uses tangible personal property or certain retail services within this state. RCW 82.12.020. The tax does not apply to the use of any property or service if the present user, donor, or bailor previously paid retail sales tax under chapter 82.08 RCW with respect to the property used or the service obtained. See WAC 458-20-178 (Use tax) for an explanation of the use tax and use tax reporting requirements.

(3) **Who is liable for the use tax on promotional material?** The use tax is imposed on the consumer. The law provides that with respect to promotional material distributed to persons within this state, the consumer is the person who distributes or causes the distribution of the promotional material. A consumer as defined in this ((~~rule~~)) section is responsible for remitting use tax only if the consumer has nexus in Washington.

(a) **Example 1.** Department Store contracts with Printer in Idaho, to print promotional material advertising sale merchandise available at Department Store's Washington locations. Printer delivers promotional material to Seattle Mailing Bureau, with whom Department Store has contracted to prepare the material for distribution to Department Store's customers. Department Store is the consumer of the promotional material and is liable for use tax on promotional material distributed within Washington. Neither Printer, Seattle Mailing Bureau, nor Department Store's customers are consumers of this promotional material.

(b) **Example 2.** Retailer contracts with Seattle Advertising Agency for advertising services. Advertising Agency makes a single charge for all services, which includes designing, printing, and distributing catalogs to potential customers. Advertising Agency contracts with California Printer to print and prepare for distribution promotional material advertising a new Washington location. Retailer is the consumer of the catalogs and is liable for use tax on the promotional material sent to Washington addresses. Neither Advertising Agency nor potential customers are consumers of this promotional material.

(4) **What is promotional material?** Promotional material is any tangible personal property, except newspapers, displayed or distributed in the state of Washington for the primary purpose of promoting the sale of products or services. Examples of promotional material include, but are not limited to, advertising literature, circulars, catalogs, brochures, inserts (but not newspaper inserts), flyers, applications, order

forms, envelopes, folders, posters, coupons, displays, signs, free gifts, or samples (such as carpet or textile samples).

(a) **Is advertising contained on billing statements promotional material?** It is presumed that the primary purpose of billing statements and statements of account is to secure payment for goods or services previously purchased. Thus, unless the facts and circumstances indicate that the primary purpose of the property is to promote the sale of goods and services, billing statements and statements of account are not considered promotional material. Attaching, affixing, or otherwise incorporating property promoting the sale of goods or services does not alter the primary purpose of billing statements and statements of account. However, flyers, inserts, or other separate property enclosed with billing statements or statements of account that promote the sale of goods or services are promotional material and subject to use tax.

(i) **Example 1.** Richland Attorney contracts with Oregon Printer to print and prepare for distribution monthly billing statements and return remittance envelopes to Attorney's clients. The contract also includes printing and inserting flyers promoting Attorney's estate planning services. The primary purpose of the flyers is to solicit the sale of services. Consequently, the flyers are promotional material. The primary purpose of the billing statements is to secure payment for services rendered. The billing statements are not promotional material.

(ii) **Example 2.** Department Store prints the monthly billing statements for its store credit card in Atlanta, Georgia, and mails them to customers located in Washington. Although the billing statement includes three sentences noting an upcoming sale, this information does not alter the primary purpose of the billing statement, which is to secure payment for services rendered. The billing statements are not promotional material.

(iii) **Example 3.** The following month, Department Store's billing statement includes a detachable coupon for fifteen percent off selected items purchased during a specified period. Although the detachable coupon solicits the sale of goods or services, it does not alter the primary purpose of the billing statement, which is to secure payment for goods or services already purchased. The billing statement and detachable coupon are not promotional material.

(iv) **Example 4.** In the third month, Department Store lengthens the billing statement to include information promoting the grand opening of a location. Although the lengthened portion of the billing statement contains information promoting the sale of goods or services, it does not alter the primary purpose of the billing statement, which is to secure payment for goods or services already purchased. The lengthened billing statement is not promotional material.

(b) **When are envelopes considered promotional material?** Envelopes used solely to mail property to promote the sale of goods or services are considered promotional material and subject to use tax.

Envelopes used to mail nonpromotional material, such as billing statements and statements of account, are used to secure payment for goods purchased or services rendered. The same is true of return envelopes that are enclosed for submitting payment. Unless the facts and circumstances indicate otherwise, the presumption is that the primary purpose of

envelopes used for mailing both promotional and nonpromotional material in the same envelope is not to promote the sale of goods and services. Thus, envelopes and return envelopes used for dual purposes are not subject to use tax, even though promotional material may be printed on or attached to the envelopes. Although the imprinted or attached material promotes the sale of goods or services, it does not alter the primary purpose of the envelopes.

(i) **Example 1.** Bank mails brochures, applications, and return envelopes from Atlanta, Georgia, to Washington addresses promoting Bank's credit card. The primary purpose of envelopes used to mail the brochures, applications, and return envelopes is to solicit the sale of services. The envelopes, brochures, and applications are promotional material.

(ii) **Example 2.** Telephone Company mails monthly billing statements to Washington customers from St. Louis, Missouri. Inserts promoting the sale of various telephone accessories are included. Return envelopes to be used in making payment of the statement amount are also enclosed. The primary purpose of the envelopes used to mail the billing statements and the return envelopes is to secure payment. Neither the mailing envelopes nor the return envelopes are promotional material.

(iii) **Example 3.** Mortgage Company mails monthly billing statements to Washington residents from its administrative offices in Nevada. The enclosed return envelope for customers to use in making payment includes an attachment promoting additional banking services. Although the attachment to the return envelopes contains advertising information, it does not alter the primary purpose of the envelope which is to obtain payment. Neither the mailing envelopes nor the return envelopes are promotional material.

(5) **What is the measure of tax?** The measure of the use tax is the value of the article used. For the purposes of computing the use tax due on promotional material, the measure of tax is the amount of consideration paid for the promotional material without deduction for the cost of materials, labor, or other service charges, even though such charges may be stated or shown separately on invoices. ~~((#))~~ Except as noted below, the measure of use tax also includes the amount of any freight, delivery, or other like transportation charge paid or given by the consumer to the seller. The value of the promotional material also includes any tariffs or duties paid. If the total consideration paid does not represent the true value of the article used, the value must be determined as nearly as possible according to the retail selling price at place of use of similar materials of like quality and character. RCW 82.12.010.

A consumer who has paid retail sales or use tax that is due in another state with respect to promotional material that is subject to use tax in this state may take a credit for the amount of tax so paid. RCW 82.12.035. For further information, refer to WAC 458-20-178 (Use tax).

(a) ~~((Does the measure of tax include delivery charges?))~~ **Delivery charges.** Effective May 17, 2005, Chapter 514, Laws of 2005, allows exemption from the use tax for amounts derived from delivery charges for direct mail when the delivery charges are separately stated on an invoice or similar billing invoice provided to the buyer.

(i) What is direct mail? "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address. RCW 82.08.010 and chapter 514, Laws of 2005.

(ii) What are delivery charges? "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.08.010.

(iii) Delivery charges as a measure of tax before May 17, 2005. For use tax due on promotional material from June 1, 2002, through May 16, 2005, the measure of tax includes all delivery charges. Postage is a delivery charge and is therefore included in the measure of tax if the cost is part of the consideration paid by the consumer to the seller. RCW 82.08.010 and 82.12.010. It is immaterial if amounts charged for postage are stated or shown separately on invoices. Amounts charged for postage and other delivery costs are not included in the measure of tax only if the amounts are not part of the consideration paid. ((For discussion about when postage is and is not considered part of the consideration paid, please refer to WAC 458-20-141 (Duplicating industry and mailing bureaus:-))

(A) When are delivery charges part of the consideration paid? Charges for postage or other delivery costs are considered part of the consideration paid if the permit to use precancelled stamps, a postage meter, or an imprint account for bulk mailings is in the name of the party contracted to provide and/or prepare promotional material for distribution. Such parties are liable to the post office for payment and the consumer's payment of such amounts represents a payment on the sale of tangible personal property or the services provided. For further information, refer to WAC 458-20-111 (Advances and reimbursements).

(B) When are delivery charges not part of the consideration paid? Charges for postage or other delivery costs are not considered part of the consideration paid if the permit to use precancelled stamps or a permit imprint account for bulk mailings is in the consumer's name. The consumer in these cases has primary or secondary liability for payment of the postage costs. (Refer to WAC 458-20-111 for information about advances and reimbursements.)

(b) What is the measure of tax when a consumer contracts with one party for the promotional material and a third party to prepare the material for distribution? The use tax is imposed on consumers of certain services rendered in respect to tangible personal property for use in this state when the retail sales tax has not been paid. RCW 82.12.020. These services generally include labor and services rendered in respect to altering, imprinting, or improving tangible personal property and include activities performed typically by

mailing bureaus or houses, such as addressing, labeling, binding, folding, sealing, and tabbing.

A consumer of promotional material is subject to use tax on the value of the promotional material and the value of the services used. The value of the service used is the amount of consideration paid for the service and includes delivery charges such as postage. RCW 82.12.010 and 82.08.010.

(c) What is the measure of tax when a consumer manufactures its own promotional materials? The measure of use tax is the value of the promotional material. Refer to WAC 458-20-112 (Value of products). A consumer who manufactures its own promotional material may also be conducting manufacturing activities and should refer to WAC 458-20-134 (Commercial or industrial use) and WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(6) Determining the applicable local use tax rate. For purposes of determining the applicable rate of local use tax for promotional material, the following guidelines must be followed unless the consumer obtains prior written approval from the department to use an alternative method. Refer to (c) of this subsection for an explanation of the circumstances under which the department will consider approving alternate methods and how to obtain such approval.

(a) Operations directed from within Washington. The applicable local taxing jurisdiction and tax rate is the in-state location from where the consumer directs or manages its Washington operations.

(i) Example 1. Department Store operates ten locations in western Washington. Department Store's corporate headquarters, the location from where it manages its in-state operations, is in Seattle. The local use tax rate for Seattle is the applicable rate.

(ii) Example 2. Retailer, a national company with headquarters in Chicago, Illinois, operates multiple locations in Washington. Retailer manages its Washington operations from a location in Spokane. The local use tax rate for Spokane is the applicable rate.

(b) Operations directed from outside Washington. A consumer that manages or directs its Washington activities from outside the state must equally apportion the value of the promotional material among the local tax jurisdictions where the consumer conducts its business activities. Promotional material that is targeted to specific business locations of the consumer must be apportioned solely between those business locations. Targeted material is material specifically distributed to promote sales of products or services solely at a specific location(s) and at a different price(s) or terms than those offered at all other Washington locations.

(i) Example 1. Bank directs the operations of its four Washington branches from its headquarters in Sacramento, California. The branches are in Seattle, unincorporated King County, Tacoma, and Everett. For purposes of determining use tax liability, twenty-five percent of the value of the promotional material must be equally apportioned to Seattle, unincorporated King County, Tacoma, and Everett.

(ii) Example 2. Furniture Store, headquartered in Nevada, orders 100,000 flyers from a Portland, Oregon, printer to be mailed to Washington households announcing the opening of its new store in Spokane. Customers will receive a ten percent discount on all items purchased at the

Spokane store. This discount will not apply to purchases made at Store C's other Washington locations. The local use tax rate for Spokane is the applicable rate.

(iii) **Example 3.** Restaurant manages the operations of its Washington locations from Portland, Oregon. Restaurant contracts to have coupon books printed and mailed to households in Clark and Cowlitz counties. The coupons are accepted only at the Vancouver and Longview locations. The value of the promotional material must be equally apportioned to both locations.

(iv) **Example 4.** Ohio Manufacturer has no offices, warehouses, or storefront locations in Washington. A salesperson operating from the person's Kent home solicits sales from Washington distributors for the manufacturer. Manufacturer mails promotional material to its distributors' customers in Washington. The local use tax rate for Kent is the applicable rate.

(v) **Example 5.** Michigan Wholesaler without offices, warehouses, or storefront locations in Washington sends salesperson into Washington to solicit sales. Wholesaler mails promotional material to potential customers in Washington. The applicable local use tax rate is a uniform state-wide local rate of .005.

(c) **Are there alternative methods for determining the place of first use?** For purposes of reporting use tax on promotional material, the department may agree to allow a consumer to use another method of determining the applicable local use tax rate provided that the method proposed by the consumer results in an equal or more equitable distribution of the tax. A consumer may request written approval for the use of an alternative method by contacting the department's taxpayer services division at:

Department of Revenue
Taxpayer Services
P.O. Box 47478
Olympia, WA 98504-7478

WSR 05-22-053
EMERGENCY RULES
DEPARTMENT OF REVENUE

[Filed October 28, 2005, 10:31 a.m., effective October 28, 2005]

Effective Date of Rule: Immediately.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: Emergency rule findings are required; see below.

Purpose: WAC 458-20-210, explains the application of business and occupation (B&O), retail sales, and use taxes to the sale and/or use of feed, seed, fertilizer, spray materials, and other tangible personal property for farming. This rule also explains the application of B&O, retail sales, and litter taxes to the sale of agricultural products by farmers.

One of the issues discussed [in] Rule 210 is the tax incentives provided for reducing agricultural burning of cereal grain and grass fields. Chapter 420, Laws of 2005, made a number of changes to the tax incentives. These changes are effective July 1, 2005. The department has adopted a new WAC 458-20-271 to explain the tax incentives

to reduce agricultural burning. The information on the tax incentives for periods prior to the legislative change has been removed from Rule 210 and incorporated into Rule 271.

The department is adopting the new Rule 271 and a revised Rule 210 on an emergency basis to recognize the legislative change. This [These] emergency rules are the same as the emergency rules filed on June 30, 2005.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-210 Sales of agricultural products by farmers.

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(1).

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: An emergency adoption of a new Rule 271 and revised Rule 210 is necessary because permanent rules cannot be adopted at this time. This rule action will provide needed tax information to taxpayers and department staff about the change in the retail sales and use tax exemption provided for reducing agricultural burning. These emergency rules are the same as those filed on June 30, 2005 (WSR 05-14-105).

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 1, 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 1, 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 1, Repealed 0.

Date Adopted: October 28, 2005.

Janis P. Bianchi, Manager
Interpretations and
Technical Advice Unit
by Roseanna Hodson

NEW SECTION

WAC 458-20-271 Tax incentives to reduce agricultural burning. (1) Introduction. Chapter 420, Laws of 2005, made several changes to the tax incentives provided for reducing agricultural burning of cereal grain and grass fields. These changes became effective July 1, 2005.

This section provides examples identifying a number of facts and then stating a conclusion. These examples should be used only as a general guide. The tax results of any situation must be determined after a review of all facts and circumstances.

(2) General information common to the tax incentives to reduce agricultural burning before, on, and after July 1, 2005.

(a) **Who is a farmer?** A "farmer" is any person engaged in the business of growing, raising, or producing, upon the person's own lands or upon the lands in which the person has a present right of possession, any agricultural product to be sold. A "farmer" does not include a person growing, raising, or producing agricultural products for the person's own consumption; a person selling any animal or substance obtained there from in connection with the person's business of operating a stockyard, slaughterhouse, or packing house; or a person in respect to the business of taking, cultivating, or raising timber. RCW 82.04.215.

(b) **What is a cereal grain?** Cereal grains include wheat, oats, corn, barley, rye, spelt, and triticale.

(c) **What are the farmer's responsibilities with respect to the retail sales and use tax exemptions?** The farmer's responsibilities include the following.

(i) **Exemption certificate to be provided to seller.** The retail sales tax exemption provided by chapter 420, Laws of 2005 and RCW 82.08.840 is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the Department.

(A) **Certificate—On and after July 1, 2005.** For purposes of the exemption available on and after July 1, 2005 (chapter 420, Laws of 2005), the buyer must provide the seller with a completed "Farmers' Retail Sales Tax Exemption Certificate," as it relates to the exemption. A certificate to be completed by the farmer may be obtained via the Department's web site at <http://dor.wa.gov>.

(B) **Certificate—Before July 1, 2005.** For purposes of the exemption available before July 1, 2005 (RCW 82.08.840), the buyer must provide the seller with a completed "Farmers' Retail Sales Tax Exemption Certificate," or another certificate with substantially the same information.

(ii) **Maintaining records.** The law requires a farmer taking the exemption to keep records necessary for the department to verify eligibility. For example, copies of farm service agency or crop insurance records may be used to identify acreages by year as to crops grown. The records must be available for audit by the department.

(iii) **Reporting and paying tax on equipment that does not qualify for the exemption.** A farmer who takes a retail sales or use tax exemption and later finds that he or she does not meet the requirements is responsible for paying the sales tax (commonly referred to as "deferred sales tax") or use tax to the department.

Farmers who are registered with the Department should report use tax on the combined excise tax return. Farmers who are not registered with the Department may report use tax on the Consumer Use Tax Return available via the Department's web site at <http://dor.wa.gov>.

(d) **What are the seller's responsibilities when making a tax-exempt sale?** The seller's responsibilities include the following.

(i) **Taking an exemption certificate from the buyer.** When making an exempt sale, the seller must take from the buyer a completed exemption certificate, as explained in subsection (2)(c)(i) of this section. The seller must retain a copy

of the completed certificate in the seller's files. A seller who fails to take, retain, and upon request make available to the department a completed exemption certificate is liable for any uncollected retail sales tax.

(ii) **Exercising good faith.** Accepting a completed certificate documents the exempt nature of a sale under chapter 420, Laws of 2005 or 82.08.840, unless there are facts that negate the presumption that the seller relied upon the certificate in good faith. The seller is not required to substantiate that the farmer satisfies the statutory requirements of a "qualifying farmer". The seller, however, must exercise a reasonable degree of care in making a tax-exempt sale.

For example, Farmer buys a disc, equipment that is potentially eligible for the exemption. Farmer provides a completed Farmers' Retail Sales Tax Exemption Certificate to Implement Dealer. Implement Dealer reviews the certificate to ensure that it is properly completed, and retains the certificate in its files. During a later routine audit examination of Implement Dealer's records, a department auditor questions whether Farmer is eligible for the exemption. Because Implement Dealer exercised a reasonable degree of care in making the tax-exempt sale, the Implement Dealer has satisfied its responsibilities. The department will resolve any questions it has regarding Farmer's eligibility with Farmer.

(3) **Incentives to reduce agricultural burning—Periods after June 30, 2005.** Chapter 420, Laws of 2005 (2SSB 5663) provides a sales and use tax exemption for specified equipment to qualified farmers. There is also an exemption for labor and services for the construction of hay sheds for qualified farmers. Sales to qualified farmers of tangible personal property that becomes an ingredient or component of a hay shed during the course of construction also are exempt. This exemption expires January 1, 2011 and replaces the exemption previously provided by RCW 82.08.840 and 82.12.840.

(a) **Who qualifies?** Only qualified farmers are eligible for this exemption. A "qualified farmer" means a farmer as defined above who has more than fifty percent (50%) of his or her tillable acres in cereal grains and/or field and turf grass grown for seed in qualified counties.

(i) **What is a "qualified county"?** A "qualified county" is a county in Washington State where cereal grain production within the county exceeds fifteen thousand (15,000) acres. The qualified counties, as of July 1, 2005, are as follows.

Adams	Garfield	Stevens
Asotin	Grant	Walla Walla
Benton	Klickitat	Whatcom
Columbia	Lincoln	Whitman
Douglas	Spokane	Yakima
Franklin		

(ii) **Must a farmer live in a qualified county to qualify for the exemption?** No. It is the location of the farmer's tillable acreage that determines eligibility for the exemption, not the location of the farmer's home. Thus, a farmer who has more than fifty percent of his or her tillable acres in wheat in qualified counties is a "qualified farmer" even if the farmer lives in a non-qualifying county.

(iii) **Must the seller live in a qualified county to make a tax-exempt sale?** No. Again, it is the location of the farmer's tillable acreage that determines eligibility for the exemption. Thus, an implement dealer located in a non-qualifying county may make a tax-exempt sale if the dealer takes a completed exemption certificate from the farmer and exercises a reasonable degree of care in making the tax-exempt sale.

