WSR 06-22-001
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-275—Filed October 18, 2006, 3:27 p.m., effective October 19, 2006, 12:01 a.m.]

Effective Date of Rule: October 19, 2006, 12:01 a.m.

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

Citation of Existing Rules Affected by this Order: Repealing WAC 220-33-01000A; and amending WAC 220-33-010.

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

Other Authority: *United States v. Oregon,* Civil No. 68-513-KI (D. Or.), Order Adopting 2005-2007 Interim Management Agreement For Upriver Chinook, Sockeye, Steelhead, Coho & White Sturgeon (May 11, 2005) (Doc. No. 2407); *Northwest Gillnetters Ass'n v. Sandison,* 95 Wn.2d 638, 628 P.2d 800 (1981); Washington fish and wildlife commission policies concerning Columbia River fisheries; 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; 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: Washington and Oregon jointly regulate Columbia River fisheries under the congressionally-ratified Columbia River compact. Four Indian Tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2005-2007 Interim Management Agreement For Upriver Chinook, Sockeye, Steelhead, Coho & White Sturgeon (May 11, 2005) (Doc. No. 2407).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal Endangered Species Act. The National Marine Fisheries Service has issued biological opinions under 16 U.S.C. § 1536 that allow for some incidental take of these species in treaty and nontreaty Columbia River fisheries. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of these biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the Endangered Species Act, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington and Oregon departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached. Regulation is consistent with compact action of October 18, 2006. 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: October 18, 2006.

Morris W. Barker
for Jeff Koenings
Director

NEW SECTION

WAC 220-33-01000B Columbia River season below Bonneville. Notwithstanding the provisions of WAC 220-33-010, and 220-33-020, it is unlawful for a person to take or possess salmon or sturgeon taken for commercial purposes from Columbia River Salmon Management and Catch Reporting Areas 1A, 1B, 1C, 1D, and 1E, except as provided in the following subsections.

1. Mainstem Columbia River

a. OPEN AREA: SMCRA 1A, 1B, 1C, D, 1E

b. SEASON:

7:00 p.m. Thursday October 19 to 7:00 a.m. Friday October 20, 2006

7:00 p.m. Tuesday October 24 to 7:00 a.m. Wednesday October 25, 2006

c. GEAR: 8-inch minimum mesh size restriction. 9 3/4-inch maximum mesh size. Drift gillnets only. Monofilament gear is allowed.

d. SANCTUARIES: Elokomin-A, Abernathy, Cowlitz, Kalama-A, Lewis-A, Sandy and Washougal.

2. **Blind Slough/Knappa Slough Select Area.**

a. OPEN AREA: Blind Slough fishing area includes all waters from markers at the mouth of Gnat Creek located approximately 0.5 mile upstream of the county road bridge downstream to markers at the mouth of Blind Slough. Concurrent waters extend downstream of the railroad bridge.

Knappa Slough fishing area includes all waters bounded by a line from the north marker at the mouth of Blind Slough, westerly to a marker on Karlson Island, downstream to boundary lines defined by markers on the west end of Minaker Island to markers on Karlson Island and the Oregon shore. An area closure of about a 100-foot radius at the mouth of Big Creek defined by markers. All waters in Knappa Slough are under concurrent jurisdiction.

b. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 27, 2006. Open hours are 6:00 p.m. to 8:00 a.m.

c. GEAR: Gillnet. Monofilament gear is allowed. 6-inch maximum mesh size. Maximum net length of 100 fathoms. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

3. **Tongue Point/South Channel Select Area.**

a. OPEN AREA: Tongue Point fishing area includes all waters bounded by a line from a marker midway between the red USCG navigation light #2 at the tip of Tongue Point and the downstream (northern most) pier (#8) at the Tongue Point Job Corps facility, to the flashing green USCG navigation light #3 on the rock jetty at the west end of Mott Island, a line from a marker at the southeast end of Mott Island northeasterly to a marker on the northwest tip of Lois Island, and a line from a marker on the southwest end of Lois Island westerly to a marker on the Oregon shore. All waters are under concurrent jurisdiction. South Channel area includes all waters bounded by a line from a marker on John Day Point through the green USCG buoy #7 to a marker on the southwest end of Lois Island upstream to an upper boundary line from a marker on Settler Point northwesterly to the flashing red USCG marker #10, northwesterly to a marker on Burnside Island defining the upstream terminus of South Channel. All waters are under concurrent jurisdiction.

b. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 27, 2006. Open hours are 4:00 p.m. to 8:00 a.m.

c. GEAR: Gillnet. Monofilament gear is allowed. 6-inch maximum mesh. In the Tongue Point area: Net length maximum of 250 fathoms, and weight not to exceed two pounds on any one fathom on the lead line. Participants in the Tongue Point fishery nay have stored onboard their boats gill nets with leadline in excess of two pounds per any one fathom. In the South Channel area: Net length maximum of 100 fathoms, and no weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

4. **Deep River Select Area.**

a. OPEN AREA: Deep River fishing area includes all waters downstream of the town of Deep River to the mouth defined by a line from USCG navigation marker #16 southwest to a marker on the Washington shore. Concurrent waters extend downstream of the Highway 4 bridge

b. SEASON: Monday Tuesday, Wednesday, and Thursday nights immediately through October 27, 2006. Open hours are 4:00 p.m. to 8:00 a.m.

c. GEAR: Monofilament gear is allowed. The mesh size is restricted to 6-inch maximum mesh. Net length maximum of 100 fathoms, and no weight restriction on the lead line. Use of additional weights or anchors attached directly to the lead line is allowed. Nets may not be tied off to stationary structures. Nets may not fully cross the navigation channel.

7. ALLOWABLE SALES: Applies to all seasons stated in sections 1-5: Salmon. Sturgeon retention is prohibited.

8. MISCELLANEOUS REGULATIONS: Applies to all seasons stated in sections 1-5: Quick reporting required for Washington wholesale dealers, WAC 220-69-240.

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

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. October 19, 2006:

WAC 220-33-01000A	Columbia River season below Bonneville. (06-266)

WSR 06-22-003
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-274—Filed October 19, 2006, 1:18 p.m., effective October 20, 2006, 12:01 a.m.]

Effective Date of Rule: October 20, 2006, 12:01 a.m.

Purpose: Amend personal use rules.

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

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 escapement 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 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: October 19, 2006.

Morris W. Barker
for Jeff Koenings
Director

NEW SECTION

WAC 232-28-61900B Exceptions to statewide rules—Cowlitz River. Notwithstanding the provisions of WAC 232-28-619, effective 12:01 a.m. October 20, through December 31, 2006 in those waters of the Cowlitz River from boundary markers at the mouth to Mayfield Dam, special daily limit of six salmon, no more than four adults, except only two adult chinook. Wild coho and chum must be released.

REPEALER

The following section of the Washington Administrative Code is repealed effective January 1, 2007:

WAC 232-28-61900B	Exceptions to statewide rules—Cowlitz River.

WSR 06-22-007
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-268—Filed October 19, 2006, 4:47 p.m., effective October 21, 2006, 12:01 a.m.]

Effective Date of Rule: October 21, 2006, 12:01 a.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Amending WAC 232-28-619.

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: Large numbers of hatchery steelhead are expected to return to the waters above Priest Rapids Dam (10,540). Only a relatively small number of the returning hatchery steelhead are needed for hatchery production. The recreational fishery will reduce the proportion of hatchery origin steelhead contributing to the adult spawning escapement, thereby minimizing impacts to wild steelhead spawners. This will increase the proportion of wild steelhead on the spawning grounds and thus improving the natural production. 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: October 19, 2006.

Morris W. Barker
for Jeff Koenings
Director

NEW SECTION

WAC 232-28-61900Z Exceptions to statewide rules—Columbia River Notwithstanding the provisions of WAC 232-28-619, effective 12:01 a.m. October 21, 2006 until further notice, it is unlawful to violate the following provisions:

(1) For purposes of this section, "adipose-fin clipped steelhead" means steelhead with an adipose-fin clip and a healed scar at the site of the fin clip, whether or not any other fins are clipped or a healed scar is present at any other fin position.

(2) Columbia River from Rocky Reach Dam to 400 feet below Chief Joseph Dam - Night closure in effect. Trout: Release all trout except up to two adipose-fin clipped steelhead may be retained. Release steelhead with anchor (floy) tag attached.

WSR 06-22-011
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-273—Filed October 20, 2006, 1:21 p.m., effective November 1, 2006, 8:00 a.m.]

Effective Date of Rule: November 1, 2006, 8:00 a.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-33000W; and amending WAC 220-56-330.

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: These rules reopen the fishery and adjust the open days per week. Available harvest shares allow the areas to be opened in this rule. 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: October 19, 2006.

J. P. Koenings
Director
by Larry Peck

NEW SECTION

WAC 220-56-33000X Crab—Areas and seasons. Notwithstanding the provisions of WAC 220-56-330, it is unlawful to fish for or possess crab taken for personal use from Puget Sound except during the following seasons:

(1) Marine Area 4 east of the Bonilla-Tatoosh line and Marine Areas 5, 6, 9, 10, 12 and 13 - Open seven days a week 8:00 a.m. November 1, 2006 through 6:00 p.m. January 2, 2007.

(2) Marine Areas 7, 8-1, 8-2 and 11 - closed until further notice.

REPEALER

The following section of the Washington Administrative Code is repealed effective 8:00 a.m. November 1, 2006:

WAC 220-56-33000W	Crab—Areas and seasons. (06-219)

WSR 06-22-012
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-276—Filed October 20, 2006, 1:22 p.m., effective October 20, 2006]

Effective Date of Rule: Immediately.

Purpose: Amend hunting rules.

Citation of Existing Rules Affected by this Order: Amending WAC 232-28-430.

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 change to the migratory waterfowl season is necessary to correct a typographical error. 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: October 20, 2006.

J. P. Koenings
Director
by Larry Peck

NEW SECTION

WAC 232-28-43000A 2006-07 Migratory waterfowl seasons and regulations Notwithstanding the provisions of WAC 232-28-430, effective 12:01 a.m. January 15, 2007, it is lawful to hunt in Goose Management Area 4.

WSR 06-22-013
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-277—Filed October 20, 2006, 1:23 p.m., effective October 20, 2006]

Effective Date of Rule: Immediately.

Purpose: Amend hunting rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-35400C; and amending WAC 232-28-354.

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 number of permits for these hunts must be increased to accommodate permit holders who where [were] subject to errors during the initiation of a new electronic licensing system. 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: October 20, 2006.

J. P. Koenings
Director
by Larry Peck

NEW SECTION

WAC 232-28-35400D 2006 Elk special permits. (1) Notwithstanding the provisions of WAC 232-28-354, the number of permits to be issued for:

(a) Crouse C elk special permit hunt is 26.

(b) Cowiche A elk special permit hunt is 25.

(c) Manastash A elk special permit hunt is 251.

(d) Bumping B elk special permit hunt is 101.

(e) Winston A elk special permit hunt is 13.

(f) Ryderwood A elk special permit hunt is 33.

(g) Mountain View D elk special permit hunt is 26.

(h) Observatory C elk special permit hunt is 90.

(i) Rimrock D elk special permit hunt is 119.

(j) Peola A elk special hunt permit is 52.

(k) Wildwood A elk special permit hunt is 16.

(2) Notwithstanding the provisions of WAC 232-28-354, it is unlawful to hunt for Elk with a Special Elk Permit in Centralia Mine A and Centralia Mine B except as provided for in this section:

(a) Centralia Mine A special elk permit hunt dates are Oct. 21-22.

(b) Centralia Mine B special elk permit hunt dates are Oct. 28-29.

REPEALER

The following section of the Washington Administration Code is repealed:

WAC 232-28-35400C	2006 Elk special permits. (06-232)

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 06-22-014

EMERGENCY RULES

DEPARTMENT OF FISH AND WILDLIFE

[Order 06-278—Filed October 20, 2006, 4:45 p.m., effective October 20, 2006]

Effective Date of Rule: Immediately.

Purpose: Amend personal use rules.

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

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 escapement 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 1, Amended 0, Repealed 2.

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

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

Date Adopted: October 20, 2006.

J. P. Koenings
Director

NEW SECTION

WAC 232-28-61900D Exceptions to statewide rules—Cowlitz River. Notwithstanding the provisions of WAC 232-28-619, effective immediately through December 31, 2006 in those waters of the Cowlitz River from boundary markers at the mouth to Mayfield Dam. Special daily limit of six salmon, no more than four adults, except only two adult chinook. Wild coho and chum must be released. Except closed 100' or posted markers below the Cowlitz Salmon Hatchery barrier dam to boundary markers near the Cowlitz Salmon Hatchery water intake located about 1,700' upstream from the Cowlitz Salmon Hatchery barrier dam.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 232-28-61900B	Exceptions to statewide rules—Cowlitz River. (06-274)

The following section of the Washington Administrative Code is repealed effective January 1, 2007:

WAC 232-28-61900D	Exceptions to statewide rules—Cowlitz River.

WSR 06-22-021
EMERGENCY RULES
DEPARTMENT OF EARLY LEARNING

[Filed October 24, 2006, 11:10 a.m., effective October 24, 2006]

Effective Date of Rule: Immediately.

Purpose: The purpose of this rule is to allow the new department of early learning to continue performing background clearances on and providing due process hearing procedures to child care providers after the department separated from the department of social and health services and became a new department on July 1, 2006. No rules are being appealed or amended, but obsolete DSHS rules about background checks and hearings are being replicated in new Title 170 WAC, which is the new department of early learning title. This is an extension to allow for more public comment.

Statutory Authority for Adoption: Section 301, chapter 265, Laws of 2006.

Other Authority: Chapter 265, Laws of 2006.

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: SSHB [2SHB] 2964 (chapter 265, Laws of 2006) created the new department of early learning, effective July 1, 2006. The department has existed as division of child care and early learning, a part of DSHS. One function of the department is to perform background checks on applicants for child care licenses and workers in child care. Another function is to process administrative hearings when an applicant for a child care license is denied the license or denied clearance to work with children. With the creation of the department of early learning, child care background check and hearing rules Title 388 WAC became obsolete for the purpose of regulating child care. These new rules are needed to allow the new department of early learning to continue performing background checks and conducting hearings. This is vital to the health and safety of children in care. These rules are necessary to implement the legislature intent in SSHB [2SHB] 2964. This extension is required to gather meaningful public input.

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 72, Amended 0, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 72, Amended 0, Repealed 0.

Date Adopted: October 24, 2006.

Jone Bosworth
Director

Chapter 170-06 WAC

DEL BACKGROUND CHECK RULES

NEW SECTION

WAC 170-06-0010 Purpose and scope. (1) The purpose of this chapter is to establish rules for background checks conducted by the department of early learning (DEL). The department does background checks on individuals who are authorized to care for or have unsupervised access to children in child care agencies or under DEL approval. Background checks are conducted to find and evaluate any history of criminal convictions, findings of abuse or neglect of children or other vulnerable persons, adverse licensing actions, or other information that raises concerns about an individual's character and suitability to care for or have unsupervised access to children in child care.

(2) This chapter applies to applicants for child care agency licenses, licensees, persons working in or living on the premises of a child care agency, and child care providers who are authorized by DEL to care for children. These rules apply to all applications for new and renewal licenses, contracts, certifications, and authorizations to care for or to have unsupervised access to children after the effective date of this chapter.

(3) If any provision of this chapter conflicts with a provision relating to background checks and qualifications of persons who are authorized to care for or have unsupervised access to children in child care, the provisions in this chapter shall govern.

(4) Effective date: These rules are effective July 3, 2006, and apply prospectively.

NEW SECTION

WAC 170-06-0020 Definitions. The following definitions apply to this chapter:

(1) **"Authorized"** or **"authorization"** means qualified by DEL to have unsupervised access to children in child care or to work in or live on the premises of a child care agency.

(2) **"DEL"** or **"department"** means the department of early learning.

(3) **"Director's list"** means a list of crimes and civil adjudications, the commission of which disqualifies an individual from being authorized by DEL to care for or have unsupervised access to children in child care.