(iv) **Does "tillable acres" include fallow and CRP acreage?** "Tillable acres" include fallow acreage, but not acreage enrolled in Conservation Reserve Program (CRP), Conservation Reserve Enhancement Program (CREP), or similar program under which the farmer agrees not to farm the land. Fallow acreage will be considered "in cereal grains and/or field and turf grass grown for seed" if in the following year it is planted with a cereal grain and/or field or turf grass grown for seed.

(v) **Examples.**

(A) **Example 1.** Farmer has 10,000 acres within a qualified county. In Year 1, 4,000 acres are planted in wheat, 2,000 acres are fallow, and 4,000 acres are enrolled in the CRP. In Year 2, the 2,000 acres left fallow in Year 1 are planted in wheat.

Farmer is a "qualified farmer" in Year 1. Farmer has 6,000 tillable acres (10,000 total - 4,000 CRP), 100% of which is located in a qualified county and in a cereal grain.

(B) **Example 2.** Farmer has 3,000 tillable acres within a qualified county and 4,000 acres within a nonqualified county. For purposes of determining whether Farmer is a qualifying farmer, only the 3,000 tillable acres within the qualified county is considered.

(b) **What equipment qualifies?** The law specifically identifies hay sheds and the following equipment as eligible for the exemption.

Bale Handlers	Minimum-till drills	Shredders
Balers	Mowers	Sprayers
Chisels	No-till drills	Swathers
Cultivators	Plows	Tractors of 250 engine hp and over
Discs	Power rakes	Transplanters
Harrowes		

The following combine components only:

Straw choppers Chaff spreaders Stripper Headers

(i) **What is a hay shed?** For the purposes of this exemption, a hay shed is a structure used to store plant residue, such as straw.

(ii) **What is a bale handler?** For purposes of this exemption, a bale handler is equipment specifically designed to load, stack, retrieve, and/or transport bales.

(iii) **Are hardware kits used to attach qualifying equipment to non-qualifying equipment eligible for the exemption?** Yes, provided the kit is necessary to attach exempt equipment to nonexempt equipment and the kit and exempt equipment are purchased together.

(iv) **Do tractors of less than 250 hp qualify for exemption if they are needed to pull or power eligible equip-**

ment? No. The law specifically exempts only tractors of two hundred fifty horse power (hp) or more. Tractors of less than two hundred fifty hp are not eligible for the exemption, even if used to pull an eligible piece of equipment (e.g., a disc) or if attachment of an eligible piece of equipment is required (e.g., some bale handlers). For purposes of this exemption, horse power is measured in engine horse power.

(d) **What doesn't qualify for the retail sales and use tax exemption?** The following are examples of items or services that do not qualify for this exemption, even if purchased or used by a qualifying farmer:

(i) Repairing, cleaning, decorating, altering, or improving of tax exempt equipment;

(ii) Items that become an ingredient or component (e.g., repair part) of tax exempt equipment;

(iii) Repairing, cleaning, altering, or improving of hay sheds after construction;

(iv) Materials incorporated into hay sheds after construction; and

(v) Construction of sheds used for storage of farm or other equipment.

(4) **Incentives to reduce agricultural burning—Periods before July 1, 2005.** This information was previously provided in WAC 458-20-210.

(a) **B&O tax credit to encourage alternatives to field burning.** Persons who qualify for a sales or use tax exemption under RCW 82.08.840 or 82.12.840 (machinery, equipment, or structures that reduce emissions from field burning) also qualify for a B&O tax credit. RCW 82.04.4459. The amount of the credit is equal to fifty percent of the amount of costs expended for constructing structures or acquiring machinery and equipment for which an exemption was taken under RCW 82.08.840 or 82.12.840. (See subsection (6)(l) of this rule for information about the sales and use tax exemptions provided by RCW 82.08.840 and 82.12.840.) No application is necessary for the credit. Persons taking the credit must keep records necessary for the department to verify eligibility for the credit. This credit is subject to the following limitations:

(i) No credit may be taken in excess of the amount of B&O tax that would otherwise be due;

(ii) Credit may not be carried over to subsequent calendar years;

(iii) The credit must be claimed by the due date of the last tax return for the calendar year in which the payment is made;

(iv) Any unused credit expires;

(v) Refunds will not be given in place of credits; and

(vi) The credit may not be claimed for expenditures that occurred before March 22, 2000.

(b) **Machinery, equipment, and structures used to reduce emissions from field burning.** RCW 82.08.840 and 82.12.840 provide a sales and use tax exemption for certain property used to reduce field burning of cereal grains and field and turf grass grown for seed, or to reduce air emissions resulting from such field burning. The retail sales tax exemption applies to sales of machinery and equipment, and to services rendered in respect to constructing structures, installing, constructing, repairing, cleaning, decorating, altering, or improving of structures or eligible machinery and equipment,

and to sales of tangible personal property that becomes an ingredient or component of eligible structures or eligible machinery and equipment, if all of the requirements for the exemption listed below in this subsection are met. The sales tax exemption is effective March 22, 2000. The use tax exemption applies to the use of machinery and equipment, and of tangible personal property that becomes an ingredient or component of eligible machinery and equipment, if all of the requirements for the exemption listed below in this subsection are met. This use tax exemption is also effective March 22, 2000. The use tax exemption also applies to the use of services rendered in respect to installing, repairing, cleaning, altering, or improving of eligible machinery and equipment, if all of the requirements for the exemption are met. This component of the use tax exemption is effective June 1, 2002.

(i) **Majority use requirement.** To qualify for an exemption, the machinery, equipment, or structure must be used more than half (50%) of the time:

(A) For gathering, densifying, processing, handling, storing, transporting, or incorporating straw or straw-based products that results in a reduction in field burning of cereal grains and field and turf grass grown for seed; or

(B) To decrease air emissions resulting from field burning of cereal grains and field and turf grass grown for seed.

(ii) **Examples.** The following examples illustrate this exemption:

(A) Farmer cultivates turf grass. Farmer purchases spray equipment. As an alternative to field burning, the fields in which the spray equipment is used must be sprayed five times instead of twice. The use of the spray equipment meets the requirement that the equipment be used more than half of the time to decrease air emissions resulting from field burning; therefore, the purchase of the spray equipment is exempt.

(B) Farmer, who performs custom baling, purchases a new baler for use in baling hay and straw. The purchase of the baler is exempt if it will be used more than half of the time to bale straw, which results in a reduction in field burning.

(C) Farmer purchases a new combine for use in harvesting wheat. In addition to cutting the stalks, separating the kernels from the chaff, and unloading the kernels, the combine also chops the residual chaff before discharging it onto the field. While the need for field burning may decrease because the smaller residue more readily decomposes, the purchase of the combine does not qualify for the exemption. The combine is not used more than half of the time to decrease air emissions from field burning.

AMENDATORY SECTION (Amending WSR 03-18-024, filed 8/25/03, effective 9/25/03)

WAC 458-20-210 Sales of tangible personal property for farming—Sales of agricultural products by farmers.

(1) **Introduction.** This rule explains the application of business and occupation (B&O), retail sales, and use taxes to the sale and/or use of feed, seed, fertilizer, spray materials, and other tangible personal property for farming. This rule also explains the application of B&O, retail sales, and litter taxes to the sale of agricultural products by farmers. Farmers should refer to WAC 458-20-101 to determine whether they

must obtain a tax registration endorsement or a temporary registration certificate from the department of revenue (department).

Farmers and persons making sales to farmers may also want to refer to the following rules for additional information:

(a) WAC 458-20-209 (Farming for hire and horticultural services provided to farmers);

(b) WAC 458-20-222 (Veterinarians);

(c) WAC 458-20-239 (Sales to nonresidents of farm machinery or implements, and related services); (~~and~~)

(d) WAC 458-20-262 (Retail sales and use tax exemptions for agricultural employee housing); and

(e) WAC 458-20-271 (Tax incentives to reduce agricultural burning).

(2) **Who is a farmer?** A "farmer" is any person engaged in the business of growing, raising, or producing, upon the person's own lands or upon the lands in which the person has a present right of possession, any agricultural product to be sold. A "farmer" does not include a person growing, raising, or producing agricultural products for the person's own consumption; a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard, slaughterhouse, or packing house; or a person in respect to the business of taking, cultivating, or raising timber. RCW 82.04.213 and chapter 118, Laws of 2001.

(3) **What is an agricultural product?** An "agricultural product" is any product of plant cultivation or animal husbandry including, but not limited to: A product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; short-rotation hardwoods as defined in RCW 84.33.035 (as of July 22, 2001); turf; or any animal, including, but not limited to, an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, a bird, an insect, or the substances obtained from such animals. An "agricultural product" does not include animals defined under RCW 16.70.020 as "pet animals." RCW 82.04.213 and chapter 118, Laws of 2001.

(4) **Sales to farmers.** Persons making sales of tangible personal property to farmers are generally subject to wholesaling or retailing B&O tax, as the case may be, on the gross proceeds of sales. Sales of some services performed for farmers, such as installing or repairing tangible personal property, are retail sales and subject to retailing B&O tax on the gross proceeds of such sales. Persons making retail sales must collect retail sales tax from the buyer, unless the sale is specifically exempt by law. Readers should refer to subsection (6) of this rule for information about specific sales tax exemptions available for sales to farmers.

(a) **Documenting wholesale sales.** A seller must obtain a resale certificate from the buyer to document the wholesale nature of any transaction. (Refer to WAC 458-20-102 for detailed information about resale certificates.)

(b) **Buyer's responsibility when the seller does not collect retail sales tax on a retail sale.** If the seller does not collect retail sales tax on a retail sale, the buyer must pay the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department, unless the sale is specifically exempt by law. The "Combined Excise Tax Return"

does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's Combined Excise Tax Return. If a deferred sales tax or use tax liability is incurred by a farmer who is not required to obtain a tax registration endorsement from the department (see WAC 458-20-101), the farmer must report the tax on a "Consumer Use Tax Return" and remit the appropriate tax to the department. Refer to WAC 458-20-178 for detailed information regarding use tax.

The Consumer Use Tax Return can be obtained by calling the department's telephone information center at 1-800-647-7706. The return may also be obtained from the department's web site at: <http://dor.wa.gov>.

(c) Feed, seed, seedlings, fertilizer, spray materials, and agents for enhanced pollination. Sales to farmers of feed, seed, seedlings, fertilizer, spray materials, and agents for enhanced pollination, including insects such as bees, to be used for the purpose of producing an agricultural product, whether for wholesale or retail sale, are wholesale sales.

However, when these items are sold to consumers for purposes other than producing agricultural products for sale, the sales are retail sales. For example, sales of feed to riding clubs, racetrack operators, boarders, or similar persons who do not resell the feed at a specific charge are retail sales. Sales of feed for feeding pets or work animals, or for raising animals for the purpose of producing agricultural products for personal consumption are also retail sales. Sales of seed, fertilizer, and spray materials for use on lawns and gardens, or for any other personal use, are likewise retail sales.

(i) What is feed? "Feed" is any substance used as food to sustain or improve animals, birds, fish, or insects, including whole and processed grains or mixtures thereof, hay and forages or meals made therefrom, mill feeds and feeding concentrates, stock salt, hay salt, bone meal, fish meal, cod liver oil, double purpose limestone grit, oyster shell, and other similar substances. Food additives that are given for their beneficial growth or weight effects are "feed."

Hormones or similar products that do not make a direct nutritional or energy contribution to the body are not "feed," nor are products used as medicines.

(ii) What is seed? "Seed" is the propagative portions of plants commonly used for seeding or planting whether true seed, bulbs, plants, seed-like fruits, seedlings, or tubers.

(iii) What is fertilizer? "Fertilizer" is any substance containing one or more recognized plant nutrients and is used for its plant nutrient content and/or is designated for use in promoting plant growth. "Fertilizer" includes limes, gypsum, and manipulated animal and vegetable manures. There is no requirement that fertilizers be applied directly to the soil.

(iv) What are spray materials? "Spray materials" are any substance or mixture of substances in liquid, powder, granular, dry flowable, or gaseous form, which is intended to prevent, destroy, control, repel, or mitigate any insect, rodent, nematode, mollusk, fungus, weed, and any other form of plant or animal life normally considered to be a pest. The term includes treated materials, such as grains, that are intended to destroy, control, or repel such pests. "Spray materials" also include substances that act as plant regulators, defoliants, desiccants, or spray adjuvants.

(v) Examples. The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(A) Sue grows vegetables for retail sale at a local market. Sue purchases fertilizers and spray materials that she applies to the vegetable plants. She also purchases feed for poultry that she raises to produce eggs for her personal consumption. Because the vegetables are an agricultural product produced for sale, retail sales tax does not apply to Sue's purchases of fertilizers and spray materials, provided she gives the seller a resale certificate. Retail sales tax does apply to her purchases of poultry feed, as the poultry are raised to produce eggs for Sue's personal consumption.

(B) WG Vineyards (WG) grows grapes that it uses to manufacture wine for sale. WG purchases pesticides and fertilizers that are applied to its vineyards. WG may purchase these pesticides and fertilizers at wholesale, provided WG gives the seller a resale certificate.

(C) Seed Co. contracts with farmers to raise seed. Seed Co. provides the seed and agrees to purchase the crop if it meets specified standards. The contracts provide that ownership of the crop is retained by Seed Co., and the risk of crop loss is borne by the farmers. The farmers are obligated to pay for the seed whether or not the crop meets the specified standard. The transfer of the possession of the seed to the farmers is a wholesale sale, provided Seed Co. obtains a resale certificate from the farmers.

(d) Chemical sprays or washes. Sales of chemical sprays or washes, whether to farmers or other persons, for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay are wholesale sales.

(e) Farming equipment. Sales to farmers of farming equipment such as machinery, machinery parts and repair, tools, and cleaning materials are retail sales and subject to retailing B&O and retail sales taxes, unless specifically exempt by law. Refer to subsections (4)(i) and (6) of this rule for information about sales tax exemptions available to farmers.

(f) Packing materials and containers. Sales of packing materials and containers, or tangible personal property that will become part of a container, to a farmer who will sell the property to be contained therein are wholesale sales, provided the packing materials and containers are not put to intervening use by the farmer. Thus, sales to farmers of binder twine for binding bales of hay that will be sold or wrappers for fruit and vegetables to be sold are subject to wholesaling B&O tax. However, sales of packing materials and containers to a farmer who will use the items as a consumer are retail sales and subject to retailing B&O and retail sales taxes. Thus, sales of binder twine to a farmer for binding bales of hay that will be used to feed the farmer's livestock are retail sales.

(g) Purchases for dual purposes. A buyer normally engaged in both consuming and reselling certain types of tangible personal property and not able to determine at the time of purchase whether the particular property purchased will be consumed or resold must purchase according to the general nature of his or her business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer

should not give a resale certificate for any part of the purchase. If the buyer principally resells the articles, the buyer may issue a resale certificate for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

If a buyer makes a purchase for dual purposes and does not give a resale certificate for any of the purchase and thereafter resells some of the articles purchased, the buyer may claim a "taxable amount for tax paid at source" deduction. Refer to WAC 458-20-102 for additional information regarding purchases for dual purposes and the "taxable amount for tax paid at source" deduction.

(i) **Potential deferred sales tax liability.** If the buyer gives a resale certificate for all purchases and thereafter consumes some of the articles purchased, the buyer is liable for deferred sales tax and must remit the tax directly to the department. Refer to subsection (4)(b) of this rule and WAC 458-20-102 for more information regarding deferred sales tax.

(ii) **Example.** A farmer purchases binder twine for binding bales of hay. Some of the hay will be sold and some will be used to feed the farmer's livestock. More than fifty percent of the binder twine is used for binding bales of hay that will be sold. Because the farmer principally uses the binder twine for binding bales of hay that will be sold, the farmer may issue a resale certificate to the seller for the entire purchase. The farmer is liable for deferred sales tax on the binder twine used for binding bales of hay that are used to feed the farmer's livestock and must remit the tax directly to the department.

(h) **"Fruit bin rentals" by fruit packers.** Fruit packers often itemize their charges to farmers for various services related to the packing and storage of fruit. An example is a charge for the bins which the packer uses in the receiving, sorting, inspecting, and storing of fruit (commonly referred to as "bin rentals"). The packer delivers the bins to the grower, who fills them with fruit for eventual storage in the packer's warehouse. Charges by fruit packers to farmers for such bin rentals do not constitute the rental of tangible personal property to the farmer where the bins are under the control of the packer for use in the receiving, sorting, inspecting, and storing of fruit. These charges are income to the packer related to the receipt or storage of fruit. The packer, as the consumer of the bins, is subject to retail sales or use tax on the purchase or use of the bins. (Information regarding the taxability of fruit packing is contained in WAC 458-20-214.)

(i) **Machinery and equipment used directly in a manufacturing operation.** Machinery and equipment used directly in a manufacturing operation by a manufacturer or processor for hire is exempt from sales or use tax provided that all requirements for the exemption are met. RCW 82.08.02565 and 82.12.02565. This exemption is commonly referred to as the M&E exemption. Farmers who use agricultural products that they have grown, raised, or produced as ingredients in a manufacturing process may be entitled to the M&E exemption on the acquisition of machinery and equipment used directly in their manufacturing operation. Refer to WAC 458-20-13601 for detailed information regarding the M&E exemption.

See subsection (5)(b) of this rule for an example illustrating a farmer using agricultural products that the farmer has grown as an ingredient in a manufacturing process.

(5) **Sales by farmers.** Farmers are not subject to B&O tax on wholesale sales of agricultural products. RCW 82.04.330. Farmers who manufacture products using agricultural products that they have grown, raised, or produced should refer to subsection (5)(b) of this rule for tax-reporting information.

Farmers are subject to retailing B&O tax on retail sales of agricultural products and retailing or wholesaling B&O tax on sales of nonagricultural products, as the case may be, unless specifically exempt by law. Also, B&O tax applies to sales of agricultural products that the seller has not grown, raised, or produced upon the seller's own land or upon land in which the seller has a present right of possession, whether these products are sold at wholesale or retail. Likewise, B&O tax applies to sales of animals or substances derived from animals in connection with the business of operating a stockyard, slaughterhouse, or packing house. Farmers may be eligible to claim a small business B&O tax credit if the amount of B&O tax liability in a reporting period is under a certain amount. For detailed information about this credit, refer to WAC 458-20-104.

(a) **Litter tax.** The gross proceeds of sales of certain products, including food for human or pet consumption, are subject to litter tax. RCW 82.19.020. Litter tax does not apply to sales of agricultural products that are exempt from B&O tax under RCW 82.04.330. RCW 82.19.050 and chapter 118, Laws of 2001. Thus, farmers are not subject to litter tax on wholesale sales of agricultural products but are liable for litter tax on the gross proceeds of retail sales of agricultural products that constitute food for human or pet consumption. Also, farmers that manufacture products for use and consumption within this state (e.g., a farmer who produces wine from grapes that the farmer has grown) may be liable for litter tax measured by the value of the products manufactured. For detailed information about the litter tax, refer to chapter 82.19 RCW and WAC 458-20-243.

For example, RD Orchards (RD) grows apples at its orchards. Most apples are sold at wholesale, but RD operates a seasonal roadside fruit stand from which it makes retail sales of apples. The wholesale sales of apples are exempt from both B&O and litter taxes. The retail sales of apples are subject to retailing B&O and litter taxes but are exempt from sales tax because the apples are sold as a food product for human consumption. (See subsection (6)(d) of this rule for information about the retail sales tax exemption applicable to sales of food products for human consumption.)

(b) **Farmers using agricultural products in a manufacturing process.** The B&O tax exemption provided by RCW 82.04.330 does not apply to any person selling manufactured substances or articles. Thus, farmers who manufacture products using agricultural products that they have grown, raised, or produced are subject to manufacturing B&O tax on the value of products manufactured. Farmers who sell their manufactured products at retail or wholesale in the state of Washington are also generally subject to the retailing or wholesaling B&O tax, as the case may be. In such cases, a multiple activities tax credit (MATC) may be avail-

able. For detailed information regarding the manufacturing B&O tax and the MATC, refer to WAC 458-20-136 and 458-20-19301, respectively.