(4) **"Disqualified"** means DEL has determined that a person's background information prevents that person from being authorized by DEL to have unsupervised access to children in child care or to work in or live on the premises of a child care agency.

(5) **"Unsupervised access"** means:

(a) An individual will or may have the opportunity to be alone with a child in care at any time for any length of time; and

(b) Neither the licensee, a qualified employee, nor a relative or guardian of the child is present.

NEW SECTION

WAC 170-06-0030 Reason for background checks. The department does background checks to help safeguard the health, safety and well-being of children in licensed child care agencies and in the care of DEL-approved providers. By doing background checks, the department reduces the risk of harm to children from caregivers who have been convicted of certain crimes or who have been found to have been a risk to children. The department's rules and state law require the evaluation of background information to determine the character, suitability and competence of persons who will care for or have unsupervised access to children in child care.

NEW SECTION

WAC 170-06-0040 Background inquiries. (1) At the time of application for a license or for authorization to care for or have unsupervised access to children in child care, a completed background check form and finger print card, if required, must be submitted to the department for each person who will have unsupervised access to any child in care. This includes:

(a) Each applicant for a license;

(b) All staff of the licensed child care agency, whether they provide child care or not;

(c) Assistants;

(d) Volunteers;

(e) Contracted providers; and

(f) Each person living on the premises of a licensed facility who is sixteen years of age or older.

(2) Each person identified in this section must consent to and authorize the department to access his or her criminal history and any information contained in any records about the person that are maintained by the department of social and health services, including child protective services, adult protective services, the division of home and community services, the division of residential care services, and the division of licensed resources.

(3) When a licensee plans to add new staff, assistants, volunteers, or contracted providers, or when any person who is sixteen years old or older moves onto the premises, the licensee shall require each person to complete and submit to the licensee a criminal history and background check form that must be submitted to DEL for processing before the date of hire or the date the individual moves onto the premises, as applicable.

(4) A person who has not been formally authorized by DEL to care for or have unsupervised access to children in child care may not have unsupervised access to any child in care.

(5) The department will discuss the result of the criminal history and background check information with the licensee, when applicable.

NEW SECTION

WAC 170-06-0050 Department action following completion of background inquiry. After the department receives the background information it will:

(1) Compare the background information with convictions/actions posted on the DEL director's list of disqualifying convictions/actions. The complete list can be found on the DEL web site or by calling any DEL office.

(2) Review the background information using the following rules:

(a) A pending charge for a crime or a deferred prosecution is given the same weight as a conviction.

(b) If the conviction has been renamed it is given the same weight as the previous named conviction. For example, larceny is now called theft.

(c) Convictions whose titles are preceded with the word "attempted" are given the same weight as those titles without the word "attempted."

(d) The crime will not be considered a conviction for the purposes of the department when it has been pardoned or a court of law acts to expunge, dismiss, or vacate the conviction record, or if an order of dismissal has been entered following a period of probation, suspension or deferral of sentence.

(e) The term "conviction" has the same meaning as the term "conviction record" as defined in RCW 10.97.030 and shall include convictions or dispositions for crimes committed as either an adult or a juvenile. It shall also include convictions or dispositions for offenses for which the person received a deferred or suspended sentence, unless the record has been expunged according to law.

(f) A person will not be authorized to have unsupervised access to children if the individual is the subject of a pending child protective services (CPS) investigation.

(g) A person who has a "founded" finding for child abuse or neglect will not be authorized to have unsupervised access to children during the administrative hearing and appeals process.

(3) Conduct a character, competence and suitability assessment of the applicant, licensee, staff member, assistant, volunteer, contacted provider, or anyone living on the premises of a child care facility, if the individual is not automatically disqualified by a conviction record, pending charges

and/or findings of abuse, neglect, exploitation or abandonment of a child or vulnerable adult, under the DEL director's list of disqualifying crimes and actions.

(4) Notify the licensee or child care provider whether or not the department is able to approve the applicant, licensee, staff, assistant, volunteer, contracted provider, or anyone living on the premises of a licensed facility to care for or have unsupervised access to children in child care.

NEW SECTION

WAC 170-06-0060 Additional information the department may consider. (1) Upon request, the licensee or any person who requests authorization to care for or to have unsupervised access to any child in care must provide to the department any additional reports or information it requests to assess the person's character, suitability and competence to have unsupervised access to children in care. This additional information may include, but is not limited to:

(a) Sexual deviancy evaluations;

(b) Substance abuse evaluations;

(c) Psychiatric evaluations; and

(d) Medical evaluations.

Any evaluation requested under this section must be by a DEL-approved evaluator and will be at the expense of the person being evaluated.

(2) The applicant licensee or the person being evaluated must give the department permission to speak with the evaluator in subsection (1)(a) through (d) of this section prior to and after the evaluation.

NEW SECTION

WAC 170-06-0070 Disqualification. (1) An applicant, licensee, staff, assistant, volunteer, contracted provider, or anyone living on the premises of a licensed child care facility who has a background containing any of the convictions/actions posted on the DEL secretary's list of permanently disqualifying convictions/actions, shall be permanently disqualified from providing licensed child care or having unsupervised access to any child in care.

(2) An applicant, licensee, staff, assistant, volunteer, contracted provider, or anyone living on the premises of a licensed facility who has a background containing any of the convictions posted on the DEL secretary's list of nonpermanent disqualifying convictions shall be disqualified from providing licensed child care or having unsupervised access to any child in care for five years after the conviction date.

(3) An applicant, licensee, staff, assistant, volunteer, contracted provider, or anyone living on the premises of a licensed facility shall be disqualified from providing licensed child care or having unsupervised access to any child in care if there is background information that the person:

(a) Has been found to have committed child abuse or neglect, unless the department determines that the person does not pose a risk to a child's safety and well-being;

(b) Is the parent of a child who has been found to be a dependent child as defined in chapter 13.34 RCW unless the department determines that the person does not pose a risk to a child's safety and well-being;

(c) Abandoned, abused, neglected, exploited, or financially exploited a vulnerable adult as defined in chapter 74.34 RCW, unless the department determines that the person does not pose a risk to a child's safety and well-being;

(d) Had a license denied or revoked from an agency that regulates care of children or vulnerable adults, unless the department determines that the person does not pose a risk to a child's safety and well-being.

(4) An applicant, licensee, staff, assistant, volunteer, contracted provider, or anyone living on the premises of a licensed facility may be disqualified from providing licensed child care or having unsupervised access to any child in care if:

(a) The licensee attempts to obtain a license by deceitful means, such as making false statements or omitting material information on the application;

(b) The staff, assistant, volunteer, contracted provider, or other person living on the premises of a licensed facility attempted to become employed, volunteer, or otherwise have unsupervised access to children by deceitful means, such as making false statements or omitting material information on an application to work or volunteer at a licensed child care agency or to otherwise provide child care;

(c) The licensee, the staff, assistant, volunteer, contracted provider, or other person living on the premises of a licensed facility used illegal drugs or misused or abused prescription drugs or alcohol that either affected their ability to perform their job duties while on the premises when children are present or presented a risk of harm to any child in care; or

(d) The licensee, the staff, assistant, volunteer, contracted provider, or other person living on the premises of a licensed facility has attempted, committed, permitted, or assisted in an illegal act on the premises of a home or facility providing care to children. For purposes of this subsection, a licensee attempted, committed, permitted, or assisted in an illegal act if he or she knew or should have known that the illegal act occurred.

(5) A licensee, staff, assistant, volunteer, contracted provider, or anyone living on the premises of a licensed facility may be disqualified from providing child care or having unsupervised access to any child in care if the person has background containing information other than conviction information that the department determines:

(a) Makes the person not of suitable character and competence or of sufficient physical or mental health to meet the needs of any child in care; or

(b) Places any person at a licensed child care facility at risk of harm.

NEW SECTION

WAC 170-06-0080 Notification of disqualification. (1) The department will notify in writing the applicant, care provider, employer, or licensee if the individual is disqualified by the background check from being authorized to care for children or to have unsupervised access to children in child care.

(2) If the department sends a notice of disqualification, the applicant will not receive a license, contract, certification,

or be authorized to have unsupervised access to children in child care.

NEW SECTION

WAC 170-06-0090 Administrative hearing to contest disqualification. (1) Any person seeking a license or employment with a licensed facility may request an administrative hearing to contest the department's decision process to disqualify him or her from having unsupervised access to any child in care. Provided, an individual shall not have the right to challenge a discretionary determination made pursuant to WAC 170-06-0070(3).

(2) Prospective volunteers, interns, contracted providers, or those seeking certification do not have the right to appeal the department's decision to disqualify them from having unsupervised access to any child in care.

(3) The employer or prospective employer cannot contest the department's decision on behalf of any other person, including a prospective employee.

(4) The administrative hearing will take place before an administrative law judge employed by the office of administrative hearings (chapter 34.05 RCW), pursuant to chapter 170-03 WAC.

NEW SECTION

WAC 170-06-0100 Request for administrative hearing. (1) Any person who has a right to contest a decision to deny a license or disqualify them from having unsupervised access to any child in care based on an evaluation of background check information must request a hearing within twenty-eight days of receipt of the decision.

(2) A request for a hearing must meet the requirements of chapter 170-03 WAC.

(3) Any decision by the department denying a license or disqualifying a person from having unsupervised access to any child in care is effective immediately upon notice and shall continue pending a final administrative decision on the merits.

NEW SECTION

WAC 170-06-0110 Limitations on challenges to disqualifications. (1) If the denial or disqualification is based on a criminal conviction, the appellant cannot contest the conviction in the administrative hearing.

(2) If the denial or disqualification is based on a finding of child abuse or neglect, or a finding of abandonment, abuse, neglect, exploitation, or financial exploitation of a vulnerable adult as defined in chapter 74.34 RCW, the appellant cannot contest the finding if:

(a) The appellant was notified of the finding by DSHS and failed to request a hearing to contest the finding; or

(b) The appellant was notified of the finding by DSHS and requested a hearing to contest the finding, but the finding was upheld by final administrative order or superior court order.

(3) If the denial or disqualification is based on a court order finding the appellant's child to be dependent as defined in chapter 13.34 RCW, the appellant cannot contest the finding of dependency in the administrative hearing.

Chapter 170-03 WAC

DEL HEARING RULES

I. GENERAL PROVISIONS

NEW SECTION

WAC 170-03-0010 Purpose and scope. (1) **Application.** This chapter contains the procedural rules that apply to adjudicative proceedings involving the department of early learning (DEL) and:

• Individuals or entities who are applicants for child care licenses or who are licensees of DEL and are adversely affected by a decision of DEL;

• Applicants for employment or employees of licensed child care agencies, child care providers, staff, volunteers, contracted providers, or other individuals who are required to meet background check standards before being authorized to care for or have unsupervised access to children in child care and who are disqualified by DEL;

Individuals receiving child care subsidies or on whose behalf child care subsidies are paid under the seasonal child care program who are assessed an overpayment and who dispute the overpayment.

(2) **Relation to statutes and rules.** The rules of this chapter are intended to supplement RCW 43.20A.205 and its DEL successor, the statute governing hearing rights for licensees, section 311, chapter 265, Laws of 2006, the Administrative Procedure Act (APA), chapter 34.05 RCW, and the model rules, chapter 10-08 WAC, adopted by the office of administrative hearings (OAH). If a provision of this chapter conflicts with a provision in any chapter containing a substantive rule, the provision in the chapter containing the substantive rule governs.

(3) **Relation to actions and rules of other agencies.** Actions of DEL sometimes rely in part on actions taken by other agencies, most notably the department of social and health services (DSHS), or are taken in conjunction with the actions of other agencies. For example, DSHS's division of licensed resources/child protective services (DLR/CPS) has statutory responsibility for investigating allegations of child abuse or neglect in licensed child care agencies. If DLR/CPS finds child abuse or neglect occurred in a child care facility, the person who is the subject of the finding will have a right to a hearing to challenge that finding under DSHS rules. If the subject is a licensed provider, the child care license may be revoked as a result of the circumstances and finding and the provider also would have a right to a hearing under DEL hearing rules. To the extent the child abuse or neglect case and the licensing case can be consolidated or combined in one hearing, they should be combined.

(4) **Application and amendments.** This chapter and any amendment to this chapter applies to cases pending at the time of the adoption of the rule or amendment, unless the amendment or rule-making order specifically states that it does not apply to pending cases. An amendment to this chap-

ter does not require that anything already done be redone in order to comply with the amendment, unless the amendment expressly says so.

Effective date: This chapter is effective July 3, 2006. In addition to cases arising on or after the effective date, this chapter applies to all pending DEL cases that have not gone to a full hearing before an ALJ by July 3, 2006, and to cases in which an initial decision is subject to review, but in which a petition for review has not been filed by July 3, 2006. This chapter does not apply to cases in which the hearing was held or begun prior to July 3, 2006, and/or which are awaiting initial decisions; Provided, Parts VIII and IX of this chapter, governing review of initial decisions, will apply to review of any initial decision mailed after the effective date of this chapter.

NEW SECTION

WAC 170-03-0020 Definitions. The following definitions apply to this chapter:

(1) **"Administrative law judge (ALJ)"** means an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs. ALJs are not DEL employees or DEL representatives.

(2) **"Business days"** means all days except Saturdays, Sundays and legal holidays.

(3) **"Calendar days"** means all days including Saturdays, Sundays and legal holidays.

(4) **"Case"** means the entire proceeding following the filing of a request for hearing with OAH.

(5) **"Continuance"** means a change in the date or time of a prehearing conference, hearing or deadline for other action.

(6) **"DEL"** or **"department"** means the department of early learning.

(7) **"Documents"** means papers, letters, writings, or other printed or written items.

(8) **"Ex parte contact"** means a written or oral communication with a judge about something related to the hearing when the other parties are not present. Procedural questions are not considered an ex parte contact. Examples of procedural questions include clarifying the hearing date, time, or location or asking for directions to the hearing location.

(9) **"Final order"** means an order that is the final DEL decision.

(10) **"Good cause"** means a substantial reason or legal justification for failing to appear, to act, or respond to an action required under these rules.

(11) **"Hearing"** means a proceeding before OAH that gives an aggrieved party an opportunity to be heard in disputes resulting from actions taken against the party by DEL. For purposes of this chapter, hearings include administrative hearings, adjudicative proceedings, and any other similar term referenced under chapter 34.05 RCW, the Administrative Procedure Act, Title 170 of the Washington Administrative Code, chapter 10-08 WAC, or other law.

(12) **"Initial decision"** is a decision made by an ALJ that may be reviewed by a review judge.

(13) **"OAH"** means the office of administrative hearings.

(14) **"Party"** means a person or entity to whom a DEL action is directed that has a right to be involved in the hearing process. DEL also is a party, but is referred to in this chapter as DEL or the department.

(15) **"Representative"** means the person selected by a party to represent that party in an administrative hearing. **"Lay representative"** means a person or advocate who is assisting a party in presenting that party's case in administrative hearings. **"DEL representative"** means an employee of DEL, a DEL contractor, or an employee of the office of the attorney general authorized to represent DEL in an administrative hearing.

(16) **"Record"** means the official documentation of the hearing process. The record includes tape recordings or transcripts, admitted exhibits, decisions, briefs, notices, orders, and other filed documents.

(17) **"Review"** means the act of reviewing initial orders and making the final agency decision as provided by RCW 34.05.464.

(18) **"Review judge"** or **"DEL review judge"** means an attorney employed by DEL to act as the reviewing officer and who is authorized to review initial orders and to prepare and enter the final agency order.

(19) **"Rule"** means a state regulation, including a licensing standard. Rules are found in the Washington Administrative Code (WAC).

(20) **"Stay"** means an order temporarily halting the DEL decision or action.

(21) **"Words of command"** such as "should," "shall," and "must" are words that impose a mandatory obligation on a participant in the hearing process. The words "may" or "will" are used when referring to a discretionary act to be taken by an ALJ or review judge.