For example, WG Vineyards (WG) produces wine from grapes that it grows in its vineyards located within this state. WG makes wholesale sales of its wine to customers both within and outside of this state. WG is subject to manufacturing B&O tax on the value of the wine it produces. WG is also subject to wholesaling B&O tax on wholesale sales of wine delivered to buyers within this state, and WG is entitled to a multiple activities tax credit. In addition, WG is subject to litter tax on the value of wine sold within this state. (See subsection (5)(a) of this rule for information on the litter tax.)

(i) **Special B&O tax rate for manufacturing fresh fruits and vegetables.** A special lower B&O tax rate is provided by RCW 82.04.260 to persons manufacturing fresh fruits or vegetables by canning, preserving, freezing, processing, or dehydrating. Thus, farmers and other persons manufacturing fresh fruits and vegetables using these processes should report their manufacturing activity under the manufacturing fresh fruits and vegetables B&O tax classification.

Wholesale sales of fresh fruits or vegetables canned, preserved, frozen, processed, or dehydrated by the seller and sold to purchasers who transport the goods out of this state in the ordinary course of business are also subject to the lower B&O tax rate provided by RCW 82.04.260.

(ii) **Special B&O tax rate for manufacturing dairy products.** Effective September 20, 2001, a special lower B&O tax rate is provided by RCW 82.04.260 to persons manufacturing dairy products that, as of that date, are identified in 21 CFR, chapter 1, parts 131, 133, and 135. These products include milk, buttermilk, cream, yogurt, cheese, and ice cream, and also include by-products from the manufacturing of dairy products such as whey and casein. Thus, farmers and other persons manufacturing qualifying dairy products should report their manufacturing activity under the manufacturing dairy products B&O tax classification. This special rate does not apply, however, when dairy products are used merely as an ingredient or component of a manufactured product that is not a dairy product (e.g., milk-based soups or pizza).

The special B&O tax rate provided by RCW 82.04.260 also applies to persons selling manufactured dairy products to purchasers who transport the goods outside of this state in the ordinary course of business. Unlike the special B&O tax rate for certain wholesale sales of fresh fruits or vegetables (see subsection (5)(b)(i) of this rule), the special B&O tax rate for sales of qualifying dairy products does not require that the sales be made by the person who manufactured the dairy products nor that they be sales at wholesale.

(c) **Raising cattle for wholesale sale.** Persons who raise cattle for wholesale sale are exempt from B&O tax under RCW 82.04.330 provided that the cattle are held for at least sixty days prior to the sale. Persons who purchase and hold cattle for fewer than sixty days before reselling the cattle are not considered to be engaging in the normal activities of growing, raising, or producing livestock for sale.

For example, a feedlot operation purchases cattle and feeds them until they attain a good market condition. The cattle are then sold at wholesale. The feedlot operator is exempt

from B&O tax on wholesale sales of cattle if the cattle are held for at least sixty days while they are prepared for market. However, the feedlot operator is subject to wholesaling B&O tax on wholesale sales of cattle held for fewer than sixty days prior to the sale.

(d) **B&O tax exemptions available to farmers.** In addition to the exemption for wholesale sales of agricultural products, there are several other B&O tax exemptions available to farmers which are discussed in this subsection.

(i) **Growing, raising, or producing agricultural products owned by other persons.** RCW 82.04.330 exempts amounts received by a farmer for growing, raising, or producing agricultural products owned by others, such as custom feed operations.

For example, a farmer is engaged in the business of raising cattle owned by others (commonly referred to as "custom feeding"). After the cattle attain a good market condition, the owner then sells them. Amounts received by the farmer for custom feeding are exempt from B&O tax under RCW 82.04.330, provided that the cattle are held by the farmer for at least sixty days. Farmers are not considered to be engaging in the activity of raising cattle for sale unless the cattle are held for at least sixty days while the cattle are prepared for market. (See subsection (5)(c) of this rule.)

(ii) **Sales of hatching eggs or poultry.** RCW 82.04.410 exempts amounts received for the sale of hatching eggs or poultry by farmers producing hatching eggs or poultry, when these agricultural products are for use in the production for sale of poultry or poultry products.

(iii) **Processed hops shipped outside Washington for first use.** RCW 82.04.337 exempts amounts received by hop growers or dealers for hops shipped outside the state of Washington for first use, if those hops have been processed into extract, pellets, or powder in this state. However, the processor or warehouse of such products is not exempt on amounts charged for processing or warehousing such products.

~~((e) B&O tax credit to encourage alternatives to field burning. Persons who qualify for a sales or use tax exemption under RCW 82.08.840 or 82.12.840 (machinery, equipment, or structures that reduce emissions from field burning) also qualify for a B&O tax credit. RCW 82.04.4459. The amount of the credit is equal to fifty percent of the amount of costs expended for constructing structures or acquiring machinery and equipment for which an exemption was taken under RCW 82.08.840 or 82.12.840. (See subsection (6)(l) of this rule for information about the sales and use tax exemptions provided by RCW 82.08.840 and 82.12.840.) No application is necessary for the credit. Persons taking the credit must keep records necessary for the department to verify eligibility for the credit. This credit is subject to the following limitations:~~

~~(i) No credit may be taken in excess of the amount of B&O tax that would otherwise be due;~~

~~(ii) Credit may not be carried over to subsequent calendar years;~~

~~(iii) The credit must be claimed by the due date of the last tax return for the calendar year in which the payment is made;~~

~~(iv) Any unused credit expires;~~

~~(v) Refunds will not be given in place of credits;~~

~~(vi) The credit may not be claimed for expenditures that occurred before March 22, 2000; and~~

~~(vii) The credit expires on January 1, 2006-))~~

(6) **Retail sales and use tax exemptions.** This subsection provides information about a number of retail sales tax and corresponding use tax exemptions available to farmers and persons buying tangible personal property at retail from farmers. Some exemptions require the buyer to provide the seller with an exemption certificate. Readers should refer to subsection (7) of this rule for additional information regarding exemption certificates.

This subsection contains a number of examples which illustrate these exemptions. The examples identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(a) **Pollen.** Pollen is exempt from retail sales and use taxes. RCW 82.08.0277 and 82.12.0273.

(b) **Semen.** Semen used in the artificial insemination of livestock is exempt from retail sales and use taxes. RCW 82.08.0272 and 82.12.0267.

(c) **Feed for livestock at public livestock markets.** Feed to be consumed by livestock at a public livestock market is exempt from retail sales and use taxes. RCW 82.08.0296 and 82.12.0296.

(d) **Food products.** Food products for human consumption are exempt from retail sales and use taxes. RCW 82.08.0293 and 82.12.0293. This exemption also applies to the sale and/or use of livestock for personal consumption as food. For detailed information about food products that qualify for this exemption, refer to WAC 458-20-244.

(e) **Auction sales of farm property.** Retail sales and use taxes do not apply to tangible personal property, including household goods, which have been used in conducting a farm activity, if the property was purchased from a farmer at an auction sale held or conducted by an auctioneer upon a farm. RCW 82.08.0257 and 82.12.0258.

(f) **Poultry.** Poultry used in the production for sale of poultry or poultry products is exempt from retail sales and use taxes. RCW 82.08.0267 and 82.12.0262.

For example, a poultry hatchery produces poultry from eggs. The resulting poultry are sold to egg producers. These sales are exempt from retail sales taxes under RCW 82.08.-0267. (They are also exempt from B&O tax. See subsection (5)(d)(ii) of this rule.)

(g) **Leases of irrigation equipment.** Retail sales and use taxes do not apply to the lease or use of irrigation equipment, but only if:

(i) The lessor purchased the irrigation equipment for the purpose of irrigating land controlled by the lessor;

(ii) The lessor has paid retail sales or use tax upon the irrigation equipment;

(iii) The irrigation equipment is attached to the land in whole or in part; and

(iv) The irrigation equipment is leased to the lessee as an incidental part of the lease of the underlying land and is used solely on such land. RCW 82.08.0288 and 82.12.0283.

(h) **Beef and dairy cattle.** Beef and dairy cattle to be used by a farmer in producing an agricultural product are exempt from retail sales and use taxes. RCW 82.08.0259 and 82.12.0261.

For example, John operates a farm where he raises beef and dairy cattle for sale. He also raises other livestock for sale including hogs, sheep, and goats. All of John's sales of dairy and beef cattle for use on a farm are exempt from retail sales tax. However, John must collect retail sales tax on all retail sales of sheep, goats, and hogs unless the sales qualify for either the food products exemption described in subsection (6)(d) of this rule, or the exemption for sales of livestock for breeding purposes which is described immediately below.

(i) **Livestock for breeding purposes.** The sale or use of livestock, as defined in RCW 16.36.005, for breeding purposes where the animals are registered in a nationally recognized breed association is exempt from retail sales and use taxes. RCW 82.08.0259 and 82.12.0261. This exemption is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

For example, ABC Farms raises and sells quarter horses registered in the American Quarter Horse Association (AQHA). Quarter horses are generally recognized as a definite breed of horse, and the AQHA is a nationally recognized breed association. Therefore, ABC Farms is not required to collect sales tax on retail sales of quarter horses for breeding purposes, provided it receives a completed exemption certificate from the buyer.

(j) **Bedding materials for chickens.** Retail sales and use taxes do not apply to bedding materials used by farmers to accumulate and facilitate the removal of chicken manure provided that the farmer is raising chickens that are sold as agricultural products. RCW 82.08.920 and 82.12.920. The exemption became effective September 20, 2001, and is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

(i) **What are bedding materials?** "Bedding materials" are wood shavings, straw, sawdust, shredded paper, and other similar materials.

(ii) **Example.** Farmer raises chickens for use in producing eggs for sale. When the chickens are no longer useful for producing eggs, Farmer sells the chickens to food processors for soup and stew meat. Farmer purchases bedding materials used to accumulate and facilitate the removal of chicken manure. The purchases of bedding materials by Farmer are exempt from retail sales tax. The law merely requires that the chickens be sold as agricultural products. It is immaterial that Farmer primarily raises the chickens to produce eggs.

(k) **Propane or natural gas used to heat structures housing chickens.** Retail sales and use taxes do not apply to propane or natural gas used by farmers to heat structures used to house chickens. The propane or natural gas must be used exclusively to heat the structures, and the structures must be used exclusively to house chickens that are sold as agricultural products. RCW 82.08.910 and 82.12.910. The exemption became effective September 20, 2001, and is available only when the buyer provides the seller with an exemption

certificate in a form and manner prescribed by the department.

(i) **What are "structures"?** "Structures" are barns, sheds, and other similar buildings in which chickens are housed.

(ii) **Example.** Farmer purchases natural gas that is used to heat structures housing chickens. The natural gas is used exclusively to heat the structures, and the structures are used exclusively to house chickens. The chickens are used to produce eggs. When the chickens are no longer useful for producing eggs, Farmer sells the chickens to food processors for soup and stew meat. The purchase of natural gas by Farmer is exempt from retail sales tax. The law merely requires that the chickens be sold as agricultural products. It is immaterial that Farmer primarily houses these chickens to produce eggs.

(iii) **Example.** Farmer purchases natural gas that is used to heat structures used in the incubation of chicken eggs and structures used for washing, packing, and storing eggs. The natural gas used to heat these structures is not exempt from retail sales tax because the structures are not used exclusively to house chickens that are sold as agricultural products.

~~(1) (Machinery, equipment, and structures used to reduce emissions from field burning. RCW 82.08.840 and 82.12.840 provide a sales and use tax exemption for certain property used to reduce field burning of cereal grains and field and turf grass grown for seed, or to reduce air emissions resulting from such field burning. The retail sales tax exemption applies to sales of machinery and equipment, and to services rendered in respect to constructing structures, installing, constructing, repairing, cleaning, decorating, altering, or improving of structures or eligible machinery and equipment, and to sales of tangible personal property that becomes an ingredient or component of eligible structures or eligible machinery and equipment, if all of the requirements for the exemption listed below in this subsection are met. The sales tax exemption is effective March 22, 2000. The use tax exemption applies to the use of machinery and equipment, and of tangible personal property that becomes an ingredient or component of eligible machinery and equipment, if all of the requirements for the exemption listed below in this subsection are met. This use tax exemption is also effective March 22, 2000. The use tax exemption also applies to the use of services rendered in respect to installing, repairing, cleaning, altering, or improving of eligible machinery and equipment, if all of the requirements for the exemption are met. This component of the use tax exemption is effective June 1, 2002.~~

~~These exemptions expire January 1, 2006. Persons taking an exemption must keep records necessary for the department to verify eligibility for the exemption. Persons who have taken an exemption and then discover that they do not meet the requirements for the exemption are subject to a deferred sales tax or use tax liability. (For additional information about deferred sales tax and use tax, refer to subsection (4)(b) of this rule.)~~

~~(i) Majority use requirement. To qualify for an exemption, the machinery, equipment, or structure must be used more than half (50%) of the time:~~

~~(A) For gathering, densifying, processing, handling, storing, transporting, or incorporating straw or straw-based~~

~~products that results in a reduction in field burning of cereal grains and field and turf grass grown for seed; or~~

~~(B) To decrease air emissions resulting from field burning of cereal grains and field and turf grass grown for seed.~~

~~(ii) Exemption certificates. For the sales tax exemption, the buyer must provide the seller with an exemption certificate in a form and manner prescribed by the department.~~

~~(iii) Examples. The following examples illustrate this exemption:~~

~~(A) Farmer cultivates turf grass. Farmer purchases spray equipment. As an alternative to field burning, the fields in which the spray equipment is used must be sprayed five times instead of twice. The use of the spray equipment meets the requirement that the equipment be used more than half of the time to decrease air emissions resulting from field burning; therefore, the purchase of the spray equipment is exempt.~~

~~(B) Farmer, who performs custom baling, purchases a new baler for use in baling hay and straw. The purchase of the baler is exempt if it will be used more than half of the time to bale straw, which results in a reduction in field burning.~~

~~(C) Farmer purchases a new combine for use in harvesting wheat. In addition to cutting the stalks, separating the kernels from the chaff, and unloading the kernels, the combine also chops the residual chaff before discharging it onto the field. While the need for field burning may decrease because the smaller residue more readily decomposes, the purchase of the combine does not qualify for the exemption. The combine is not used more than half of the time to decrease air emissions from field burning.~~

~~(m)) Dairy nutrient management equipment and facilities. RCW 82.08.890 and 82.12.890 provide a sales and use tax exemption for persons operating dairy nutrient management equipment and facilities. The retail sales tax exemption applies to sales to eligible persons of services rendered in respect to operating, repairing, cleaning, altering, or improving of dairy nutrient management equipment and facilities, or to sales of tangible personal property that becomes an ingredient or component of the equipment and facilities. The sales tax exemption became effective July 13, 2001. The use tax exemption applies to the use by an eligible person of tangible personal property that becomes an ingredient or component of dairy nutrient management equipment and facilities. This use tax exemption also became effective July 13, 2001. The use tax exemption also applies to the use of labor and services rendered in respect to repairing, cleaning, altering, or improving eligible tangible personal property. This component of the use tax exemption is effective June 1, 2002. The sales and use tax exemption applies to sales made or to the use of tangible personal property or labor and services made after the dairy nutrient management plan is certified under chapter 90.64 RCW.~~

~~(i) These exemptions are available only if all of the following requirements are met:~~

~~(A) The equipment and facilities must be used exclusively for activities necessary to maintain a dairy nutrient management plan as required under chapter 90.64 RCW; and~~

~~(B) The buyer provides the seller with an exemption certificate in a form and manner prescribed by the department which must be retained in the seller's files. The department will provide an exemption certificate to an eligible person~~

upon application. A sample letter for use in applying for an exemption certificate can be obtained from the department as provided in subsection (7) of this rule.

(ii) For purposes of this exemption, the following definitions apply:

(A) "Eligible person" means a person licensed to produce milk under chapter 15.36 RCW who has a certified dairy nutrient management plan by December 31, 2003, as required by chapter 90.64 RCW.

(B) "Dairy nutrient management equipment and facilities" means machinery, equipment, and structures used exclusively in the handling and treatment of dairy manure, such as aerators, agitators, alley scrapers, augers, dams, gutter cleaners, loaders, lagoons, pipes, pumps, separators, and tanks. The term also includes tangible personal property that becomes an ingredient or component of the equipment and facilities, including repair and replacement parts.

(n) **Animal pharmaceuticals.** Certain animal pharmaceuticals are exempt from retail sales and use taxes when sold to, or used by, farmers or veterinarians. RCW 82.08.880 and 82.12.880. To qualify for the exemption, the animal pharmaceutical must be administered to an animal that is raised by a farmer for the purpose of producing an agricultural product for sale. Also, the animal pharmaceutical must be approved by the United States Department of Agriculture (USDA) or the United States Food and Drug Administration (FDA).

This exemption became effective August 1, 2001, and is available only when the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.

(i) **What is a "veterinarian"?** A "veterinarian" means a person who is licensed to practice veterinary medicine, surgery, or dentistry under chapter 18.92 RCW.

(ii) **How can I determine whether the FDA or USDA has approved an animal pharmaceutical?** The FDA and USDA have an established approval process set forth in federal regulations. The FDA maintains a list of all approved animal pharmaceuticals called the "*Green Book*." The USDA maintains a list of approved biotechnology products called the "*Veterinary Biologics Product Catalogue*." Pharmaceuticals that are not on either of these lists have not been approved and are not eligible for the exemption.

(iii) **Example.** Dairy Farmer purchases sterilizing agents. The sterilizing agents are applied to the equipment and facilities where Dairy Farmer's cows are milked. Dairy Farmer also purchases teat dips, antiseptic udder washes, and salves that are not listed in either the FDA's *Green Book* of approved animal pharmaceuticals or the USDA's *Veterinary Biologics Product Catalogue* of approved biotechnology products. The purchases of sterilizing agents are not exempt as animal pharmaceuticals because the sterilizing agents are not administered to animals. The teat dips, antiseptic udder washes, and salves are likewise not exempt because they have not been approved by the FDA or USDA. This is the case even if these products are approved by the United States Environmental Protection Agency or any other governmental agency.

(iv) **What type of animal must the pharmaceutical be administered to?** As noted above, the exemption is limited to the sale and/or use of animal pharmaceuticals administered

to an animal that is raised by a farmer for the purpose of producing an agricultural product for sale. The conditions under which a farmer may purchase tax-exempt animal pharmaceuticals are similar to those under which a farmer may purchase feed at wholesale. Both types of purchases require that the particular product be sold to a farmer (or a veterinarian in the case of animal pharmaceuticals), and that the product be given or administered to an animal raised by a farmer for the purpose of producing an agricultural product for sale.

(v) **Examples of animals raised for the purpose of producing agricultural products for sale.** The animal pharmaceutical exemption is available in the following nonexclusive list of examples because the animals are being raised for the purpose of producing an agricultural product for sale, presuming all other requirements for the exemption are met:

(A) Horses, cattle, or other livestock raised by a farmer for sale;

(B) Cattle raised by a farmer for the purpose of slaughtering, if the resulting products are sold;

(C) Milk cows raised and/or used by a dairy farmer for the purpose of producing milk for sale;

(D) Horses raised by a farmer for the purpose of producing foals for sale;

(E) Sheep raised by a farmer for the purpose of producing wool for sale; and

(F) "Private sector cultured aquatic products" as defined by RCW 15.85.020 (e.g., salmon, catfish, and mussels) raised by an aquatic farmer for the purpose of sale.

(vi) **Examples of animals that are not raised for the purpose of producing agricultural products for sale.** The animal pharmaceutical exemption is not available in the following nonexclusive list of examples because the animals are not being raised for the purpose of producing an agricultural product for sale:

(A) Cattle raised for the purpose of slaughtering if the resulting products are not produced for sale;

(B) Sheep and other livestock raised as pets;

(C) Dogs or cats, whether raised as pets or for sale. Dogs and cats are pet animals; therefore, they are not considered to be agricultural products. (See subsection (3) of this rule); and

(D) Horses raised for the purpose of racing, showing, riding, and jumping. However, if at some time in the future the horses are no longer raised for racing, showing, riding, or jumping and are instead being raised by a farmer for the purpose of producing foals for sale, the exemption will apply if all other requirements for the exemption are met.