NEW SECTION

WAC 170-03-0030 Computing time for meeting deadlines in the hearing process. (1) When counting days to find out when the time allowed or prescribed for an action under these rules or to meet a hearing deadline:

(a) Do not include the day of the action, notice, or order. For example, if a hearing decision is mailed on Tuesday and a party has twenty-one days from the date of mailing to request a review, count Wednesday as the first day.

(b) Count the last day of the period, unless the last day is a Saturday, Sunday or legal holiday, in which case the deadline is the next business day.

(2) For periods of seven days or less, count only business days. For example, if you have seven days to respond to a review request that was mailed to you on Friday, May 10, the response period ends on Tuesday, May 21.

(3) For periods over seven days, count every day, including Saturdays, Sundays, and legal holidays.

(4) The deadline ends at 5:00 p.m. on the last day.

II. HEARING RIGHTS AND REQUESTS

NEW SECTION

WAC 170-03-0040 The right to a hearing. (1) A person or entity has a right to a hearing only if a law or DEL rule expressly gives that right and a hearing is timely requested.

(2) A party has only a limited time to request a hearing. The deadline for the request is set by statute or DEL rule. In most cases, DEL will send a notice of adverse action or disqualification that gives specific information about how, where and when to request a hearing.

(3) A challenge to a DEL adverse action is heard in an administrative hearing by an administrative law judge (ALJ) employed by the office of administrative hearings (OAH). Not all actions of DEL may be challenged through the hearing.

(4) If a party requests a hearing, one will be scheduled.

(5) If DEL or the ALJ questions a party's right to a hearing, the ALJ decides whether the party has that right. The ALJ will decide either:

(a) There is no right to a hearing and dismiss the case; or

(b) There is a right to a hearing and proceed with the hearing.

NEW SECTION

WAC 170-03-0050 Requesting a hearing. (1) A request for hearing must be made in writing. It can be made by the party requesting the hearing or the party's representative.

(2) The hearing request should include:

(a) The requesting party's name, address, and telephone number;

(b) A brief explanation of why the requesting party disagrees with the DEL action;

(c) Any assistance, such as a foreign or sign language interpreter or accommodation for a disability, needed by the requesting party;

(d) A copy of the notice from DEL stating the adverse action.

(3) The request should be filed with OAH and served on DEL.

NEW SECTION

WAC 170-03-0060 Filing the request for hearing. (1) Filing is the act of delivering documents to OAH at the location listed in WAC 170-03-0070.

(2) The date of filing is the date documents are actually received by OAH during office hours.

(3) A party may file documents with OAH by:

(a) Personal service (hand delivery);

(b) First class, registered, or certified mail;

(c) Fax transmission, if the party also mails a copy of the document the same day;

(d) Commercial delivery service; or

(e) Legal messenger service.

(4) A party cannot file documents by e-mail.

NEW SECTION

WAC 170-03-0070 Location of office of administrative hearings. (1) The office of administrative hearings (OAH) is open from 8:00 a.m. to 5:00 p.m. Monday through Friday, except legal holidays.

(2) The address for the office of administrative hearings (OAH) is:

Office of Administrative Hearings
2420 Bristol Court S.W., 1st Floor
P.O. Box 42488
Olympia, WA 98504-2488
360-664-8717
360-664-8721 (fax)

Requests for hearing should be sent to the attention of Barb Cleveland, Executive Assistant.

NEW SECTION

WAC 170-03-0080 Service of notice and documents. (1) Service is the act of delivering a copy of documents to the opposing party. Service gives the opposing party notice of the request for hearing or other action. When a document is given to a party, that party is considered served with official notice of the contents of the document.

(2) A party may serve another party by:

(a) Personal service (hand delivery);

(b) First class, registered, or certified mail;

(c) Fax, if the party also mails a copy of the document the same day;

(d) Commercial delivery service; or

(e) Legal messenger service.

(3) A party cannot serve documents by e-mail.

(4) A party must serve all other parties or a party's representative, if the party is represented, whenever the party files a pleading (request for hearing), brief or other document with OAH or the review judge or when required by law.

(5) Service is complete when:

(a) Personal service is made;

(b) Mail is properly stamped, addressed and deposited in the United States mail;

(c) Fax produces proof of transmission;

(d) A parcel is delivered to a commercial delivery service with charges prepaid; or

(e) A parcel is delivered to a legal messenger service with charges prepaid.

NEW SECTION

WAC 170-03-0090 Proof of service. A party may prove that an opposing party was served with documents by providing any of the following:

(1) A sworn statement by the person who served the document;

(2) The certified mail receipt signed by the recipient;

(3) An affidavit or certificate of mailing;

(4) A signed receipt from the person who accepted the commercial delivery service or legal messenger service package;

(5) Proof of fax transmission; or

(6) Acknowledgment by the party being served.

NEW SECTION

WAC 170-03-0100 Representation during the hearing process. (1) The party requesting the hearing may represent himself or herself or may have another person, except a DEL employee, act as the representative.

(2) The representative may be a friend, relative, community advocate, attorney, paralegal, or lay representative.

(3) The representative should provide OAH and the other parties with the representative's name, address, and telephone number. If the representative is an attorney or lay representative, the representative must file a written notice of appearance in the action. If the representative is not an attorney, the party must provide a written statement to DEL authorizing the release of information about the party to the representative.

(4) DEL may be represented by an employee of DEL, a DEL contractor, or an assistant attorney general.

III. INTERPRETER SERVICES

NEW SECTION

WAC 170-03-0110 The right to an interpreter in the hearing process. (1) If a party has limited English proficiency (LEP), OAH will provide an interpreter.

(2) If OAH is notified that a party is a limited English-speaking person, all notices concerning hearings must:

(a) Be written in the party's primary language; or

(b) Include a statement, in the primary language, explaining the importance of the notice and informing the party how to get help in understanding the notice and responding to it.

NEW SECTION

WAC 170-03-0120 Definitions. The following definitions apply to rules relating to interpreter services.

(1) **"Hearing impaired person"** means a person who, because of a hearing or speech impairment, cannot readily speak, understand or communicate in spoken language.

(2) **"Limited English proficient (LEP)"** includes limited English-speaking persons or other persons unable to communicate in spoken English because of a hearing impairment.

(3) **"Limited English-speaking (LES) person"** means a person who, because of non-English-speaking cultural background or disability, cannot readily speak or understand the English language.

NEW SECTION

WAC 170-03-0130 Interpreter qualifications. (1) OAH must provide a qualified interpreter to assist any person who:

(a) Has limited English proficiency; and

(b) Is a party or witness in a hearing.

(2) OAH may hire or contract with persons to interpret at hearings.

(3) Relatives of any party and DEL employees may not be used as interpreters.

(4) The ALJ must determine, at the beginning of the hearing, if an interpreter can accurately interpret all communication for the person requesting the service.

(5) The parties or their representatives may question the interpreter's qualifications and ability to be impartial.

(6) If at any time before or during the hearing the interpreter does not provide accurate and effective communication, the ALJ must provide another interpreter.

NEW SECTION

WAC 170-03-0140 Waiver of interpreter services. (1) An eligible party may waive interpreter services.

(2) A request for waiver must be made in writing or through a qualified interpreter on the record.

(3) The ALJ must determine that the waiver has been knowingly and voluntarily made.

(4) A waiver of interpreter services may be withdrawn at any time before or during the hearing.

(5) A waiver of interpreter services at the hearing constitutes a waiver of a right to challenge any aspect of the hearing based on a lack of understanding resulting from an inability to understand or a lack of proficiency in the English language.

NEW SECTION

WAC 170-03-0150 Requirements that apply to the use of interpreters. (1) Interpreters must:

(a) Use the interpretive mode that the parties, the limited English proficient or hearing impaired person, the interpreter and the ALJ consider the most accurate and effective;

(b) Interpret statements made by the parties and the ALJ;

(c) Not disclose information about the hearing without the written consent of the parties; and

(d) Not comment on the hearing or give legal advice.

(2) The ALJ must allow enough time for all interpretations to be made and understood.

(3) The ALJ may videotape a hearing and use it as the official transcript for hearings involving a hearing impaired person.