(vii) **Do products that are used to administer animal pharmaceuticals qualify for the exemption?** Sales of products that are used to administer animal pharmaceuticals (e.g., syringes) do not qualify for the exemption, even if they are later used to administer a tax-exempt animal pharmaceutical. However, sales of tax-exempt animal pharmaceuticals contained in a product used to administer the animal pharmaceutical (e.g., a dose of a tax-exempt pharmaceutical contained in a syringe or cotton applicator) do qualify for the exemption.

(7) **Sales tax exemption certificates.** As indicated in subsection (6) of this rule, certain sales of tangible personal property and retail services either to or by farmers are exempt from retail sales tax. Except as provided below, for those

exemptions that require the buyer to provide the seller with an exemption certificate at the time of sale, farmers may use the department's "Farmers' Retail Sales Tax Exemption Certificate" or another certificate with substantially the same information as it relates to the claimed exemption. Sellers must retain a copy of the exemption certificate in their files. Without proper documentation, sellers are liable for payment of the retail sales tax on sales claimed as exempt.

The Farmers' Retail Sales Tax Exemption Certificate cannot be used for the dairy nutrient management exemption discussed in subsection (6)(m) of this rule. However, as noted above, the department will provide eligible persons, upon application, with an exemption certificate for this exemption. The Farmers' Retail Sales Tax Exemption Certificate and a sample letter for use in applying for the Dairy Nutrient Management Exemption Certificate can be obtained by calling the department's taxpayer information center at 1-800-647-7706. These documents can also be downloaded from the department's web site at <http://dor.wa.gov/>.

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.

WSR 05-23-007

EMERGENCY RULES

ENVIRONMENTAL HEARINGS OFFICE

(Pollution Control Hearings Board)

[Filed November 3, 2005, 2:35 p.m., effective November 3, 2005]

Effective Date of Rule: Immediately.

Purpose: The 2004 legislature passed SSB 5590, amending chapter 43.21B RCW (chapter 204, Laws of 2004). The legislation modified the basis for calculating the time period for appeals to the Pollution Control Hearings Board (PCHB). The Environmental Hearings Office previously adopted a rule amendment to conform its rules to the legislation, but did not include one rule subsection that also needed to be amended.

Citation of Existing Rules Affected by this Order: Amending WAC 371-08-555.

Statutory Authority for Adoption: RCW 43.21B.170 (PCHB rule-making authority), chapter 34.05 RCW.

Other Authority: RCW 43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310 (sections amended by SSB 5590).

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: See Purpose above.

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 1, 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: November 1, 2005.

Bill Clarke
Director

AMENDATORY SECTION (Amending WSR 97-19-064, filed 9/15/97, effective 10/16/97)

WAC 371-08-555 Time for filing petitions for review to superior court. An appeal of a final board order is called a petition for review. A petition for review must be filed with superior court within thirty days of the date ((~~that the board issues its~~) of receipt of the final order or decision. The petitioner shall file a copy of the petition for review to superior court with the board and shall serve all parties of record. All appeals must first be filed in superior court even if direct review to the court of appeals will be sought.

WSR 05-23-014

EMERGENCY RULES

DEPARTMENT OF

FISH AND WILDLIFE

[Order 05-258—Filed November 4, 2005, 1:26 p.m., effective November 4, 2005]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-47-31100D and 220-47-41100E; and amending WAC 220-47-311 and 220-47-411.

Statutory Authority for Adoption: RCW 77.12.240.

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 implements a comanager agreement to close the Area 12C fishery to insure that the nontreaty harvestable share is not exceeded. The regulation also implements an opening in Area 8 based on a comanager agreed in-season update to the Skagit River chum run size of at least 90,000 chum which provides approximately 30,000 harvestable chum. There is insufficient time to promulgate 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 2, 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: November 4, 2005.

J. P. Koenings
Director
by Larry Peck

NEW SECTION

WAC 220-47-31100E Purse seine—Open periods. Notwithstanding the provisions of Chapter 220-47-311 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Areas 7 and 7A:

Purse Seines - Open in Area 7 and 7A to the purse seine vessels using the 5-inch strip during the following hours and dates, provided it is unlawful to retain Chinook or Coho salmon, and any Chinook or Coho salmon caught must be released immediately.

If fishing with an operating recovery box:

7:00 a.m. to 5:00 p.m. 11/4, 11/7, 11/8, 11/9, 11/10, 11/11

If fishing without an operating recovery box:

7:00 a.m. to 2:30 p.m. 11/4, 11/7, 11/8, 11/9, 11/10, 11/11.

(2) Areas 8:

Purse Seines - Open in Area 8 to the purse seine vessels using the 5-inch strip during the following hours and dates, provided it is unlawful to retain Chinook or Coho salmon, and any Chinook or Coho salmon caught must be released immediately.

7:00 a.m. to 5:00 p.m. 11/7, 11/9

(3) Area 12C - 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.

NEW SECTION

WAC 220-47-41100F Gill net—Open periods. Notwithstanding the provisions of Chapter 220-47-411 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, mesh size, areas, species restrictions, notification, and land-

ing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Area 6D open for Skiff Gill Nets using 5 inch mesh from 7:00 a.m. to 7:00 p.m. on 11/4. Nets must be attended at all times and Chinook and Chum salmon must be released by cutting the meshes ensnaring the fish.

(2) Area 7 and 7A open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 7:00 p.m. 11/4, 11/7, 11/8, 11/9, 11/10, 11/11.

(3) Area 8 open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 7:00 p.m. 11/7, 11/8, 11/9, 11/10, 11/11.

(4) Area 12C - Closed.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 220-47-31100D Purse seine—Open periods. (05-255)

WAC 220-47-41100E Gill net—Open periods. (05-256)

WSR 05-23-025

EMERGENCY RULES

DEPARTMENT OF FISH AND WILDLIFE

[Order 05-259—Filed November 7, 2005, 11:46 a.m., effective November 9, 2005, 7:00 a.m.]

Effective Date of Rule: November 9, 2005, 7:00 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-04000P; and amending WAC 220-52-040.

Statutory Authority for Adoption: RCW 77.12.047.

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 state may not authorize commercial shellfish harvests absent agreed planning or compliance with a process. The provisions of this rule are in conformity with agreed plans with applicable tribes which have been entered as required by court order. The pot limit for the commercial crab fishery in the Puget Sound licensing district is to maintain commercial harvest allocation plans. There is insufficient time to promulgate 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 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: November 7, 2005.

J. P. Koenings
Director

NEW SECTION

WAC 220-52-04000Q Commercial crab fishery— Lawful and unlawful gear, methods, and other unlawful acts. Notwithstanding the provisions of WAC 220-52-040, effective immediately until further notice, it is unlawful for any person to fish for crabs for commercial purposes with more than 50 pots per license, per buoy tag number in Marine Fish Shellfish Catch Reporting Areas 24A, 24B, 24C, 24D, and 26A-E. The remaining 50 buoy tags per license must be onboard the designated vessel and available for inspection in the pot-limited areas.

REPEALER

The following section of the Washington Administrative Code is repealed effective 7:00 a.m. November 9, 2005:

WAC 220-52-04000P	Commercial crab fishery— Lawful and unlawful gear, methods, and other unlawful acts. (05-253)
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**WSR 05-23-032
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 05-261—Filed November 8, 2005, 1:54 p.m., effective November 8, 2005]

Effective Date of Rule: Immediately.

Purpose: Amend wildlife rules.

Citation of Existing Rules Affected by this Order: Amending WAC 232-12-315.

Statutory Authority for Adoption: RCW 77.12.240.

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: Weather conditions have forced deer and elk to lower elevations, where harassment by dogs has been observed. In order to protect deer and elk, it is necessary to allow officers to take dogs into custody, and if

necessary destroy dogs. There is insufficient time to promulgate 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: November 8, 2005.

J. P. Koenings
Director

NEW SECTION

WAC 232-12-31500N Emergency for custody or destruction of dogs harassing deer or elk. Effective immediately until further notice, an emergency is declared in the following Washington State Counties and it is lawful for Fish and Wildlife Officers to take into custody or destroy, if necessary, any dog that is pursuing, harassing, attacking or killing deer or elk.

- (1) Chelan County
- (2) Douglas County
- (3) Ferry County
- (4) Kitittas County
- (5) Okanogan County
- (6) Pend Oreille County
- (7) Spokane County
- (8) Stevens County
- (9) Yakima County

Reviser's note: The spelling 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.

**WSR 05-23-034
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 05-260—Filed November 8, 2005, 3:47 p.m., effective November 12, 2005, 12:01 p.m.]

Effective Date of Rule: November 12, 2005, 12:01 p.m.

Purpose: Amend personal use rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-36000M; and amending WAC 220-56-360.

Statutory Authority for Adoption: RCW 77.12.047.

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 promulgate 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: November 8, 2005.

J. P. Koenings
Director

NEW SECTION

WAC 220-56-36000M 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 p.m. November 12 through 11:59 p.m. November 14, 2005, razor clam digging is allowed in Razor Clam Area 1 and Razor Clam Area 2. Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

2. Effective 12:01 p.m. November 12 through 11:59 p.m. November 14, 2005, razor clam digging is allowed in that portion Razor Clam Area 3 that is between the Grays Harbor North Jetty and the southern boundary of the Quinault Indian Nation (Grays Harbor County) and that portion of Razor Clam Area 3 that is between Olympic National Park South Beach Campground access road (Kalaloch area, Jefferson County) and Browns Point (Kalaloch area, Jefferson County). Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

3. Effective 12:01 p.m. November 15 through 11:59 p.m. November 15, 2005, razor clam digging is allowed in Razor Clam Area 2 and that portion of Razor Clam Area 3 that is between the Copalis River (Grays Harbor County) and the southern boundary of the Quinault Indian Reservation (Grays Harbor County). Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

4. 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 a.m. November 16, 2005:

WAC 220-56-36000M Razor clams—Areas and seasons.

WSR 05-23-060

EMERGENCY RULES

DEPARTMENT OF FISH AND WILDLIFE

[Order 05-263—Filed November 10, 2005, 3:53 p.m., effective November 11, 2005]

Effective Date of Rule: November 11, 2005.

Purpose: Amend personal use rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900Y.

Statutory Authority for Adoption: RCW 77.12.047.

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: Hatchery egg take is expected to be met and surplus coho are available for harvest. There is insufficient time to promulgate 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 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: November 10, 2005.

Ronald McQueen
for Jeff Koenings
Director

REPEALER

The following section of the Washington Administrative Code is repealed effective November 11, 2005:

WAC 232-28-61900Y Exceptions to statewide rules—Elochoman River. (05-237)

WSR 05-23-061
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 05-262—Filed November 10, 2005, 3:54 p.m., effective November 14, 2005, 7:00 a.m.]

Effective Date of Rule: November 14, 2005, 7:00 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-47-31100E and 220-47-41100F; and amending WAC 220-47-311 and 220-47-411.

Statutory Authority for Adoption: RCW 77.12.047.

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 implements a comanager agreement to close Areas 12, 12B and 12C fishery to insure that the nontreaty harvestable share is not exceeded. This regulation implements an opening in Area 8 based on a comanager agreed in-season update to the Skagit River chum run size of at least 90,000 chum which provides approximately 30,000 harvestable chum. Catch and effort has been low to date (two landings 538 chum) leaving sufficient harvestable numbers of chum in the nontreaty share to expand the fishery. There is insufficient time to promulgate 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 2, 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: November 10, 2005.

Ronald McQueen
for Jeff Koenings
Director

NEW SECTION

WAC 220-47-31100F Purse seine—Open periods. Notwithstanding the provisions of Chapter 220-47-311 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Areas 8:

Purse Seines - Open in Area 8 to the purse seine vessels using the 5-inch strip during the following hours and dates, provided it is unlawful to retain Chinook or Coho salmon, and any Chinook or Coho salmon caught must be released immediately.

7:00 a.m. to 5:00 p.m. 11/14, 11/16, 11/21, 11/22

(2) Areas 12, 12B and 12C - 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.

NEW SECTION

WAC 220-47-41100G Gill net—Open periods. Notwithstanding the provisions of Chapter 220-47-411 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, mesh size, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Area 8 open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 7:00 p.m. 11/14, 11/15, 11/16, 11/17, 11/18, 11/21, 11/22, 11/23, 11/24, 11/25.

(2) Areas 12, 12B and 12C - Closed.REPEALER

The following sections of the Washington Administrative Code are repealed effective 7:00 a.m. November 14, 2005:

WAC 220-47-31100E Purse seine—Open periods. (05-258)

WAC 220-47-41100F Gill net—Open periods. (05-258)

WSR 05-23-080
EMERGENCY RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed November 15, 2005, 4:27 p.m., effective November 15, 2005]

Effective Date of Rule: Immediately.

Purpose: The department is amending WAC 388-825-254 WAC [Service] need level rates and 388-825-228 How can short-term intervention services through the family support opportunity program help my family?, to implement section 205 (1)(e), chapter 518, Laws of 2005, the budgeted allotment for the vendor rate increase (VRI) and the individual provider hourly rate increase for fiscal year 2006 and fiscal year 2007.

Citation of Existing Rules Affected by this Order: Amending WAC 388-825-254 and 388-825-228.

Statutory Authority for Adoption: RCW 71A.12.030.

Other Authority: ESSB 6090 2005-07 Conference budget (section 205 (1)(a), chapter 518, Laws of 2005).

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 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: Chapter 518, Laws of 2005 raised these payment rates effective July 1, 2005. Emergency rules are needed to assure that vulnerable clients continue to receive services essential to their health and welfare without disruption, and vendors providing services can be paid at the rates as increased by the legislature. The department has filed a notice of intent to adopt permanent rules, as WSR 05-15-094. The department plans to file the CR-102 proposed rule-making notice for permanent adoption shortly.

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: November 14, 2005.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 04-22-068, filed 10/29/04, effective 11/29/04)

WAC 388-825-228 How can short-term intervention services through the family support opportunity program help my family? If your family is eligible, you may receive up to one thousand (~~four~~) five hundred dollars per year in short-term intervention, funding to pay for necessary services not otherwise available.

(1) Short-term intervention funds can be authorized for a one-time only need or for an episodic service need that occurs over a one-year period.

(2) Short-term intervention funding cannot be used for basic subsistence such as food or shelter but is available for those specialized costs directly related to and resulting from your child's disability.

AMENDATORY SECTION (Amending WSR 04-22-068, filed 10/29/04, effective 11/29/04)

WAC 388-825-254 Service need level rates. (1) The department shall base periodic service authorizations on:

(a) Requests for family support services described in WAC 388-825-252 (2) and (5);

(b) Service need levels. The amount of SSP (state supplementary payment) available to an individual will be included when calculating the monthly allocation of state family support dollars.

(c) Availability of family support funding;

(d) Authorization by a review committee, in each regional office, which reviews each request for service;

(e) The amounts designated in subsection (2)(a) through (d) of this section are subject to periodic increase if vendor rate increases are mandated by the legislature.

(2) Service need level lid amounts as follows:

(a) Clients designated for service need level one (WAC 388-825-256) may receive up to (~~one thousand one hundred ninety-eight dollars per month~~) fifteen thousand four hundred dollars per year or (~~two thousand four hundred sixty-two dollars~~) twenty-nine thousand four hundred dollars per (~~month~~) year if the individual requires licensed nursing care in the home:

(i) If an individual is receiving funding through Medicaid Personal Care or other DSHS in-home residential support, the maximum payable through family support shall be (~~five hundred thirty-one~~) six thousand eight hundred dollars per (~~month~~) year;

(ii) If the combined total of family support services at this maximum plus in-home support is less than (~~one~~) six thousand (~~one~~) eight hundred (~~ninety-eight~~) dollars additional family support can be authorized to bring the total to (~~one~~) six thousand (~~one~~) eight hundred (~~ninety-eight~~) dollars per year.

(b) Clients designated for service need level two (WAC 388-825-256) may receive up to (~~four hundred seventy-two~~) six thousand dollars per (~~month~~) year if not receiving funding through Medicaid Personal Care:

(i) If an individual is receiving funds through Medicaid personal care or other DSHS in-home residential support service, the maximum receivable through family support shall be (~~two hundred sixty-five~~) three thousand four hundred dollars per (~~month~~) year;

(ii) If the combined total of family support services at this maximum plus in-home support is less than (~~four hundred seventy-two~~) six thousand dollars, additional family support can be authorized to bring the total to (~~four hundred seventy-two~~) six thousand dollars per year.

(c) Clients designated for service need level three (WAC 388-825-256) may receive up to (~~two hundred sixty-five~~)

~~dollars per month~~) three thousand four hundred dollars per year provided the individual is not receiving Medicaid personal care. If the individual is receiving Medicaid personal care or other DSHS in-home residential support service, the maximum receivable through family support shall be one ~~((hundred thirty three dollars per month))~~ thousand seven hundred dollars per year; and

(d) Clients designated for service level four (WAC 388-825-256) may receive up to one ~~((hundred thirty three dollars per month))~~ thousand seven hundred dollars per year family support services.

(3) The department shall authorize family support services contingent upon the applicant providing accurate and complete information on disability-related requests.

(4) The department shall ensure service authorizations do not exceed maximum amounts for each service need level based on the availability of funds.

WSR 05-23-114
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 05-264—Filed November 18, 2005, 3:03 p.m., effective November 19, 2005, 7:00 a.m.]

Effective Date of Rule: November 19, 2005, 7:00 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order:
Repealing WAC 220-47-31100F and 220-47-41100G; and amending WAC 220-47-311 and 220-47-411.

Statutory Authority for Adoption: RCW 77.12.047.

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 implements a comanager agreement to close the purse seine fishery and reduce the gill net fishery by two days in Area 8A and to close the Area 10 and 11 gill net fishery to insure that the nontreaty harvestable share is not exceeded. There is insufficient time to promulgate 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 2, 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: November 18, 2005.

Evan Jacoby
for Jeff Koenings
Director

NEW SECTION

WAC 220-47-31100G Purse seine—Open periods. Notwithstanding the provisions of Chapter 220-47-311 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Areas 8:

Purse Seines - Open in Area 8 to the purse seine vessels using the 5-inch strip during the following hours and dates, provided it is unlawful to retain Chinook or Coho salmon, and any Chinook or Coho salmon caught must be released immediately.

7:00 a.m. to 5:00 p.m. 11/21, 11/22

(2) Areas 8A - Closed.

(3) Areas 12, 12B and 12C - Closed.

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.

NEW SECTION

WAC 220-47-41100H Gill net—Open periods. Notwithstanding the provisions of Chapter 220-47-411 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, mesh size, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Area 8 open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 6:00 p.m. 11/21, 11/22, 11/23, 11/24, 11/25.

(2) Area 8A open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 6:00 p.m. 11/22, and closed on 11/24 and 11/25.

(3) Areas 10 and 11 - Closed.

(4) Areas 12, 12B and 12C - Closed

REPEALER

The following sections of the Washington Administrative Code are repealed effective 7:00 a.m. November 19, 2005:

WAC 220-47-31100F Purse seine—Open periods. (05-262)

WAC 220-47-41100G Gill net—Open periods. (05-262)

WSR 05-23-115
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 05-265—Filed November 18, 2005, 3:04 p.m., effective November 18, 2005]

Effective Date of Rule: Immediately.

Purpose: Amend personal use rules.

Citation of Existing Rules Affected by this Order:
 Repealing WAC 220-56-11600A.

Statutory Authority for Adoption: RCW 77.12.047.

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: Permanent rules are being promulgated and this interim rule will cover the period until the permanent rules take effect. There is insufficient time to promulgate 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: November 18, 2005.

Evan Jacoby
 for Jeff Koenings
 Director

NEW SECTION

WAC 220-56-11600B Saltwater hook rules. Notwithstanding the provisions of WAC 220-56-116, effective immediately until further notice:

(1) It is unlawful to fish for salmon in Catch Record Card areas 1 through 4 except with single point barbless hooks, other than in the Westport and Ocean Shores boat basins, which have special terminal gear restrictions as provided for in WAC 220-56-123.

(2) It is unlawful to fish in Catch Record Card Areas 5 through 13 using barbed hooks, or to possess fish taken from Catch Record Card Areas 5 through 13 while fishing with barbed hooks, except that it is lawful to use barbed hooks with forage fish jigger gear and to possess forage fish taken with barbed hooks on forage fish jigger gear.

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 220-56-11600A Saltwater hook rules. (05-155)

WSR 05-23-116
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 05-266—Filed November 18, 2005, 4:02 p.m., effective November 28, 2005]

Effective Date of Rule: November 28, 2005.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order:
 Amending WAC 220-52-046.

Statutory Authority for Adoption: RCW 77.12.047.

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 crabmeat pick-out rate has not achieved the 23% level necessary to open the fishery. The season will be delayed until this level is achieved. There is insufficient time to promulgate 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: November 21, 2005.

Evan Jacoby
 for Jeff Koenings
 Director

NEW SECTION

WAC 220-52-04600E Coastal crab seasons. Notwithstanding the provisions of WAC 220-52-046, effective

November 28, 2005, until further notice it is unlawful to set or pull commercial crab gear in or from Washington coastal waters, the Pacific Ocean, Grays Harbor, Willapa Bay, or the Columbia River.

WSR 05-23-127

EMERGENCY RULES

**DEPARTMENT OF ARCHAEOLOGY
AND HISTORIC PRESERVATION**

[Filed November 21, 2005, 11:23 a.m., effective November 21, 2005]

Effective Date of Rule: Immediately.

Purpose: The Office of Archaeology and Historic Preservation becomes an independent Department of Archaeology and Historic Preservation (DAHP) effective July 24, 2005, per chapter 333, Laws of 2005. The emergency adoption of these rules will enable the new department to continue operating and serving constituents without interruption or delay while the department completes the permanent rule-making process. Emergency rules were previously adopted on July 25, 2005. DAHP is in the process of adopting permanent rules and just held three public hearings. We expect to adopt those rules on or about December 6. These emergency rules will expire upon the effective date of the permanent rules.

Citation of Existing Rules Affected by this Order: Amending chapters 25-48, 25-46, 25-42, and 25-12 WAC.

Statutory Authority for Adoption: RCW 27.34.220, 27.53.140, 43.21C.120.

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 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: As of July 24, 2005, a new state Department of Archaeology and Historic Preservation is formed. Current rules for the Office of Archaeology and Historic Preservation must be amended to implement the statutes creating and authorizing the new department. Emergency rules are necessary to allow the new department to exercise its statutory authority while permanent rules are adopted. Emergency rules were previously adopted on July 25, 2005. DAHP is in the process of adopting permanent rules and just held three public hearings. We expect to adopt those rules on or about December 6. These emergency rules will expire upon the effective date of the 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 58, 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 58, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 12, Amended 44, Repealed 1.

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: November 21, 2005.

Allyson Brooks, Ph.D.

State Historic

Preservation Officer

AMENDATORY SECTION (Amending Order 6, filed 5/30/80)

WAC 25-12-020 Definitions. (1) Public records. "Public record" includes 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.

(2) Writing. Writing means handwriting, typewriting, printing, photostating, and every other means of recording, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums and other documents.

(3) Advisory council on historic preservation. The advisory council on historic preservation is the council established pursuant to RCW ((43-51A-110)) 27.34.250 through 27.34.280, and is hereinafter referred to as the "council."

(4) ((Office)) Department of archaeology and historic preservation. The ((office)) department of archaeology and historic preservation is that agency established pursuant to RCW ((43-51A-030)) 27.34.210, and is hereinafter referred to as the "((office)) department." The ((office)) department provides staff for the council.

(5) State historic preservation officer. The state historic preservation officer is that person appointed pursuant to RCW ((43-51A-060)) 27.34.210 to implement the purposes of that chapter, and hereinafter referred to as "SHPO."

(6) ((Professional public. The professional public includes individuals, government agencies, or private businesses which, as a means of providing livelihood or fulfilling legal obligations, are available to prepare nominations to the state and national registers of historic places. The professional public is further identified in WAC 25-12-050(2).))

(7) Nonprofessional public. The nonprofessional public includes individuals, organizations, government agencies, or private businesses not identified as provided in WAC 25-12-050(2-)) State register. These are buildings, sites, structures, objects or districts which are listed on the Washington Heritage Register of Historic Places, and is hereinafter referred to as the "state register."

AMENDATORY SECTION (Amending Order 6, filed 5/30/80)

WAC 25-12-030 Description of purpose and staff.

The council is of an advisory nature for the governor and the office. Financial and administrative services including those related to budgeting, accounting, financial reporting, personnel and procurement shall be provided to the council by the ~~((office))~~ department. The administrative location of the council and that of its staff is at the ~~((Office))~~ Department of Archaeology and Historic Preservation, ((411 West 21st Avenue)) P.O. Box 48343, Olympia, Washington 98504-8343. The council meets on the last Friday of every ~~((third))~~ fourth month unless otherwise agreed by a majority of the members of the council.

AMENDATORY SECTION (Amending Order 6, filed 5/30/80)

WAC 25-12-050 Procedures—Nominations ~~((proposed by the professional public))~~ to state and/or National Register. (1) ~~Any member(s) of the ((professional)) public may submit ((completed)) nominations directly to the SHPO for review and evaluation. The opportunity to review drafts of the nomination is ((encouraged)) required~~ to promote the rapid handling of the complete document.

(2) The SHPO shall prepare and maintain a list of ~~((the))~~ qualified professional ((public to identify those who can submit nominations under this section and for referrals as provided in WAC 25-12-040(3))) consultants who meet and/or exceed the Secretary of the Interior's Historic Preservation Professional Qualification Standards (48 FR 44716). Inclusion on the list shall be limited to those individuals~~((governmental agencies, or private businesses that))~~ who have demonstrated an ability to prepare nominations consistent with WAC 25-12-060(3) and 36 CFR Part 60.

(3) Any nomination developed under this section shall be treated as outlined in WAC 25-12-060.

AMENDATORY SECTION (Amending Order 6, filed 5/30/80)

WAC 25-12-060 ~~((Procedures.))~~ Nomination—Process. The following is a statement of the general course and method followed in the nomination and designation of historic properties to the state or National Register.

(1) The SHPO shall not schedule any nomination for review by the council if the nomination is poorly prepared, incomplete in any manner, or ~~((treats))~~ for a property that does not appear to be eligible for the state or national registers of historic places. The agenda shall be established by the SHPO in cooperation and consultation with the chairperson of the council.

(2) The SHPO may return any nomination to the originator for correction, or for additional information of any kind required for completion and accuracy.

(3) The SHPO shall prepare and distribute standards of acceptability for nominations, ~~((such standards to be not more restrictive than those promulgated by the Heritage Conservation and Recreation Service for the conduct of the))~~ for both the state and National Register programs.

(4) The SHPO will notify the owner of the property and the most appropriate local jurisdiction or government of the date, time, and location of the review of the nomination by the council, such notification to occur not more than ~~((45))~~ 75 days nor less than 30 days prior to the scheduled meeting date.

(5) In the nomination of an historic district to the state or National Register where more than 50 property owners are involved, notification shall occur through a notice in a local newspaper of general circulation. The general notice shall be published at least 30 days, but no more than 75 days before the scheduled meeting date. In addition to formal legal notice, proponents of historic districts shall follow an additional notification process to be outlined by the council. For districts of less than 50 property owners, individual notification of the pending nomination will be sent.

(6) ~~((Federally affected properties which have been determined under federal regulations to be ineligible for the National Register will be referred to the SHPO to be evaluated for inclusion on the State Register without referring the nomination to the council for further consideration.~~

~~((7))~~ Following council review, the council will transmit its recommendations to the SHPO. When the council has reviewed and approved a procedurally correct nomination and has forwarded it to the SHPO, the SHPO will submit the nomination to the National Register, unless, in his opinion, the SHPO considers the property one which does not meet the National Register criteria. A decision to submit a nomination to the National Register is within the discretion of the SHPO. All council determinations regarding nominations are advisory only. In each instance that the SHPO determines a nomination to be ineligible for inclusion in the National Register, he/she shall notify the council of this action at its next regularly scheduled meeting.

~~((8))~~ (7) The SHPO shall act upon all nominations reviewed by the council prior to its next regularly scheduled meeting, and shall report those actions to the council at that meeting.

(8) The council alone will determine if properties are eligible for listing on the state register at its regularly scheduled meetings.

AMENDATORY SECTION (Amending Order 6, filed 5/30/80)

WAC 25-12-070 Public records available. All public records of the council, as defined in WAC 25-18-020, are available for public inspection ~~((any and))~~ and copying at the ~~((office))~~ department location described in WAC 25-12-030, pursuant to WAC 25-18-040 through 25-18-130, except as otherwise provided by RCW 42.17.310.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 25-12-040

Procedures—Nominations proposed by nonprofessional public.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-010 Definitions. The definitions of the words and terms of WAC 197-11-700 through 197-11-799 are made a part of this chapter along with the following additions:

(1) "~~((Office))~~ Department" means the Washington state ~~((office))~~ department of archaeology and historic preservation.

(2) "Director" means the state historic preservation ~~((office))~~ department as provided for in chapter 27.34 RCW.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-020 Impact of SEPA on ~~((office))~~ department. The ~~((office))~~ department fully endorses the intent and purpose of SEPA and will make every effort to implement and fulfill the intent and requirements of SEPA and the SEPA rules. The capacity of the ~~((office))~~ department to provide full service to the public and other agencies is limited by funds and ~~((manpower))~~ staffing. The ~~((office))~~ department will make every effort to implement SEPA in the best manner possible with the resources available.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-030 Purpose. (1) The purpose of this chapter is to implement chapter 197-11 WAC, SEPA rules, as applicable to the ~~((office))~~ department.

(2) These policies and procedures are developed to implement SEPA in a manner which reduces duplication, establishes effective and uniform guidelines, encourages public involvement, and promotes certainty with respect to the requirements of the act.

(3) These policies and procedures are not intended to cover compliance by the ~~((office))~~ department with respect to the National Environmental Policy Act of 1969 (NEPA). In those situations where the ~~((office))~~ department is required by federal law or regulations to perform some element of compliance with NEPA, compliance will be governed by the applicable federal statute and regulations.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-040 Scope and coverage of this chapter.

(1) It is the intent of the ~~((office))~~ department that compliance with this chapter shall constitute complete procedural compliance with SEPA for all actions as defined in WAC 197-11-704.

(2) This chapter applies to all actions as defined in WAC 197-11-704 and applies to all activities of the ~~((office))~~ department. Furthermore, although these guidelines normally do not apply to actions of the ~~((office))~~ department exempted under WAC 197-11-800, the ~~((office))~~ department accepts the responsibility of attempting to follow the intent of SEPA and its decision making process for exempt actions.

(3) To the fullest extent possible, the ~~((office))~~ department shall integrate procedures required by this chapter with existing planning and permitting procedures. These procedures should be initiated early, and undertaken in conjunction with other governmental operations to avoid lengthy time delays and unnecessary duplication of effort.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-050 Agency policy—Substantive authority and mitigation. (1) ~~((The overriding))~~ It is the policy of the ~~((office is))~~ department to avoid or mitigate adverse environmental impacts which may result from its decisions. ~~((This policy results from:~~

~~(a) The legislated duty of the office to preserve and protect the heritage of the state in a manner that does not impair the resource (RCW 27.34.200); and~~

~~(b) Recognition of the fact that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment (RCW 43.21C.020(31));)~~

(2) If an action is subject to SEPA, including an activity or activities requiring a permit from the ~~((office))~~ department, and is reasonably likely to have an adverse environmental impact as identified in an environmental document, the ~~((office))~~ department will:

(a) Require reasonable alternatives to the action and/or proven measures which will mitigate or eliminate the identified potential adverse impact, and make such alternatives and/or proven mitigation measures conditions of the ~~((office's))~~ department's approval; or

(b) Deny the proposal if significant adverse impacts as identified in a final or supplemental environmental impact statement prepared under chapter 197-11 WAC are not satisfactorily avoided or mitigated by proven techniques.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-060 Timing of the SEPA process. (1) The environmental review process will normally begin upon receipt of a determination of nonsignificance (DNS), determination of significance (DS), scoping notice, or draft environmental impact statement (DEIS) when another agency is the lead agency. When the ~~((office))~~ department is the lead agency for nonagency actions, review will begin upon receipt of a complete permit application and a complete environmental checklist. The department typically requests plans, a location map, and a project description, pursuant to WAC 197-11-100, but may request additional information of the applicant as needed to make a threshold determination. The applicant should submit this information with the checklist so that review may proceed expeditiously. For agency actions, environmental review will normally begin when the proposed action is sufficiently developed to allow preliminary decisions.

(2) Upon written request of an applicant, preliminary environmental review will be conducted prior to receipt of detailed project plans and specifications. In such instances,

the applicant shall submit information judged by the ((office)) department to be sufficient to make a preliminary review.

(3) The preliminary review will be advisory only and not binding upon the ((office)) department. Final review and determination will be made only upon receipt of detailed project plans and specifications.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-070 Summary of information which may be required of an applicant. (1) The applicant for each project for which the ((office)) department is the lead agency shall submit a complete environmental checklist along with a complete application for the required approval.

(2) After review of the environmental checklist, the ((office)) department may require the applicant to submit additional information necessary to properly evaluate the potential environmental impacts of the project. Field investigation or research may be required of the applicant or conducted by the ((office)) department at the applicant's cost.

(3) A draft and final EIS is required for each project for which a determination is made that the proposal will have a probable significant adverse impact on the environment. Preparation of the EIS((s)) is the responsibility of the ((office)) department, by or under the direction of its responsible official, as specified by ((office)) department procedures. No matter who participates in the preparation of the EIS, it is the EIS of the ((agency)) department. The responsible official, prior to distributing an EIS, shall be satisfied that it complies with this chapter and chapter 197-11 WAC.

(4) The ((office)) department may have an EIS prepared by ((office)) department staff, an applicant or its agent, or by an outside consultant retained by either an applicant or the ((office)) department. The ((office)) department shall assure that the EIS is prepared in a professional manner and with appropriate interdisciplinary methodology. The responsible official shall direct the areas of research and examination to be undertaken as a result of the scoping process, as well as the organization of the resulting document.

(5) If a person other than the ((office)) department is preparing the EIS, the ((office)) department shall:

(a) Coordinate any scoping procedures so that the individual preparing the EIS receives all substantive information submitted by any agency and the public;

(b) Assist in obtaining any information on file with other agencies that is needed by the person preparing the EIS;

(c) Allow any party preparing an EIS access to all public records of the ((office)) department that relate to the subject of the EIS, under RCW 42.17.250 through 42.17.340.

(6) Normally, the ((office)) department will prepare an EIS((s)) for its own proposals.

(7) For applicant proposals, the ((office)) department normally will require the applicant to prepare or help prepare the EIS at the applicant's expense, under provisions of this chapter and chapter 197-11 WAC. Expenses shall include fees of any consultants, if required, the ((office's)) department's consultation time and cost of any required materials. A performance bond in an amount specified by the ((office))

department may be required of the applicant to ensure payment of the ((office's)) department's expenses.

(8) The ((office)) department may require an applicant to provide information that the ((office)) department does not possess, including specific investigations. ~~((The applicant is not required to supply information that is not required under this chapter and chapter 197-11 WAC-))~~

(9) A supplemental EIS shall be prepared as an addition to either the draft or final EIS if the ((office decides)) department determines that:

(a) There are substantial changes to a proposal which will have a probable significant adverse environmental impact; or

(b) There is significant new information relative to the probable significant environmental impact of a proposal; or

(c) ~~((Its))~~ Written comments on the DEIS warrant additional ~~((discussion for the purposes of its action than that found in the lead agency's FEIS))~~ environmental review.

The provisions of subsections (3), (4), (5), (6), (7), and (8) of this section except for the first sentence of subsection (3) of this section, also pertain to a supplemental EIS or addendum.

(10) Upon the written request of an applicant for a project for which the ((office)) department is the lead agency, the ((office)) department will consider initiating environmental review and preparation of an EIS at the conceptual stage as opposed to the final detailed design state.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-080 Assumption of lead agency status.

(1) Whenever the ((office feels)) department determines that a DNS issued by another lead agency is inappropriate and that the proposal in question could cause significant harm to the resources under ~~((its))~~ the department's jurisdiction, the ((office)) department will assume lead agency status per WAC 197-11-948.

(2) Within ten days of assuming lead agency status, the ((office)) department will notify the proponent of the proposal in writing as to the reasons for its assumption of lead agency status.

(3) Prior to preparation of an EIS for the proposal, the ((office)) department will consult with the proponent and give the proponent an opportunity to modify or change the proposal in such a way that an EIS may not be necessary as outlined in WAC 197-11-360(4).

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-090 Designation of responsible official.

Under normal circumstances, the responsible official is the director or ~~((his))~~ the director's designee. The responsible official shall carry out duties and functions for the purpose of assuring the ((office's)) department's compliance with SEPA and SEPA guidelines. The responsible official may delegate duties and functions assigned under this chapter and chapter 197-11 WAC; the responsible official alone, however, is wholly responsible for proper accomplishment of such duties and functions.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-100 Mitigated DNS. (1) An applicant may ask the ((office)) department whether issuance of a DS is likely for a proposal. This request for early notice must:

- (a) Be written;
- (b) Follow submission of a permit application and environmental checklist for a nonexempt proposal for which the ((office)) department is lead agency; and
- (c) Precede the ((office's)) department's actual threshold determination for the proposal.

(2) The responsible official shall respond in writing to the request within ten working days of receipt of the letter(;;). The response shall:

- (a) ~~(Be written;~~
- ~~(b))~~ State whether the ((office)) department is considering issuance of a DS; ~~((e))~~ and, if so, indicate the general or specific area(s) of concern that led the ((office)) department to consider a DS; and

~~((d))~~ (b) State that the applicant may change or clarify the proposal to mitigate the impacts indicated in the letter, revising the environmental checklist as necessary to reflect the changes or clarifications.

(3) The ((office)) department shall not continue with the threshold determination until receiving a written response from the applicant changing or clarifying the proposal or asking that the threshold determination be based on the original proposal.

(4) If the applicant submits a changed or clarified proposal, along with a revised environmental checklist, the ((office)) department will make its threshold determination based on the changed or clarified proposal(;;).

(a) If the ((office's)) department's response to the request for early notice indicated specific mitigation measures that would remove all probable significant adverse environmental impacts, and the applicant changes or clarifies the proposal to include all of those specific mitigation measures, the ((office ~~shall~~)) department will issue a DNS and circulate the DNS for review and comments ((as in)) per WAC 197-11-340(2).

(b) If the ((office)) department indicated general or specific areas of concern but did not indicate specific mitigation measures that would allow it to issue a DNS, the ((office)) department shall determine if the changed or clarified proposal may have a probable significant environmental impact, issuing a DNS or DS as appropriate.

(5) The ((office)) department may specify mitigation measures that would allow it to issue a DNS without a request for early notice from an applicant. If it does so, and the applicant changes or clarifies the proposal to include those measures, the ((office)) department shall issue a DNS and circulate it for review and comment under WAC 197-11-340(2).

(6) When an applicant changes or clarifies the proposal, the clarification or changes may be included in written attachments to the documents already submitted. If the environmental checklist and supporting documents would be difficult to read and/or understand because of the need to read them in conjunction with the attachment(s) the ((office)) department may require the applicant to submit a new checklist.

(7) The ((office)) department may change or clarify features of its own proposals before making the threshold determination.

(8) The ((office's)) department's written response under subsection (2) of this section shall not be constructed as a determination of significance. In addition, preliminary discussion of clarification of or changes to a proposal, as opposed to a written request for early notice, shall not bind the ((office)) department to consider the clarification or changes in the threshold determination.