NEW SECTION

WAC 170-03-0160 Requirements that apply to decisions involving limited English-speaking parties. (1) When an interpreter is used at a hearing, the ALJ must explain that the decision will be written in English but that a party using an interpreter may contact the interpreter for an oral translation of the decision at no cost.

(2) Interpreters must provide a telephone number where they can be reached to the ALJ and to the LES party. This number must be included in any decision or order mailed to the parties.

(3) OAH or the review judge must mail a copy of a decision or order to the interpreter for use in oral translation.

IV. PREHEARING PROCEDURES

NEW SECTION

WAC 170-03-0170 Notice of hearing. (1) When a hearing is requested, OAH sends the parties a written notice of the hearing or prehearing conference.

(2) The notice of hearing or prehearing conference will include:

(a) The names of all parties who receive the notice and, if known, the names and addresses of their representatives;

(b) The name, mailing address, and telephone number of the ALJ, if known;

(c) The date, time, place, and nature of the hearing;

(d) The legal authority and jurisdiction for the hearing; and

(e) The date of the hearing request.

(3) OAH also will send information with the notice of hearing stating:

(a) If a party fails to attend or participate in a prehearing conference or a hearing, that party may lose the right to a hearing and the ALJ may enter an order of default or an order dismissing the case.

(b) If a party needs a qualified interpreter because the appealing party or any witness has limited English proficiency, OAH will provide an interpreter at no cost.

(c) If the hearing is to be held by telephone or in person, and how to request a change in the way it is held.

(d) How to indicate any special needs for a party or witness.

(e) How to contact OAH if a party has a safety concern.

NEW SECTION

WAC 170-03-0180 Prehearing conferences. (1) A prehearing conference is a formal meeting that may be conducted by an ALJ before a full hearing. A prehearing conference may not be conducted in some cases. In others, more than one prehearing conference may be necessary.

(2) Either the ALJ or a party may request a prehearing conference, but the ALJ decides whether to hold a prehearing conference. OAH sends notice of the time and date of the conference to all parties.

(3) An ALJ may conduct the conference in person, by telephone conference call, by electronic means, or in any other manner acceptable to the parties.

(4) Attendance of the parties and their representatives is mandatory. A party may lose the right to participate during the hearing if that party does not attend the prehearing conference.

(5) Additional prehearing conferences may be requested by the parties and/or set by the ALJ to address the procedural or other issues specific to the case.

NEW SECTION

WAC 170-03-0190 Purposes of prehearing conference. (1) The purposes of the prehearing conference are to clarify issues, set deadlines for the parties to exchange information regarding witnesses and evidence, and set the time for the hearing.

(2) During a prehearing conference the parties and the ALJ may:

(a) Simplify or clarify the issues to be decided during the hearing;

(b) Agree to the date, time and place of the hearing;

(c) Identify accommodation and safety issues;

(d) Agree to postpone the hearing;

(e) Allow the parties to make changes in their own documents, including the DEL notice of adverse action or the appealing party's hearing request;

(f) Agree to facts and documents to be entered during the hearing;

(g) Set a deadline for each party to file and serve the names and phone numbers of witnesses, and copies of all documents or other exhibits that will be presented at the hearing;

(h) Schedule additional prehearing conferences;

(i) Resolve the dispute;

(j) Consider granting a stay if authorized by law or DEL rule;

(k) Consider a motion for summary judgment or other motion; or

(l) Determine any other procedural issues raised by the parties.

NEW SECTION

WAC 170-03-0200 Prehearing order. (1) After the conference ends, the ALJ will send a prehearing order describing:

(a) The decisions made or actions taken during the conference;

(b) Any changes to DEL's or other party's initial documents; and

(c) Any agreements reached.

(2) A party may object to the prehearing order by notifying the ALJ in writing within ten days after the mailing date of the order. The ALJ must issue a ruling on the objection.

(3) If no objection is made to the prehearing order, the order determines how the hearing is conducted, including whether the hearing will be in person or held by telephone conference or other means, unless the ALJ changes the order for good cause.

NEW SECTION

WAC 170-03-0210 Assignment and challenge of assignment of administrative law judge. (1) OAH assigns an ALJ at least five business days before the hearing and discloses that assignment in writing to the parties. A party may ask which ALJ is assigned to the hearing by calling or writing the OAH field office listed on the notice of hearing.

(2) A party may file a motion of prejudice against an ALJ under RCW 34.12.050 by:

(a) Sending a written motion of prejudice at least three business days before the hearing, and before the ALJ rules on a discretionary issue in the case.

(b) The motion of prejudice must include an affidavit or statement that a party does not believe that the ALJ can hear the case fairly.

(c) The party must send the request to the OAH field office where the ALJ works and send a copy of the request to all other parties or, if other parties are represented, to the representatives.

(3) The first timely request for a different ALJ is automatically granted. Any later request may be granted or denied by the chief ALJ or a designee.

(4) A party may also request that an ALJ or review judge be disqualified under RCW 34.05.425, for bias, prejudice, conflict of interest, or if one of the parties or a party's representative has an ex parte contact with the ALJ or review judge by:

(a) Sending a written petition for disqualification. A petition for disqualification is a written explanation to request assignment of a different ALJ or review judge. A party must promptly make the petition upon discovery of possible bias, conflict of interest or an ex parte contact.

(b) A party must send or deliver the petition to the judge assigned to the case and send a copy of the petition to all other parties or, if other parties are represented, to the representatives. The ALJ or review judge must decide whether to grant or deny the petition and must state the facts and reasons for the decision.

V. LAWS APPLIED IN ADMINISTRATIVE HEARINGS

NEW SECTION

WAC 170-03-0220 Rules an ALJ or review judge must apply when making a decision. (1) ALJs and the review judge must first apply the DEL rules adopted in the Washington Administrative Code.

(2) If no DEL rule applies, the ALJ or review judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and published appellate court decisions.

NEW SECTION

WAC 170-03-0230 Challenges to validity of DEL rules. (1) Neither an ALJ nor a review judge may decide that a DEL rule is invalid or unenforceable. Only a court may decide this issue.

(2) If the validity of a DEL rule is raised during the hearing, the ALJ or review judge may allow argument for later court review.

NEW SECTION

WAC 170-03-0240 Amendment to DEL notice or party's request for hearing. (1) The ALJ must allow DEL to amend (change) the notice of a DEL action before or during the hearing to match the evidence and facts.

(2) If DEL amends its notice, it must put the change in writing and give a copy to the ALJ and the other parties.

(3) The ALJ may allow an appealing party to amend a hearing request before or during the hearing to conform with an amended DEL notice.

(4) If there is an amendment to either the DEL notice or the appealing party's request for hearing, the ALJ must offer to continue or postpone the hearing to give the parties more time to prepare or present evidence or argument if there is a significant change from the earlier DEL notice or from the appealing party's request for hearing.

(5) If the ALJ grants a continuance, OAH must send a new hearing notice at least seven business days before the new hearing date.

NEW SECTION

WAC 170-03-0250 Change of address. (1) A party must tell DEL and OAH, as soon as possible, when the party's mailing address or telephone number changes.

(2) If OAH and DEL are not notified of a change in a party's mailing address and either DEL or OAH continues to send notices and other important papers to the address stated in the file, the ALJ and DEL may assume that the documents were received.

NEW SECTION

WAC 170-03-0260 Continuances. (1) Any party may request a continuance either orally or in writing.

(2) Before contacting the ALJ to request a continuance, a party should contact the other parties, if possible, to find out if they will agree to a continuance.

(3) The party making the request for a continuance must let the ALJ know whether the other parties agree to the continuance.

(a) If the parties agree to a continuance, the ALJ will grant the request, unless the ALJ finds that good cause for a continuance does not exist.

(b) If the parties do not agree to a continuance, the ALJ will set a hearing to decide whether there is good cause to grant or deny the continuance.

(4) If a continuance is granted, OAH will send written notice of the changed time and date of the hearing.

NEW SECTION

WAC 170-03-0270 Order of dismissal. (1) An order of dismissal is an order sent by the ALJ to end the hearing. The order is made by agreement of the parties, or because the party who requested the hearing withdrew the request, failed to appear, or refused to participate.