(9) When an applicant submits a changed or clarified proposal pursuant to this section, it shall be considered part of the applicant's application for a permit or other approval for all purposes. Unless the ((office's)) department's decision expressly states otherwise, when a mitigated DNS is issued for a proposal, any decision approving the proposal shall be based on the proposal as changed or clarified pursuant to this section.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-110 SEPA public information center. The ((office)) department designates its main ((office)) department as its SEPA public information center. The mailing address is ~~((411 West 21st Ave.[-]))~~ P.O. Box 48343, Olympia, Washington 98504-8343; telephone ((206) 753-5010) 360-586-3065.

AMENDATORY SECTION (Amending Order 10, filed 6/5/86)

WAC 25-42-120 Public notice. (1) When required under chapter 197-11 WAC, the ((office)) department will give public notice by one or more of the following methods as appropriate for the specific circumstances:

(a) Notifying public and private groups and agencies and tribes with known interest in a certain proposal or in the type of proposals being considered;

(b) Notifying individuals with known interest in a certain proposal or in the type of proposal being considered;

(c) Publication in a newspaper of general circulation in the area in which the proposal will be implemented; and/or

(d) ~~(Notifying the news media; and/or~~

~~(e))~~ Posting on the property site in question.

(2) The ((office)) department may require an applicant to perform the public notice requirements at the applicant's expense.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-020 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Historic archaeological resources" means those properties, including, but not limited to all ships, or aircraft, and any part or the contents thereof and all treasure trove which are listed or, in the professional judgment of the department, eligible for listing in the Washington State Register of Historic Places (RCW 27.34.220) or the National

Register of Historic Places as defined in the National Historic Preservation Act of 1966 (Title 1, Sec. 101, Public Law 89-665; 80 Stat. 915; 16 U.S.C. Sec. 470) as now or hereafter amended.

(2) "State-owned aquatic lands" means all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters.

(3) "Department" means the department of ~~((community development~~.

~~(4) "Office" means the office of) archaeology and historic preservation ((, department of community development. (5)) established in chapter 43... RCW.~~

(4) "Director" means the director of the department of ~~((community development))~~ archaeology and historic preservation or the director's designee.

~~((6))~~ (5) "Entity" means any person, firm, corporation, institution, or agency.

~~((7))~~ (6) "Previously unreported" means the historic archaeological resource and its location are not known to the ~~((office))~~ department and are not available from public records including but not limited to government records, historic records, or insurance claims.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-040 Registration forms. (1) Any person or entity who discovers a previously unreported historic archaeological resource abandoned for thirty years or more on, in, or under state-owned aquatic lands may register it with the department.

(2) Each registration of a previously unreported historic archaeological resource shall be submitted on the Submerged Historic Archaeological Resource Registration Form approved by the director. These registration forms may be obtained from the ~~((Office))~~ Department of Archaeology and Historic Preservation, ((Department of Community Development, 111 West 21st Avenue KL-11)) P.O. Box 48343, Olympia, Washington 98504-8343; telephone ((360) 753-5010)) 360-586-3065.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-060 Summary of information required for registration. (1) In order to be considered complete, each registration form shall include:

(a) A description of the historic archaeological resource sufficient to identify its historic association, identity, and integrity of its physical remains. Any historic information you have on the resource and the circumstances of its loss.

(b) Locational information including latitude, longitude, and depth, township, range, section and quarter section, and UTM.

(c) A copy of the relevant United States Coast and Geodetic Survey chart indicating the resource's location. The location of the resource plotted on a USGS topography map.

(d) A copy of a photograph or videotape documenting the existence of identifiable physical remains of the resource sufficient to establish its historic identity and integrity. If a photograph or videotape will not establish the existence of

identifiable physical remains of the resource sufficient to establish its historic identity and integrity, the applicant may apply to the ~~((office))~~ department for permission to obtain a sample artifact for this purpose. In the event the applicant wishes to apply for such permission, the applicant shall be subject to some portions of WAC 25-48-030.

(2) Failure to supply this information to the satisfaction of the ~~((office))~~ department may result in the application being deemed incomplete or inadequate under WAC 25-46-100 and 25-46-120.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-080 Competing applications for the same resource. (1) When registration forms are submitted for the same resource by two or more entities, the applications shall be evaluated, accepted, or denied in sequence based upon the unique log number assigned by the department. The registration forms must be submitted via FedEx or other delivery service which records time and date of delivery.

(2) Notice will be sent by the department to each of the entities submitting the registration application for the same resource notifying them of the competing application and the sequence in which they will be evaluated. No competing application will be evaluated until such time as the first pending application has been denied and all appeal rights of that applicant have been exhausted.

(3) When an historic archaeological resource has been registered with the department all subsequent registration applications for that resource within the five-year time period for right of first refusal will be issued a notice that the resource has already been registered and the applications are denied.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-100 Issuance of registration acceptance. (1) Each registration form shall be assigned a unique sequential log number upon date and time of receipt by the department and shall be evaluated in sequence.

(2) Upon receipt of the registration form, the office shall inform the applicant by registered mail within fourteen calendar days of any incomplete or inadequate information and afford the applicant twenty-one calendar days from the receipt of the notice to provide the missing or inadequate information, plus such time as may be authorized by the department for a sample artifact permit granted under WAC 25-46-060 (1)(d) and chapter 25-48 WAC.

(3) If the applicant does not supply the missing or inadequate information within the specified time period the application shall be considered void and a notice of denial sent to the applicant.

(4) The department will act upon a complete registration application within thirty-five calendar days of receipt and shall so notify the applicant. In all notifications of registration acceptance, the department shall specify:

(a) The name, address, and telephone number of the entity submitting the registration application~~((-))~~;

(b) A description of the historic archaeological resource sufficient to identify its historic association and identity((-);

(c) The location of the resource including its latitude and longitude and depth((-);

(d) A statement of the director's opinion on the resource's eligibility to the Washington state register of historic places or the National Register of Historic Places((-);

(e) The date of the acceptance of the registration((-);

(f) The date of the expiration of the right for first refusal((-); and

(g) That excavation or removal of any artifacts from the historic archaeological resource will require an archaeological excavation and removal permit and that granting of such a permit is not guaranteed.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-120 Registration denial. (1) If a registration application is denied, a written statement of the reasons for the denial will accompany the notice of registration denial to the applicant.

(2) Registration may be denied for the following reasons:

(a) The application is incomplete or inadequate and has not been completed or corrected pursuant to WAC 25-46-100;

(b) The resource does not qualify as an historic archaeological resource under WAC 25-46-020(1);

(c) The resource has already been registered;

(d) The resource and its location are already known to the ~~((office))~~ department or are part of the public record.

AMENDATORY SECTION (Amending Order 88-07, filed 11/4/88)

WAC 25-46-140 Appeals relating to registration. (1) Any affected person may request a hearing to appeal a denial of registration or extinguishment of a right of first refusal under WAC 25-46-160 to the director. ~~((Said request must be in writing and filed with the director within twenty-one calendar days of receipt of notice of registration denial or extinguishment.))~~ A request for a hearing shall be made by filing a written application for adjudicative proceeding with the department at the following address: Department of Archaeology and Historic Preservation, P.O. Box 48343, Olympia, WA 98504-8343. The application must be received by the department within twenty-one calendar days of the date of service of the notice of the denial or extinguishing. The application shall specify the issue or issues to be decided and indicate whether the requester desires a full adjudicative proceeding, a brief adjudicative proceeding, or an emergency adjudicative proceeding.

(2) When the department receives an application for adjudicative proceeding, it will immediately notify the director of its receipt and provide the director and the state archaeologist or the assistant state archaeologist with a copy of the application and the notice or document being appealed. The director thereupon will designate a presiding officer as follows:

(a) Where an application requests a full adjudicative proceeding, or where the director determines a full adjudicative

proceeding is required, the director will designate as presiding officer an administrative law judge assigned by the office of administrative hearings under chapter 34.12 RCW.

(b) Where an application requests a brief adjudicative proceeding or emergency adjudicative proceeding, or where the director determines a brief adjudicative proceeding or emergency adjudicative proceeding is appropriate, the director will designate a senior staff person in the department as presiding officer. The person designated shall not have participated in the matter and shall not be subject to the authority or direction of any person who has participated in the matter.

(3) Upon being designated, the presiding officer shall notify the requester, the state archaeologist, and the assistant state archaeologist of his or her name and business address and provide any other information required by chapter 34.05 RCW or 10-08 WAC, or this chapter.

(4) Upon receiving the notice required in subsection (3) of this section, the state archaeologist or the assistant state archaeologist shall immediately transmit to the presiding officer the application, together with any accompanying documents provided by the requester, and a copy of the notice or other document being appealed.

NEW SECTION

WAC 25-46-142 Adjudicative proceedings. (1) The department hereby adopts the model rules of procedure, chapter 10-08 WAC, adopted by the chief administrative law judge pursuant to RCW 34.05.250, as now or hereafter amended, for use in adjudicative proceedings of agency action under this chapter.

(2) "Service" and "filing" of documents in adjudicative proceedings, brief adjudicative proceedings, and emergency adjudicative proceedings are defined as in RCW 34.05.010 and WAC 10-08-110.

(3) In the case of a conflict between the model rules of procedure and this chapter, the rules in this chapter shall take precedence.

(4) All factual determinations shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The burden in all proceedings is a preponderance of the evidence.

(a) In all proceedings contesting the denial of registration under WAC 25-46-120, the burden shall be on the applicant to establish that the application meets all applicable requirements and standards.

(b) In all proceedings contesting the extinguishing of a right of first refusal under WAC 25-46-160, the burden shall be on the person challenging the extinguishing to establish the timely exercise of its right of first refusal.

(c) In all other proceedings, the burden is on the state historic preservation officer to prove the alleged factual basis set forth in the notice.

NEW SECTION

WAC 25-46-144 Brief adjudicative proceedings. (1) Pursuant to RCW 34.05.482, the department will use brief adjudicative proceedings where permitted by law and where protection of the public interest does not require the department to give notice and an opportunity to participate to per-

sons other than the parties. A brief adjudicative proceeding is intended to serve as an inexpensive and efficient alternative where the issues can be decided by reference to writings and other documents without a full, formal hearing.

(2) A brief adjudicative proceeding may be used to review the following actions taken under this chapter:

(a) Denying an application for registration under WAC 25-46-120;

(b) Extinguishing a right of first refusal under WAC 25-46-160.

(3) An application for brief adjudicative proceeding shall include a written explanation of the applicant's view of the matter and a copy of any other documents the applicant wishes to have the presiding officer consider. Any response by the department shall be filed with the presiding officer and served on the applicant within fourteen days of receiving an application for a brief adjudicative proceeding.

(4) If the applicant desires an opportunity to make an oral statement to the presiding officer, a request to make an oral statement must be included in the application for a brief adjudicative proceeding. The presiding officer may grant a request to make an oral statement if the presiding officer believes the statement would benefit him or her in reaching a decision. The presiding officer shall notify the parties within a reasonable time of his or her decision to grant or deny a request to make an oral statement. If the presiding officer grants any request to make an oral statement, all parties shall be entitled to make oral statements, and the presiding officer shall notify all parties of the time and place for hearing oral statements.

(5) At the time any unfavorable action is taken, the presiding officer shall serve upon each party a brief statement of the reasons for the decision. Within ten days of the decision, the presiding officer shall serve upon each party a brief written statement of the reasons for the decision and information about any internal administrative review available.

(6) The presiding officer's brief written statement is an initial order. The initial order shall be the final order without further action unless within twenty-one days of the date of service a party requests administrative review of the initial order or the director initiates review of the initial order.

(7) If the presiding officer determines a more comprehensive hearing is warranted, or on the motion of any party, he or she may convert the proceeding to a full adjudicative proceeding by requesting in writing, with findings supporting the request, that the proceeding be so converted and that the director designate as presiding officer an administrative law judge assigned by the office of administrative hearings under chapter 34.12 RCW. The director will act as soon as possible on the request.

(8)(a) A party may request review of the initial order by filing a written request with the director at the following address: Director, Department of Archaeology and Historic Preservation, P.O. Box 48343, Olympia, WA 98504-8343. A request for review of an initial order shall contain an explanation of the requester's view of the matter and a statement of reasons why the initial order is incorrect. The request must be received by the director and served on all other parties within twenty-one days of the date the initial order was

served on the parties. A copy of the request must be served on the state archaeologist or the assistant state archaeologist.

(b) Any response to the request for review of an initial order shall be filed with the director and served on the requester within ten days after receiving the request.

(c) In response to a request for review of an initial order, the director shall immediately obtain the record compiled by the presiding officer. The director, at his or her sole discretion, may act as the reviewing officer or designate a reviewing officer who is authorized to grant appropriate relief upon review.

(d) The reviewing officer may issue an order on review, which shall include a brief statement of the reasons for the decision and include a notice that judicial review may be available.

(e) A request for review of an initial order is deemed to have been denied if the reviewing officer does not issue an order on review within twenty days of the date the request for review of the initial order was filed with the director.

(9)(a) The director may initiate review of the initial order on his or her own motion, without notifying the parties. The director, at his or her sole discretion, may act as the reviewing officer or designate a reviewing officer who is authorized to grant appropriate relief upon review.

(b) The reviewing officer shall obtain and review the record compiled by the presiding officer before taking action.

(c) The reviewing officer may not take any action on review less favorable to any party than in the initial order without giving that party notice and an opportunity to provide a written explanation of its view of the matter. The notice shall specify the deadline for that party to submit its written explanation.

(d) Any order on review shall be issued and served on the parties within twenty days of the date the initial order was served on the parties or within twenty days of the date a request for review of the initial order was filed with the director, whichever occurs later. If an order on review is not issued and served by the applicable deadline in this paragraph, the initial order becomes the final order.

NEW SECTION

WAC 25-46-146 Emergency adjudicative proceedings. (1) A respondent who receives a notice of registration denial under WAC 25-46-120 may request an emergency hearing under RCW 34.05.422 and 34.05.479 to contest the findings included in the notice of registration denial by filing an application for emergency adjudicative proceeding. A respondent who does not file an application for emergency adjudicative proceeding may contest the findings included in the notice of registration denial in a regularly scheduled adjudicative hearing.

(2) An application for emergency adjudicative proceeding must be received by the department within seven calendar days of the date of service of the notice of summary suspension. An application for emergency adjudicative proceeding received by the department more than seven calendar days after the date of service of the notice of registration denial shall be deemed an application for full adjudicative proceeding and will be scheduled accordingly.

(3) An application for emergency adjudicative proceeding shall include a written explanation of the applicant's view of registration denial and a copy of any other documents the applicant wishes to have the presiding officer consider.

(4) The presiding officer, in his or her discretion, may provide for telefacsimile or electronic service and filing of documents, using means that are similarly available to all parties, in the notice required in WAC 25-46-140(3).

(5) Upon receiving the notice required in WAC 25-46-140(3), the state archaeologist or the assistant state archaeologist shall immediately transmit to the presiding officer copies of any documents that were considered or relied upon in issuing the notice of summary suspension, in addition to the documents listed in WAC 25-46-140(4).

(6) Within seven business days after receiving an application for emergency adjudicative proceeding, the presiding officer shall issue an order that either:

(a) Affirms that the registration denial is necessary to prevent or avoid immediate danger to the public health, safety or welfare including property; or

(b) Sets aside the summary suspension as unnecessary to prevent or avoid immediate danger to the public health, safety or welfare including property.

No other issue shall be decided in the emergency adjudicative proceeding. The order shall include a brief statement of findings of fact, conclusions of law, and policy reasons for the decision.

(7) The order is effective when signed by the presiding officer. The presiding officer shall promptly notify each party of the decision and serve each party with a copy of the order.

(8) If other issues remain to be decided, or if the respondent requests review of the order, the presiding officer may request that a full adjudicative proceeding be scheduled and that the director designate as presiding officer an administrative law judge assigned by the office of administrative hearings under chapter 34.12 RCW. The request shall summarize the issues that remain to be decided. The director will act as soon as possible on the request. The order issued under this section becomes final unless within seven days of the date of issuance a full adjudicative proceeding is scheduled.

AMENDATORY SECTION (Amending Order 88-06, filed 11/4/88)

WAC 25-48-010 Purpose. The purpose of this chapter is to establish application and review procedures for the issuance of archaeological excavation and removal permits and for the issuance of civil penalties as provided for in chapter ~~(s 27.44 and)~~ 27.53 RCW.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-020 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Archaeology" means systematic, scientific study of ~~(man's)~~ the human past through ~~(his)~~ material remains.

(2) "Historic" means peoples and cultures who are known through written documents in their own or other lan-

guages. As applied to underwater archaeological resources, the term historic shall include only those properties which are listed in or eligible for listing in the Washington State Register of Historic Places (RCW 27.34.220) or the National Register of Historic Places as defined in the National Historic Preservation Act of 1966 (Title 1, Sec. 101, Public Law 889-665; 80 Stat. 915; 16 U.S.C. Sec. 470) as now or hereafter amended.

(3) "Prehistoric" means peoples and cultures who are unknown through contemporaneous written documents in any language.

(4) "Professional archaeologist" means a person who:

(a) Has designed and executed an archaeological study as evidenced by a thesis or dissertation~~(s)~~ and ~~(has)~~ been awarded an advanced degree such as an M.A., M.S., or Ph.D. ~~((from an accredited institution of higher education))~~ in archaeology, anthropology, ~~((or))~~ history or other germane discipline with a specialization in archaeology from an accredited institution of higher education; and

(b) Has a minimum of one year of field experience with at least twenty-four weeks of field work under the supervision of a professional archaeologist, including no less than twelve weeks of survey or reconnaissance work~~(s)~~ and at least eight weeks of supervised laboratory experience. Twenty weeks of field work in a supervisory capacity must be documentable with a report on the field work produced by the individual ~~((on the field work))~~.

(5) "Public lands" means lands owned by or under the possession, custody, or control of the state of Washington or any county, city, or political subdivision of the state; including the state's submerged lands under the Submerged Lands Act, 43 U.S.C. Sec. 1301 et seq.

(6) "Site restoration" means to repair the archaeological property to its preexcavation vegetational and topographic state.

(7) "Amateur society" means any organization composed primarily of persons who are not professional archaeologists, whose primary interest is in the archaeological resources of the state, and which has been certified in writing by two professional archaeologists.

(8) "Archaeological object" means an object that comprises the physical evidence of an indigenous and subsequent culture including material remains of past human life including monuments, symbols, tools, facilities, and technological by-products.

(9) "Archaeological site" means a geographic locality in Washington, including but not limited to, submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects.

(10) "Archaeological resource" means any material remains of human life or activities which are of archaeological interest~~((This shall include))~~, including all sites, objects, structures, artifacts, implements, and locations of prehistorical or archaeological interest, whether previously recorded or still unrecognized, including, but not limited to, those pertaining to prehistoric and historic American Indian or aboriginal burials, campsites, dwellings, and their habitation sites, including rock shelters and caves, their artifacts and implements of culture such as projectile points, arrowheads, skeletal remains, grave goods, basketry, pestles, mauls, and grind-

ing stones, knives, scrapers, rock carvings and paintings, and other implements and artifacts of any material.

(11) "Historic archaeological resources" means those properties which are listed in or eligible for listing in the Washington State Register of Historic Places (RCW 27.34.-220) or the National Register of Historic Places as defined in the National Historic Preservation Act of 1966 (Title 1, Sec. 101, Public Law 89-665; 80 Stat. 915; 16 U.S.C. Sec. 470) as now or hereafter amended.

(12) "Of archaeological interest" means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation, and explanation.

(13) "Director" means the director of the department of ~~((community development))~~ archaeology and historic preservation or his or her designee.

(14) ~~("Office" means the Washington state office of archaeology and historic preservation, department of community development.~~

~~(15))~~ "Department" means the department of ~~((community development))~~ archaeology and historic preservation.

(15) "State historic preservation officer" means the director, who serves as the state historic preservation officer under RCW 43.334.020.

(16) "Suspension" means the abeyance of a permit under this chapter for a specified period of time.

(17) "Revocation" means the termination of a permit under this chapter.

(18) "Mitigation" means:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action;

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;

(e) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and/or

(f) Monitoring the impact and taking appropriate corrective measures.