(2) If a hearing is dismissed because the appealing party did not appear or refused to participate, the DEL decision stands.

(3) If the hearing is dismissed due to a written agreement between the parties, the parties must follow the agreement.

NEW SECTION

WAC 170-03-0280 Vacating an order of default or order of dismissal. (1) A party may ask the ALJ to vacate (set aside) an order of default or dismissal.

(a) A request to vacate an order must be filed with OAH within twenty-one calendar days after the date the order of

default or dismissal was mailed. If no request is received within that deadline, the order becomes a final order.

(b) The request to vacate an order of default or dismissal must specify why the party believes there is good cause for the order to be vacated.

(2) OAH will schedule a hearing on the request to vacate the order.

(3) At the hearing, the ALJ will receive evidence and argument from the parties on whether there is good cause for an order of default to be vacated.

(4) The ALJ will vacate an order of dismissal and reinstate the hearing if the defaulted party shows good cause or if the DEL representative agrees to waive the deadline.

(5) An agreed order of dismissal may be vacated only upon proof that a party has violated a condition of the agreed order of dismissal.

NEW SECTION

WAC 170-03-0290 Stay of DEL action. (1) Except as set forth in WAC 170-03-0300, at any point in the proceeding before OAH or the review judge, the appealing party may request that an ALJ or review judge stay (stop) a DEL action until there is a decision entered by the ALJ or review judge.

(2) The ALJ shall not grant a stay unless the ALJ makes specific findings that the stay is in the public interest or is made for good cause. In finding good cause the ALJ must determine:

(a) The party requesting the stay is likely to prevail in the hearing on the merits;

(b) The party requesting the stay will suffer irreparable injury, if the stay is not granted; and

(c) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances of the case.

NEW SECTION

WAC 170-03-0300 Stay of summary suspension of child care license. (1) The department may immediately and summarily suspend a license issued under chapter 265, Laws of 2006 when:

(a) It finds that conditions in the licensed facility constitute an imminent danger to a child or children in care; or

(b) The public health, safety, or welfare requires emergency action.

(2) A licensee who contests suspension of a license by the department may obtain a stay of the effectiveness of that order only as set forth in this section.

(3) The licensee may request a stay by including such a request in the request for hearing or in a subsequent motion. The request for stay must be accompanied by a statement of grounds justifying the stay and a description of evidence setting forth the factual basis upon which the request is based.

(4) Upon receipt of a request for a stay, the ALJ will schedule a hearing on the request. The hearing may be combined with a prehearing conference. If it appears that a hearing on the merits and issues of the case should be consolidated with the request for a stay, the ALJ may advance the hearing date on its own initiative or by request of the parties.

(5) The ALJ shall not grant a stay unless the ALJ makes specific findings that the stay is in the public interest or is made for good cause. In finding good cause, the ALJ must determine:

(a) The licensee is likely to prevail in the hearing on the licensing action;

(b) The licensee will suffer irreparable injury, if the stay is not granted; and

(c) The threat to the public health, safety, or welfare inherent in the licensee's operation of a child care facility is not sufficiently serious to justify the suspension of the license.

(6) Economic hardship of itself shall be an insufficient reason for a stay of a suspension of a license.

(7) Unless otherwise stipulated by the parties, the ALJ, after granting or denying a request for a stay, will expedite the hearing and decision on the merits.

(8) The decision on the request for the stay is subject to review by the review judge at the request of either DEL or the licensee. The request for review must be filed not later than seven days following the date the decision on the request for stay is mailed by OAH to the parties.

(9) A request for review by the review judge shall be promptly determined. The decision on the request for review by the review judge shall not be subject to judicial review.

VI. HEARINGS

NEW SECTION

WAC 170-03-0340 Conduct of hearings. (1) Hearings may be held in person or by telephone conference or other electronic means.

(2) All parties, their representatives and witnesses may attend the hearing in person or by telephone conference or other electronic means at the discretion of the ALJ.

(3) Whether a hearing is held in person or by telephone conference, the parties have the right to see all documents, hear all testimony and question all witnesses.

(4) When a hearing is held by telephone or other electronic means, all documentary evidence must be filed and served in advance of the hearing.

(5) All hearings must be recorded.

NEW SECTION

WAC 170-03-0350 Authority of the administrative law judge. (1) The ALJ must hear and decide the issues de novo (anew) based on what is presented during the hearing, provided that the ALJ's authority shall be limited to determining whether the sanction imposed or action taken by the department was warranted and/or justified under the evidence presented during the hearing. The ALJ shall not have authority to substitute or impose an alternative sanction, remedy or action.

(2) As needed, the ALJ may:

(a) Administer oaths and affirmations;

(b) Determine the order for presenting evidence;

(c) Issue subpoenas and protective orders as provided in the Administrative Procedure Act;

(d) Rule on objections, motions, and other procedural matters;

(e) Rule on motions for summary judgment;

(f) Rule on offers of proof and receive relevant evidence;

(g) Pursuant to RCW 34.05.449(5), close parts of a hearing to public observation or order the exclusion of witnesses upon a showing of good cause;

(h) Question witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the matter;

(i) Request additional exhibits and/or testimony following a finding that the additional evidence is necessary to complete the record provided all parties are given a full opportunity for cross-examination and/or rebuttal;

(j) Take official notice of facts pursuant to RCW 34.05.452(5);

(k) Regulate the course of the hearing and take any appropriate action necessary to maintain order during the hearing;

(l) Permit or require oral argument or briefs and determine the time limits for submission thereof;

(m) Issue an order of default pursuant to RCW 34.05.-440;

(n) Hold prehearing conferences;

(o) Allow a party to waive rights given by chapter 34.05 RCW or these rules unless another law prevents it;

(p) Decide whether a party has a right to a hearing;

(q) Permit and regulate the taking of discovery;

(r) Consider granting a stay if authorized by law or DEL rule; and

(s) Take any other action necessary and authorized by any applicable statute or rule.

(3) The ALJ may, upon his or her own motion or the motion of any party, order that multiple administrative proceedings be consolidated for hearing if they involve common issues or parties.

(4) The ALJ may waive any of the department's procedural rules, other than a rule relating to jurisdiction, for any party not represented by legal counsel or a lay representative upon specific findings that:

(a) The waiver is necessary to avoid manifest injustice to the unrepresented party; and

(b) That the waiver would not prejudice any other party.

(5) The ALJ shall make findings of fact based on the preponderance of the evidence unless otherwise required by law.

NEW SECTION

WAC 170-03-0360 Order of the hearing. (1) At the hearing, the ALJ:

(a) Explains the rights of the parties;

(b) Marks and admits or rejects exhibits;

(c) Ensures that a record is made;

(d) Explains that a decision is mailed after the hearing; and

(e) Notifies the parties of appeal rights.

(2) The parties may:

(a) Make opening statements to explain the issues;

(b) Offer evidence to prove their positions, including oral or written statements of witnesses;

(c) Question the witnesses presented by the other parties; and

(d) Give closing arguments about what the evidence shows and what laws apply.

(3) At the end of the hearing if the ALJ does not allow more time to send in evidence, the record is closed.

NEW SECTION

WAC 170-03-0390 Evidence. (1) Evidence includes documents, objects, and testimony of witnesses that parties give during the hearing to help prove their positions.

(2) Evidence may be all or parts of original documents or copies of the originals.

(3) Parties may offer statements signed by a witness under oath or affirmation as evidence, if the witness cannot appear.

(4) Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ.

(5) The ALJ may only consider admitted evidence to decide a case.

NEW SECTION

WAC 170-03-0400 Introduction of evidence into the record. (1) The ALJ may set a deadline before the hearing for the parties to provide proposed exhibits and names of witnesses to the ALJ and to all other parties. If the parties miss the deadline, the ALJ may refuse to admit the evidence unless the parties show:

(a) They have good cause for missing the deadline; or

(b) The other parties agree to waive the deadline.

(2) The ALJ may admit and consider hearsay evidence. Hearsay is a statement made outside of the hearing used to prove the truth of what is in the statement. The ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it.

(3) The ALJ may reject evidence, if it:

(a) Is not relevant;

(b) Repeats evidence already admitted;

(c) Is from a privileged communication protected by law; or

(d) Is otherwise legally improper.