(19) "Abandonment" means that the resource has been deserted and the owner has relinquished ownership rights with no retention, as demonstrated by a writing, oral communication, action, or inaction.

(20) "Person" means any individual, corporation, partnership, trust, institution, association, or other private entity; or any officer, employee, agent, department, or instrumentality of the state or any county, city, or other political subdivision of the state.

(21) "Permittee" means any person who holds an active archaeological excavation permit issued under RCW 27.53.-060 and this chapter.

(22) "Respondent" means any person who has received a notice of violation under WAC 25-48-041, a notice of permit denial under WAC 25-48-105, a notice that a right of first refusal has been extinguished under WAC 25-48-108, or a notice of suspension or revocation under WAC 25-48-110, and who has filed an application for an adjudicative proceeding.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-030 Scope and coverage of this chapter.

(1) This chapter ~~((is applicable))~~ applies to any person, ~~((corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the state, county, or city, or a political subdivision of the state))~~ as defined in WAC 25-48-020.

(2) This chapter ~~((is applicable))~~ applies to the alteration, digging, excavating, or removal of archaeological objects or sites or historic archaeological resources which have been abandoned thirty years or more, and to the removal of glyptic or painted records or archaeological resources from native Indian cairns or graves.

(3) This chapter does not apply to the removal of artifacts found exposed on the surface of the ground which are not historic archaeological resources or sites except when there will be removal of glyptic or painted records, or archaeological resources from native Indian cairns or graves.

(4) ~~((This chapter is applicable as follows))~~ The following sections of this chapter apply to the removal of sample artifacts as provided under WAC 25-46-060 (1)(d):

WAC 25-48-010.

WAC 25-48-020.

WAC 25-48-030.

WAC 25-48-050.

WAC 25-48-060 (1)(a)(g) except for the requirements of a completed inventory form, (1)(d), (f), (g), (h), (m), (n), and (5).

WAC 25-48-090.

WAC 25-48-100.

WAC 25-48-105.

WAC 25-48-120.

NEW SECTION

WAC 25-48-035 Delegation to state archaeologist and assistant state archaeologist.

(1) The director's authority to determine violations of chapter 27.53 RCW and to impose civil penalties under RCW 27.53.095 and this chapter is delegated to the state archaeologist and the assistant state archaeologist, subject to review by the director as provided in WAC 25-48-120. This delegation of authority to the state archaeologist and the assistant state archaeologist is in addition to any other delegation granted in statute, by rule, or otherwise in writing by the director.

(2) The director retains authority to review determinations made by the state archaeologist or the assistant state archaeologist under this chapter and to hear appeals of those determinations.

(3) The state historic preservation officer may delegate to subordinate staff in the office the functions and duties assigned in this chapter to the state historic preservation officer.

AMENDATORY SECTION (Amending Order 11, filed 6/5/86)

WAC 25-48-040 Agency policy. The overriding policy of the ~~((office))~~ department is to assure the protection of the archaeological resources of the state. This policy results from:

(1) The legislated duty of the ~~((office))~~ department to preserve and protect the heritage of the state in a manner that does not impair the resources (RCW 27.34.220); and

(2) ~~((Recognition of the fact that the public has an interest in the knowledge of the state's heritage and a responsibility to contribute to the preservation and enhancement of that heritage))~~ The public interest in the conservation, preservation, and protection of the state's archaeological resources, and the knowledge to be derived and gained from the scientific study of these resources (RCW 27.53.010).

NEW SECTION

WAC 25-48-041 Notice of violation—Penalties. (1)(a) It is unlawful for any person to knowingly and willfully remove, alter, dig into, excavate or remove an archeological object or site or archeological resource without a permit required by RCW 27.53.060.

(b) It is unlawful for any person to knowingly and willfully fail to comply with the provisions of a permit issued by the state historic preservation officer under RCW 27.53.060.

(2) Pursuant to RCW 27.53.095, the state archaeologist or the assistant state archaeologist may issue a notice of violation to any person who knowingly and willfully violates RCW 27.53.060 or the provisions of a permit issued under RCW 27.53.060 and this chapter.

(3) The notice of violation shall impose a monetary penalty of five thousand dollars; provided, however, that the state archaeologist or the assistant state archaeologist may decrease the penalty for the first or second violation upon a determination, supported by specific findings, that the circumstances of the violation warrant a lesser penalty than the statutory maximum. This determination shall be based on the factors set out in WAC 25-48-044. The monetary penalty for any subsequent violation will be five thousand dollars.

(4) In addition to any civil penalty imposed under this section, the notice of violation also shall require the respondent to pay the following costs, as determined under WAC 25-48-043:

(a) Reasonable investigative costs incurred by a mutually agreed upon independent professional archaeologist investigating the alleged violation; and

(b) Reasonable site restoration costs.

(5) The notice of violation shall set forth the conduct determined to violate RCW 27.53.060 or a permit issued thereunder, the damage for which restoration is required, the amount of civil penalty assessed, and, if appropriate, the findings warranting a lesser penalty than the statutory maximum. If the reasonable investigative costs incurred by a mutually

agreed upon independent professional archaeologist investigating the alleged violation and the reasonable site restoration costs have been determined, they shall be set forth in the notice of violation; if those costs are determined after the notice of violation has been issued, those costs may be levied against the respondent by a later addendum to the notice of violation or in a final order following an adjudicative proceeding.

(6) The notice of violation shall inform the respondent of its right to request a hearing to contest the notice of violation.

(7) In addition to any civil penalty imposed under this section, the state archaeologist or the assistant state archaeologist may refer any alleged violation to any federal, state, or county authority with jurisdiction over the act or acts alleged to constitute the violation.

NEW SECTION

WAC 25-48-043 Procedure for selecting a mutually agreed upon independent professional archaeologist investigator and for determining site restoration costs. (1)

Pursuant to RCW 27.53.095, a person found to have violated chapter 27.53 RCW or a permit issued under RCW 27.53.060 shall pay the reasonable investigative costs incurred by an independent professional archaeologist investigating the alleged violation who has been mutually agreed to by the state archaeologist or the assistant state archaeologist and the respondent. The state archaeologist or the assistant state archaeologist and the respondent may agree to investigation by a qualified employee of the department.

(2) If the state archaeologist or the assistant state archaeologist determines an agreement cannot be reached with the respondent under subsection (1) of this section, the independent professional archaeologist investigator shall be selected as follows:

(a) The state archaeologist or the assistant state archaeologist shall notify the respondent that an agreement cannot be reached and instruct the respondent to provide to the department, within five working days, the name, address, and telephone number of a professional archaeologist together with a summary of the professional archaeologist's professional qualifications. The respondent is responsible for all fees and costs billed by the professional archaeologist the respondent selects.

(b) The state archaeologist or the assistant state archaeologist shall select a professional archaeologist who is not employed or contractually bound to the office. The department is responsible for all fees and costs billed by the professional archaeologist the state archaeologist or the assistant state archaeologist selects.

(c) The professional archaeologists selected by the respondent and by the state archaeologist or the assistant state archaeologist shall jointly select a third professional archaeologist to investigate the alleged violation. Their selection must be communicated to the state archaeologist or the assistant state archaeologist and the respondent within ten working days. The state archaeologist or the assistant state archaeologist shall provide the professional archaeologist investigator with written authorization to conduct the investigation.

(d) The respondent is responsible for all fees and costs billed by the professional archaeologist investigator.

(3) The professional archaeologist investigator agreed to under subsection (1) or (2) of this section shall assess damage and disturbance to the archaeological resource or site caused by the conduct alleged in the notice of violation and prepare a written report containing the following information:

(a) A map and description of the site, indicating the location and extent of damage or disturbance;

(b) An estimate of the volume of soil disturbed;

(c) An inventory of artifacts and archaeological context and data damaged or disturbed;

(d) An estimate of the archaeological value of artifacts and samples damaged or disturbed;

(e) A summary of the site restoration actions required because of damage or disturbance;

(f) An estimate of site restoration costs, supported by a narrative or numerical explanation; and

(g) Any other information the state historical preservation officer reasonably may require.

(4) The written report required under subsection (3) of this section must be provided to the department, the respondent, the affected tribes, local government, and the property owner, within sixty calendar days of the date the professional archaeologist investigator is authorized by the state archaeologist or the assistant state archaeologist to conduct the investigation.

(5) In determining the site restoration actions required because of damage or disturbance, the professional archaeologist investigator shall include the following, as necessary and appropriate:

(a) Landscaping to return the site to its original geography and configuration;

(b) Recovering, analyzing, and reporting on all archaeological materials damaged or disturbed by the alleged conduct;

(c) Preparing the archaeological materials for curation and the cost of curation or, if appropriate, reburial.

NEW SECTION

WAC 25-48-044 Penalties—Adjustments. (1) The state archaeologist or the assistant state archaeologist may decrease the penalty imposed under WAC 25-48-041(3) for the first or second violation upon a determination, supported by specific findings based on the following factors, that the circumstances of the violation warrant a lesser penalty:

(a) Whether the respondent's act or acts resulted in actual or potential harm to an archeological site, resource, or object, or to human remains;

(b) Whether the respondent's act or acts involve more than one human remains, the damage or disintegration of human remains, or the use of human remains for profit or other financial gain;

(c) Whether the notice of violation encompasses multiple acts that constitute separate violations of this chapter or chapter 27.53 RCW;

(d) Whether the respondent's act or acts reasonably appear to be part of a pattern of the same or similar conduct,

whether or not that conduct previously resulted in any state or federal sanction;

(e) Whether the respondent voluntarily disclosed or reported an act or acts constituting a violation of this chapter or chapter 27.53 RCW;

(f) Whether the respondent voluntarily takes remedial measures to provide increased protection for an archeological site, resource, or object or for human remains;

(g) Whether the respondent voluntarily takes measures to reduce the likelihood the violation will be repeated.

(2) The state archaeologist or the assistant state archaeologist may negotiate an agreed settlement of the penalty with the respondent, on such terms and for such reasons as the state archaeologist or the assistant state archaeologist deems appropriate. Any prior negotiated settlement may be considered by the state archaeologist or the assistant state archaeologist in determining the appropriate penalty for a subsequent violation.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-050 Application requirements and forms. (1) Any person or entity covered by this chapter (~~and described in WAC 25-48-030~~) proposing to dig, alter, excavate, and/or remove archaeological objects and sites or historic archaeological resources, or proposing to remove glyphic or painted records of tribes or peoples, or archaeological resources from native Indian cairns or graves shall apply to the ~~(office)~~ department for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued.

(2) Each application for a permit from the department shall be submitted on the archaeological excavation and removal permit application form approved by the ~~(director. These)~~ state historic preservation officer. An application form(s) may be obtained from the ~~(Office)~~ Department of Archaeology and Historic Preservation, (Department of Community Development, 111 West 21st Avenue KL 11, Olympia, WA 98504; telephone (206) 753-5010) P.O. Box 48343, Olympia, WA 98504-8343; telephone 360-586-3065.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-060 Summary of information required of an applicant. (1) Each application for a permit shall include:

(a) Sufficient background information and summary of previous field investigation, research and data gaps about the site(s) proposed for excavation such that the reviewers have a cohesive understanding of the site(s) and current research questions to be able to review the proposal as a complete document.

(b) The nature and extent of the work proposed, including how and why it is proposed to be conducted and the methods proposed for excavation and recovery, number and placement of excavation units, proposed time of performance, locational maps, and a completed site inventory form.

~~((b))~~ (c) Summary of the environmental setting with an emphasis on vegetation, past and present available natural

toric aircraft, the name of the Washington museum, historical society, nonprofit organization, or governmental entity that proposes to assume curatorial responsibility for the resource. The applicant(s) shall submit written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility for the resource and all associated records, data, photographs and other documents derived from the proposed work and to safeguard, preserve, and allow for the future scientific and public access to these materials.

~~((5))~~ (6) After review of the application, the ~~((office))~~ department may require additional information to properly evaluate the proposed work and shall so inform the applicant. Field investigation or research may be required of the applicant or conducted by the ~~((office))~~ department at the applicant's cost. A bond in an amount specified by the ~~((office))~~ department may be required of the applicant to ensure payment of the professional expenses incurred by the ~~((office))~~ department. Advance notice of any anticipated cost shall be given to the applicant.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-070 Notification to Indian tribes. (1) Upon receipt of a completed application form for archaeological excavation of a native American archaeological site, native Indian cairn or grave, or the removal of glyptic or painted records, the ~~((office))~~ department, at least thirty days before issuing such a permit under this chapter, shall notify ~~((the))~~ any affected Indian tribe which may consider the site to be of historic or cultural significance.

(2) Notice by the ~~((office))~~ department shall be sent to the chief executive officer or other designated official of the native Indian tribe. Any native Indian tribe or other native American group may supply the ~~((office))~~ department in advance with sites or locations for which such tribe or group wishes to receive notice under this section.

(3) Upon request during the thirty-day period, the ~~((office))~~ department may meet with official representatives of any native Indian tribe or group to discuss ~~((their))~~ its interests, including, but not limited to, the proposed excavation methods. Comments received from tribal representatives shall be considered by the department in the issuance or denial of the permit and the issuance of terms and conditions. Mitigation measures requested by the tribal representatives, including stipulations pertaining to the disposition of human remains, may be incorporated into the terms and conditions of the permit.

(4) When the ~~((office))~~ department determines that ~~((a))~~ an emergency permit applied for under this chapter must be issued immediately under WAC 25-48-095 because of an imminent threat of loss or destruction of an archaeological resource, the ~~((office))~~ department shall so notify the appropriate tribe.

(5) The tribes with whom the ~~((office))~~ department has consulted shall be promptly notified in writing of the issuance of the permit.

AMENDATORY SECTION (Amending Order 11, filed 6/5/86)

WAC 25-48-080 Public notice. (1) The ~~((office))~~ department will give public notice of a pending permit application by one or more of the following methods as appropriate for the specific circumstances in order to solicit public and scientific comment:

(a) Notifying public~~(s)~~ and private groups, tribes, and agencies with ~~((a))~~ known interest in a certain application or type of application being considered;

(b) Notifying individuals with known interest in a certain application or in the type of application being considered;

(c) Publication in a newspaper of general circulation in the area in which the application will be implemented;

(d) Notifying the news media; and/or

(e) Posting on the property site in question.

(2) Comments ~~((from such notified agencies, groups, entities or individuals))~~ on a pending application must be received by the department within thirty days of the notice. Comments may be mailed or faxed to the following address: Department of Archaeology and Historic Preservation, P.O. Box 48343, Olympia, WA 98504-8343. Arrangements for alternative delivery of comments may be made by calling 360-586-3065.

(3) Comments timely received shall be considered by the department in the issuance or denial of the permit application and the imposition of terms and conditions in the permit.

(4) In the discretion of the state archeologist or the assistant state archeologist, a fifteen-day extension may be granted for additional comments. The party requesting the extension must make the request in writing within the original thirty-day comment period.

AMENDATORY SECTION (Amending Order 88-06, filed 11/4/88)

WAC 25-48-085 Applications for excavation and removal of previously registered shipwrecks and historic aircraft. Where the completed application is for the excavation and/or removal of an historic archaeological resource that is a shipwreck or historic aircraft that has been registered with the department by ~~((an entity))~~ a person other than the applicant, the ~~((office))~~ department will:

(1) Notify the ~~((entity))~~ person by certified mail, return receipt requested, that registered the historic archaeological resource with the department that it shall have sixty days from receipt of notice to submit its own permit application and exercise its first refusal right, or the right shall be extinguished.

(2) Notify the applicant that its permit application will not be acted upon until the ~~((entity))~~ person that has registered the historic archaeological resource has exercised its right of first refusal by submitting a permit application or has allowed its right to be extinguished.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-090 Issuance of permit. The ~~((office))~~ department will normally act upon a permit application

within sixty days of receipt of a complete permit application, except in the case of an historic archaeological resource where the applicant is not the holder of the right of first refusal. Such applications shall be subject to the provisions of WAC 25-48-085. ~~((The director may issue a temporary permit immediately where delay could cause damage to an archaeological or historic archaeological resource or site. Said permit shall be valid only for thirty days.))~~ The ~~((office))~~ department may issue a permit~~((;))~~ for a specified period of time appropriate to the work to be conducted~~((;))~~ upon determining that:

(1) The applicant, or in the case of an amateur society~~((;))~~ or other group or organization~~((;))~~ the individual proposed to be responsible for conducting the archaeological work~~((is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological methods and theory, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also));~~

(a) Meets the minimum qualifications as a professional archaeologist specified in WAC 25-48-020(4);

(b) Possesses demonstrable competence in archaeological methods and theory, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed; and

(c) Has complied with current and past permits issued under RCW 27.53.060.

(2) The proposed archaeological work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data.

(3) The proposed archaeological work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of public lands concerned.

(4) Any Washington university, museum, repository, or other scientific or educational institution proposed as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records.

(5) Where the application is for a state-owned historic archaeological resource, a contract between the applicant and the department has been executed. Such a contract shall include but not be limited to the following terms and conditions:

(a) Historic shipwrecks:

(i) The contract shall provide for fair compensation to a salvor. Fair compensation means an amount not less than ninety percent of the appraised value of the objects recovered following successful completion of the contract.

(ii) The salvor may retain objects with a value of up to ninety percent of the appraised value of the total objects recovered, or cash, or a combination of objects and cash. In no event may the total of objects and cash exceed ninety percent of the total appraised value of the objects recovered. A salvor shall not be entitled to further compensation from any state sources.

(iii) The contract shall provide that the state will be given first choice of which objects it may wish to retain for display purposes for the people of the state from among all the objects recovered. The state may retain objects with a value of up to ten percent of the appraised value of the total objects recovered. If the state chooses not to retain recovered objects with a value of up to ten percent of the appraised value, the state shall be entitled to receive its share in cash or a combination of recovered objects and cash so long as the state's total share does not exceed ten percent of the appraised value of the objects recovered.

(iv) The contract shall provide that both the state and the salvor shall have the right to select a single appraiser or joint appraisers.

~~((v))~~ ~~((The contract shall provide that the applicant agrees to allow the department access to all artifacts and data recovered from the historic shipwreck for purposes of scholarly research and photographic documentation for the period specified by the department.~~

~~((vi))~~ The contract shall ~~((also))~~ provide that title to the objects shall pass to the salvor when the permit is issued. However, should the salvor fail to fully perform under the terms of the contract, title to all objects recovered shall revert to the state. If the salvor should fail to perform the contract terms specified in (a)~~((;))~~ ~~((vi))~~ of this subsection and has disposed of the objects to which title has passed, the salvor shall be liable to the state for liquidated damages in the amount of the appraised value of the objects disposed of.

(vi) The contract shall provide that the applicant agrees to allow the department access to all artifacts and data recovered from the historic shipwreck for purposes of scholarly research and photographic documentation for the period specified by the department.

(b) Historic aircraft:

(i) The contract shall provide that historic aircraft belonging to the state of Washington may only be recovered if the purposes of the salvage operation is to recover the aircraft for a Washington museum, historical society, nonprofit organization, or governmental entity.

(ii) Title to the aircraft may only be passed by the state to one of the entities listed in (b)(i) of this subsection.

(iii) Compensation to the salvor shall only be derived from the sale or exchange of the aircraft to one of the entities listed in (b)(i) of this subsection or such other compensation as one of the entities and the salvor may arrange. The salvor shall not have a claim to compensation from state funds.

(c) Other historic archaeological resources:

The director, in his or her discretion, may negotiate the terms of such contracts.

(6) Evidence that the applicant agrees to mitigate any archaeological damage which occurs during the excavations and recovery operations.

(7) Evidence that the applicant agrees to allow the department access to all artifacts and data recovered from historic archaeological sites for purposes of scholarly research and photographic documentation for a period to be agreed upon by the parties.

(8) Evidence that the applicant agrees to allow the department to have the right to publish scientific papers con-

cerning the results of all research conducted as project mitigation.

(9) ~~((After the granting of a permit and, when))~~ If information filed with the ((office)) department becomes inaccurate in any way((;)) or additions or deletions are necessary, the applicant or permittee shall ((submit)) provide the department with full details of any such changes and/or correct any inaccuracy, together with copies of any new required documents, ((with the office)) within fifteen days ((following the)) after the applicant or permittee becomes aware of the inaccuracy or need for change. The ((office)) department reserves the right to suspend or revoke a permit under the terms of WAC 25-48-110 or to amend a permit under WAC 25-48-100 if the new or corrected information warrants.

NEW SECTION

WAC 25-48-095 Emergency permits. (1) The department may issue an emergency permit immediately where delay could cause damage to an archaeological or historic resource or site, or to burial(s) or human remains.

(2) Before issuing an emergency permit, the department shall require the applicant to provide the information required in WAC 25-48-060. The department, in its discretion, may allow the applicant to provide the required information in abbreviated form.

(3) The emergency permit shall include the terms and conditions specified in WAC 25-48-100.

(4) The department may issue an emergency permit without complying with the notification requirements in WAC 25-48-070 and 25-48-080, except as provided in WAC 25-48-070(4).

(5) An emergency permit shall be valid for not more than thirty days. The department, in its discretion, may extend the emergency permit for an additional thirty days.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-100 Terms and conditions of permits. (1) In all permits issued, the ((office)) department shall specify:

(a) The nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work;

(b) The name of the individual(s) responsible for conducting the work and, if different, the name of the individual(s) responsible for carrying out the terms and conditions of the permit.

(c) The name of any university, museum, repository, or other scientific or educational institutions in which any collected materials and data shall be deposited.

(d) Reporting documentation requirements and site restoration and mitigation requirements.

(2) The ~~((director))~~ department may specify such terms and conditions as deemed necessary, consistent with this chapter, to:

(a) Protect the public interest in the conservation, preservation, and protection of the state's archaeological resources, and the knowledge to be derived and gained from the scientific study of these resources;

(b) Protect the public safety and other values and/or resources((,-to));

(c) Secure work areas, ((to)) safeguard other legitimate land uses, and ((to)) limit activities incidental to work authorized under the permit.

~~((This may include))~~ (3) The department may require evidence of sufficient bonding to cover cost of site restoration.

~~((3))~~ (4) The department may specify such terms and conditions as deemed necessary that are recommended by persons commenting within the comment period provided in WAC 25-48-080.

(5) The ~~((office))~~ department may include in permits issued for archaeological work on native Indian cairns and graves or glyptic or painted records such terms and conditions as may be requested by the concerned native Indian tribe and approved by the department.

~~((4))~~ (6) Initiation of work or other activities under the authority of a permit signifies the permittee's acceptance of the terms and conditions of the permit.

~~((5))~~ (7) The permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired.

~~((6))~~ (8) The permittee may request that the ((office)) department extend or modify a permit. Such a request will require compliance with all the provisions of this chapter.

~~((7))~~ (9) The permittee's performance under any permit issued for a period greater than one year shall be subject to review by the ((office)) department, at least annually.

(10) If at any time the department determines the terms and conditions of the permit are inadequate to provide the protections addressed under subsections (2) and (3) of this section, the department may add, amend, or delete the terms and conditions of the permit.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-105 Permit denial. If a permit is denied, a written statement of the reasons for the denial will accompany the notice of permit denial to the applicant as well as notice of the right to request a hearing. A permit may be denied ~~((for failure to adequately meet the requirements of an applicant under WAC 25-48-060 and/or the standards set forth in WAC 25-48-090))~~ if:

(1) The application does not meet the requirements and standards in WAC 25-48-060 and 25-48-090;

(2) The applicant or any individual proposed to be responsible for conducting the work or carrying out the terms and conditions of the permit has failed to meet the terms and conditions of a permit previously issued under this chapter; or

(3) The applicant or any individual proposed to be responsible for conducting the work or carrying out the terms and conditions of the permit has been found to have violated this chapter or any federal or state law regulating archaeological objects or sites, historic archaeological resources, glyptic or painted records, or native Indian cairns or graves.

AMENDATORY SECTION (Amending Order 88-06, filed 11/4/88)

WAC 25-48-108 Right of first refusal—Discovery of new technology. (1) Any ~~((agency, institution,))~~ person ~~((firm, or corporation which))~~ that has been denied a permit because the historic archaeological resource would be destroyed beyond mitigation by ~~((their))~~ its method of salvage shall have the right of first refusal for a permit at a future date should technology be found which would make salvage possible without destroying the historic archaeological resource.

(2) Such rights may be assigned, but it is the responsibility of the parties to the assignment to provide written evidence of the assignment to the department, including the correct name and mailing address of the assignee.

(3) Upon receipt of a complete permit application and determination that a new technology can salvage the resource, the ~~((director))~~ department shall notify by certified mail, return receipt requested, the holder of the right of first refusal of a permit application that a new technology exists and the holder has sixty days from the receipt of the ~~((director's))~~ department's determination to submit its own permit application and thereby exercise its first refusal right, or the right shall be extinguished.

(4) If the person ~~((firm, corporation, institution, or agency))~~ that possesses the first refusal right for a permit does not exercise its first refusal right within the sixty-day time period, the department shall send to that ~~((entity))~~ person a notice by certified mail, return receipt requested, that the ~~((entity's))~~ person's right of first refusal has been extinguished.

AMENDATORY SECTION (Amending WSR 90-01-091, filed 12/19/89, effective 1/19/90)

WAC 25-48-110 Suspension and revocation of permits. (1) The ~~((office))~~ state archaeologist or the assistant state archaeologist may suspend or revoke a permit issued pursuant to this chapter upon determining that the permittee has failed to meet any of the terms and conditions of the permit and upon at least twenty days written notice. In the case of emergencies which imminently threaten health, safety, or welfare including property, the ~~((office))~~ state archaeologist or the assistant state archaeologist may summarily suspend a permit by immediately issuing a written order which incorporates a finding to that effect.

(2) The ~~((office))~~ state archaeologist or the assistant state archaeologist shall provide the permittee with written notice ~~((and the notice of right to request a public hearing to the permittee))~~ of the suspension or revocation, the cause thereof, and in the case of a suspension, the length of the suspension and the requirements which must be met before the suspension will be removed. The notice shall inform the respondent of its right to request a hearing to contest the revocation or suspension. In addition, a notice of summary suspension shall inform the respondent of its right to request an emergency adjudicative proceeding.

AMENDATORY SECTION (Amending Order 88-06, filed 11/4/88)

WAC 25-48-120 ~~((Appeals relating to permits.))~~ Administrative appeals. ~~((Any affected person may request a hearing to appeal a denial, suspension, or revocation of a permit or extinguishment of a right of first refusal under WAC 25-48-108 to the director. Said request must be in writing and filed with the director within twenty-one calendar days of receipt of notice of the denial, suspension, revocation, or extinguishment.))~~ (1) An applicant for or holder of a permit issued under this chapter may request a hearing to contest a penalty imposed under WAC 25-48-041, the terms and conditions imposed on a permit under WAC 25-48-100, a denial of a permit application under WAC 25-48-105, a suspension or revocation of a permit under WAC 25-48-110, or the extinguishing of a right of first refusal under WAC 25-48-108.

(2) A request for a hearing shall be made by filing a written application for adjudicative proceeding with the department at the following address: Department of Archaeology and Historic Preservation, P.O. Box 48343, Olympia, WA 98504-8343. The application must be received by the department within twenty-one calendar days of the date of service of the notice of the penalty, denial, suspension, revocation, or extinguishing. An application contesting the terms and conditions imposed on a permit under WAC 25-48-100 must be received by the department within twenty-one days of the date the permit was issued. The application shall specify the issue or issues to be decided and indicate whether the requester desires a full adjudicative proceeding, a brief adjudicative proceeding, or an emergency adjudicative proceeding.

(3) When the department receives an application for adjudicative proceeding, it will immediately notify the director of its receipt and provide the director and the state archaeologist or the assistant state archaeologist with a copy of the application and the notice or document being appealed. The director thereupon will designate a presiding officer as follows:

(a) Where an application requests a full adjudicative proceeding, or where the director determines a full adjudicative proceeding is required, the director will designate as presiding officer an administrative law judge assigned by the office of administrative hearings under chapter 34.12 RCW.

(b) Where an application requests a brief adjudicative proceeding or emergency adjudicative proceeding, or where the director determines a brief adjudicative proceeding or emergency adjudicative proceeding is appropriate, the director will designate a senior staff person in the department as presiding officer. The person designated shall not have participated in the matter and shall not be subject to the authority or direction of any person who has participated in the matter.

(4) Upon being designated, the presiding officer shall notify the requestor, the state archaeologist, and the assistant state archaeologist of his or her name and business address and provide any other information required by chapter 34.05 RCW, 10-08 WAC, or this chapter.

(5) Upon receiving the notice required in subsection (4) of this section, the state archaeologist or the assistant state archaeologist shall immediately transmit to the presiding

officer the application, together with any accompanying documents provided by the requester, and a copy of the notice or other document being appealed.

NEW SECTION

WAC 25-48-121 Adjudicative proceedings. (1) The department hereby adopts the model rules of procedure, chapter 10-08 WAC, adopted by the chief administrative law judge pursuant to RCW 34.05.250, as now or hereafter amended, for use in adjudicative proceedings of agency action under this chapter.

(2) "Service" and "filing" of documents in adjudicative proceedings, brief adjudicative proceedings, and emergency adjudicative proceedings are defined as in RCW 34.05.010 and WAC 10-08-110.

(3) In the case of a conflict between the model rules of procedure and this chapter, the rules in this chapter shall take precedence.

(4) All factual determinations shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The burden in all proceedings is a preponderance of the evidence.

(a) In all proceedings contesting the denial of a permit application under WAC 25-48-108, the burden shall be on the applicant to establish that the application meets all applicable requirements and standards.

(b) In all proceedings contesting the extinguishing of a right of first refusal under WAC 25-48-108, the burden shall be on the person challenging the extinguishing to establish the timely exercise of its right of first refusal.

(c) In all other proceedings, the burden is on the state historic preservation officer to prove the alleged factual basis set forth in the notice.

NEW SECTION

WAC 25-48-122 Brief adjudicative proceedings. (1) Pursuant to RCW 34.05.482, the department will use brief adjudicative proceedings where permitted by law and where protection of the public interest does not require the department to give notice and an opportunity to participate to persons other than the parties. A brief adjudicative proceeding is intended to serve as an inexpensive and efficient alternative where the issues can be decided by reference to writings and other documents without a full, formal hearing.

(2) A brief adjudicative proceeding may be used to review the following actions taken under this chapter:

(a) A notice of violation of the terms and conditions of a permit under WAC 25-48-041 (1)(b);

(b) A denial of a permit application under WAC 25-48-105;

(c) Extinguishing a right of first refusal under WAC 25-48-108.

(3) An application for brief adjudicative proceeding shall include a written explanation of the applicant's view of the matter and a copy of any other documents the applicant wishes to have the presiding officer consider. Any response by the department shall be filed with the presiding officer and served on the applicant within fourteen days of receiving an application for a brief adjudicative proceeding.

(4) If the applicant desires an opportunity to make an oral statement to the presiding officer, a request to make an oral statement must be included in the application for a brief adjudicative proceeding. The presiding officer may grant a request to make an oral statement if the presiding officer believes the statement would benefit him or her in reaching a decision. The presiding officer shall notify the parties within a reasonable time of his or her decision to grant or deny a request to make an oral statement. If the presiding officer grants any request to make an oral statement, all parties shall be entitled to make oral statements, and the presiding officer shall notify all parties of the time and place for hearing oral statements.

(5) At the time any unfavorable action is taken, the presiding officer shall serve upon each party a brief statement of the reasons for the decision. Within ten days of the decision, the presiding officer shall serve upon each party a brief written statement of the reasons for the decision and information about any internal administrative review available.

(6) The presiding officer's brief written statement is an initial order. The initial order shall be the final order without further action unless within twenty-one days of the date of service a party requests administrative review of the initial order or the director initiates review of the initial order.

(7) If the presiding officer determines a more comprehensive hearing is warranted, or on the motion of any party, he or she may convert the proceeding to a full adjudicative proceeding by requesting in writing, with findings supporting the request, that the proceeding be so converted and that the director designate as presiding officer an administrative law judge assigned by the office of administrative hearings under chapter 34.12 RCW. The director will act as soon as possible on the request.

(8)(a) A party may request review of the initial order by filing a written request with the director at the following address: Director, Department of Archaeology and Historic Preservation, P.O. Box 48343, Olympia, WA 98504-8343. A request for review of an initial order shall contain an explanation of the requester's view of the matter and a statement of reasons why the initial order is incorrect. The request must be received by the director and served on all other parties within twenty-one days of the date the initial order was served on the parties. A copy of the request must be served on the state archaeologist or the assistant state archaeologist.

(b) Any response to the request for review of an initial order shall be filed with the director and served on the requester within ten days after receiving the request.

(c) In response to a request for review of an initial order, the director shall immediately obtain the record compiled by the presiding officer. The director, at his or her sole discretion, may act as the reviewing officer or designate a reviewing officer who is authorized to grant appropriate relief upon review.

(d) The reviewing officer may issue an order on review, which shall include a brief statement of the reasons for the decision and include a notice that judicial review may be available.

(e) A request for review of an initial order is deemed to have been denied if the reviewing officer does not issue an

order on review within twenty days of the date the request for review of the initial order was filed with the director.

(9)(a) The director may initiate review of the initial order on his or her own motion, without notifying the parties. The director, at his or her sole discretion, may act as the reviewing officer or designate a reviewing officer who is authorized to grant appropriate relief upon review.

(b) The reviewing officer shall obtain and review the record compiled by the presiding officer before taking action.

(c) The reviewing officer may not take any action on review less favorable to any party than in the initial order without giving that party notice and an opportunity to provide a written explanation of its view of the matter. The notice shall specify the deadline for that party to submit its written explanation.

(d) Any order on review shall be issued and served on the parties within twenty days of the date the initial order was served on the parties or within twenty days of the date a request for review of the initial order was filed with the director, whichever occurs later. If an order on review is not issued and served by the applicable deadline in this paragraph, the initial order becomes the final order.

NEW SECTION

WAC 25-48-123 Emergency adjudicative proceedings. (1) A respondent who receives a notice of summary suspension of a permit under WAC 25-48-110 may request an emergency hearing under RCW 34.05.422 and 34.05.479 to contest the findings included in the notice of summary suspension by filing an application for emergency adjudicative proceeding. A respondent who does not file an application for emergency adjudicative proceeding may contest the findings included in the notice of summary suspension in a regularly scheduled adjudicative hearing.

(2) An application for emergency adjudicative proceeding must be received by the department within seven calendar days of the date of service of the notice of summary suspension. An application for emergency adjudicative proceeding received by the department more than seven calendar days after the date of service of the notice of summary suspension shall be deemed an application for full adjudicative proceeding and will be scheduled accordingly.

(3) An application for emergency adjudicative proceeding shall include a written explanation of the applicant's view of the summary suspension and a copy of any other documents the applicant wishes to have the presiding officer consider.

(4) The presiding officer, in his or her discretion, may provide for telefacsimile or electronic service and filing of documents, using means that are similarly available to all parties, in the notice required in WAC 25-48-120(4).

(5) Upon receiving the notice required in WAC 25-48-120(4), the state archaeologist or the assistant state archaeologist shall immediately transmit to the presiding officer copies of any documents that were considered or relied upon in issuing the notice of summary suspension, in addition to the documents listed in WAC 25-48-120(5).

(6) Within seven business days after receiving an application for emergency adjudicative proceeding, the presiding officer shall issue an order that either:

(a) Affirms that the summary suspension is necessary to prevent or avoid immediate danger to the public health, safety or welfare including property; or

(b) Sets aside the summary suspension as unnecessary to prevent or avoid immediate danger to the public health, safety or welfare including property.

No other issue shall be decided in the emergency adjudicative proceeding. The order shall include a brief statement of findings of fact, conclusions of law, and policy reasons for the decision.

(7) The order is effective when signed by the presiding officer. The presiding officer shall promptly notify each party of the decision and serve each party with a copy of the order.

(8) If other issues remain to be decided, or if the respondent requests review of the order, the presiding officer may request that a full adjudicative proceeding be scheduled and that the director designate as presiding officer an administrative law judge assigned by the office of administrative hearings under chapter 34.12 RCW. The request shall summarize the issues that remain to be decided. The director will act as soon as possible on the request. The order issued under this section becomes final unless within seven days of the date of issuance a full adjudicative proceeding is scheduled.

AMENDATORY SECTION (Amending Order 88-06, filed 11/4/88)

WAC 25-48-125 Listing of areas where permits are required to protect historic archaeological sites on aquatic lands. The following is a list of those areas where permits are required under RCW 27.53.060 to protect historic archaeological sites on aquatic lands:

Lake Washington.

Elliott Bay.

Columbia River Bar.

AMENDATORY SECTION (Amending Order 11, filed 6/5/86)

WAC 25-48-130 Display of permit. (1) The permit granted by the ~~((office))~~ department shall be either prominently displayed at all times upon the archaeological site being excavated during the permitted period, or carried on the person of the individual responsible for the field work, as specified in the permit.

(2) If more than one archaeological site is being excavated under a single permit, the permittee may obtain from the ~~((office))~~ department such copy or copies of his or her permit as may be necessary to display at each archaeological site being excavated.

(3) The director or his designee, including the state archaeologist and the assistant state archaeologist, may examine at any time the permit, work, and site at which such permitted work is being undertaken.

NEW SECTION

WAC 25-48-135 Procedure for collecting radiometric data without a permit. A professional archaeologist, as defined in WAC 25-48-020(4), may collect radiocarbon samples without first obtaining a permit under this chapter if the following conditions are met:

(1) The sample or samples must consist of charcoal or shell; no human or mammal bone may be sampled without a permit;

(2) At least ten working days following the sampling, the professional archaeologist must notify the department of the radiocarbon sampling; and

(3) Within thirty days of receiving copies of the results worksheets or their equivalent from the radiocarbon laboratory, the professional archaeologist must submit to the department copies of the results worksheets or their equivalent together with a brief written report documenting sampling and results.

WSR 05-23-134
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 05-267—Filed November 21, 2005, 4:27 p.m., effective November 21, 2005, 7:00 p.m.]

Effective Date of Rule: November 21, 2005, 7:00 p.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-47-31100G and 220-47-41100H; and amending WAC 220-47-311 and 220-47-411.

Statutory Authority for Adoption: RCW 77.12.047.

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 implements a comanager agreement to close Area 8D due to lower than expected escapement to the hatchery. There is insufficient time to promulgate 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 2, 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: November 21, 2005.

Evan Jacoby
for Jeff Koenings
Director

NEW SECTION

WAC 220-47-31100H Purse seine—Open periods. Notwithstanding the provisions of Chapter 220-47-311 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Areas 8:

Purse Seines - Open in Area 8 to the purse seine vessels using the 5-inch strip during the following hours and dates, provided it is unlawful to retain Chinook or Coho salmon, and any Chinook or Coho salmon caught must be released immediately.

7:00 a.m. to 4:00 p.m. 11/22

(2) Areas 8A - Closed.**(3) Areas 8D - Closed.****(4) Areas 12, 12B and 12C - Closed.**

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.

NEW SECTION

WAC 220-47-41100I Gill net—Open periods. Notwithstanding the provisions of Chapter 220-47-411 WAC, effective immediately until further notice, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas except in accordance with the open periods, mesh size, areas, species restrictions, notification, and landing requirements set forth in this section, provided that unless otherwise amended, all permanent rules remain in effect:

(1) Area 8 open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 6:00 p.m. 11/22, 11/23, 11/24, 11/25.

(2) Area 8A open for Gill Nets using 6 1/4 inch mesh from 7:00 a.m. to 6:00 p.m. 11/22, and closed on 11/24 and 11/25.

(3) Areas 8D - Closed.**(4) Areas 10 and 11 - Closed.****(5) Areas 12, 12B and 12C - 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 sections of the Washington Administrative Code are repealed effective 7:00 p.m. November 21, 2005:

WAC 220-47-31100G Purse seine—Open periods.
(05-264)

WAC 220-47-41100H Gill net—Open periods. (05-264)