(4) Except in cases where the department's notice of adverse action alleges the person lacks the character to provide for the needs of any child in care or to have unsupervised access to any child in care, evidence regarding character or reputation shall not be admissible. In cases where such evidence is admissible, the ALJ shall exercise reasonable control over the number of character witnesses so as to avoid duplication of testimony and evidence and needless consumption of time.

NEW SECTION

WAC 170-03-0410 Objections to evidence. (1) Although a party may offer any documents and testimony at the hearing to support the party's position, other parties may object to the evidence and may question the witnesses. For example, a party may object to the authenticity or admissibil-

ity of any exhibit, or offer argument about how much weight the ALJ should give the exhibit.

(2) The ALJ determines whether to admit the evidence and what weight (importance) to give it.

(3) If the ALJ does not admit the evidence, the party may make an offer of proof to show why the ALJ should admit it. The offer of proof preserves the issue for appeal. To make an offer of proof, a party presents evidence and argument on the record to show why the ALJ should consider the evidence.

(4) If a witness refuses to answer any question ruled proper by the ALJ, the ALJ has discretion to strike all testimony previously given by that witness on the proceeding.

NEW SECTION

WAC 170-03-0420 Stipulations. (1) A stipulation is an agreement among two or more parties that certain facts or evidence is correct or authentic.

(2) If an ALJ accepts a stipulation, the ALJ must enter it into the record.

NEW SECTION

WAC 170-03-0430 Exhibits. (1) Proposed exhibits are documents or other objects that a party wants the ALJ to consider when reaching a decision. After the document or object is accepted by the ALJ, it is admitted and becomes an exhibit.

(2) The ALJ may require the parties to mark and number their proposed exhibits before the hearing and to provide copies to the other parties as far ahead of the hearing as possible.

(3) The ALJ admits proposed exhibits into the record by marking, listing, identifying, and admitting the proposed exhibits.

(4) The ALJ may also exclude proposed exhibits from the record.

NEW SECTION

WAC 170-03-0440 Judicial notice. (1) Judicial notice is evidence that includes facts or standards that are generally recognized and accepted by judges, government agencies, or national associations, such as a calendar, building code or standard of practice.

(2) An ALJ may consider and admit evidence by taking judicial notice.

(3) If a party requests judicial notice, or if the ALJ intends to take judicial notice, the ALJ may ask the party to provide a copy of the document that contains the information.

(4) The ALJ must give the parties time to object to judicial notice evidence.

NEW SECTION

WAC 170-03-0450 Witnesses. (1) A witness is any person who makes statements or gives testimony that becomes evidence in a hearing.

(2) One type of witness is an expert witness. An expert witness is qualified by knowledge, experience, and education to give opinions or evidence in a specialized area.

(3) Witnesses may include:

(a) The appealing party or a DEL representative;

(b) Anyone a party or the ALJ asks to be a witness.

(4) The ALJ decides who may testify as a witness.

(5) Unless DEL agrees, a current or former DEL employee may not be an expert witness against DEL if that employee was actively involved in the case while working for DEL.

NEW SECTION

WAC 170-03-0460 Requiring witnesses to testify or provide documents. (1) A party may require witnesses to testify or provide documents by issuing a subpoena. A subpoena is an order to appear at a certain time and place to give testimony, or to provide books, documents, or other items.

(2) ALJs, DEL, and attorneys for the parties may prepare subpoenas.

(3) If a party is not represented by an attorney, the party may ask the ALJ to prepare a subpoena on that party's behalf.

(a) The ALJ may schedule a hearing to decide whether to issue a subpoena.

(b) There is no cost to prepare a subpoena, but a party may have to pay for:

(i) Serving a subpoena;

(ii) Complying with a subpoena; and

(iii) Witness fees according to RCW 34.05.446(7).

(4) A party may request that an ALJ quash (set aside) or change the subpoena at any time before the deadline given in the subpoena.

(5) An ALJ may set aside or change a subpoena if it is unreasonable.

NEW SECTION

WAC 170-03-0470 Serving a subpoena. (1) Any person who is at least eighteen years old and not a party to the hearing may serve a subpoena.

(2) Service of a subpoena is complete when the server:

(a) Gives the witness a copy of the subpoena; or

(b) Leaves a copy at the residence of the witness with a person over the age of eighteen.

(3) To prove that a subpoena was served on a witness, the person serving the subpoena must sign a written, dated statement including:

(a) Who was served with the subpoena;

(b) When the subpoena was served;

(c) Where the subpoena was served; and

(d) The name, age, and address of the person who served the subpoena.

NEW SECTION

WAC 170-03-0480 Testimony. (1) Direct examination. All witnesses may be asked questions by the party that calls the witness to testify. Each witness:

(a) Must affirm or take an oath to testify truthfully during the hearing;

(b) May testify in person or by telephone;

(c) May request interpreters from OAH at no cost to the parties;

(d) May be subpoenaed and ordered to appear according to WAC 170-03-0460.

(2) Cross-examination. The parties have the right to cross-examine (question) each witness called by any other party.

(3) If a party has a representative, only the representative, and not the party, may question the witness.

(4) The ALJ may also question witnesses.

NEW SECTION

WAC 170-03-0490 Burden of proof. (1) The party who has the burden of proof is the party who has the responsibility to provide evidence to persuade the ALJ that a position is correct under the standard of proof required.

(2) Standard of proof refers to the amount of evidence needed to prove a party's position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.

(3) The ALJ decides if a party has met the burden of proof.

NEW SECTION

WAC 170-03-0500 Equitable estoppel. (1) Equitable estoppel is a legal doctrine defined in case law that may prevent DEL from taking some action against a party in a proceeding to challenge an overpayment notice issued by DEL.

(2) There are five elements of equitable estoppel that must be proved by clear and convincing evidence. All of the following elements must be proved:

(a) DEL made a statement or took action or failed to take action, which is inconsistent with its later claim or position regarding an overpayment.

(b) The appealing party relied on DEL's original statement, action or failure to act.

(c) The appealing party will be injured if DEL is allowed to contradict the original statement, action or failure to act.

(d) Equitable estoppel is needed to prevent a manifest injustice.

(e) The exercise of government functions is not impaired.

(3) If the ALJ concludes that all of the elements of equitable estoppel in subsection (2) of this section have been proved with clear and convincing evidence, DEL is stopped or prevented from taking action or enforcing its claim for repayment of the overpayment.

NEW SECTION

WAC 170-03-0510 Closing the record. When the record is closed, no more evidence may be taken, without a showing of good cause. The record is closed:

(1) At the end of the hearing if the ALJ does not allow more time to send in evidence or argument; or

(2) After the deadline for sending in evidence or argument is over.

VII. INITIAL DECISION

NEW SECTION

WAC 170-03-0520 Timing of the ALJ's decision. (1) After the record is closed, the ALJ must write a hearing decision and send copies to the parties.

(2) The maximum time an ALJ has to send a decision is ninety calendar days after the record is closed.

NEW SECTION

WAC 170-03-0530 Contents of the initial decision. The ALJ initial decision must:

(1) Identify the hearing decision as a DEL case;

(2) List the name and docket number of the case and the names of all parties and representatives;

(3) Find the specific facts determined to exist by the ALJ, based on the hearing record, and relied on by the ALJ in resolving the dispute;

(4) Explain why evidence is credible when the facts or conduct of a witness is in question;

(5) State the law that applies to the dispute;

(6) Apply the law to the facts of the case in the conclusions of law;

(7) Discuss the reasons for the decision based on the facts and the law;

(8) State the result;

(9) Explain how to request changes in the decision and the deadlines for requesting them;

(10) State the date the decision becomes final; and

(11) Include any other information required by law or DEL program rules.

NEW SECTION

WAC 170-03-0540 Finality of initial decision. If no one requests review of the initial order or if a review request is dismissed, the initial decision becomes the final decision of DEL twenty-one calendar days after the date it is mailed to the parties by OAH.

NEW SECTION

WAC 170-03-0550 Challenges to the initial decision. (1) If a party disagrees with an ALJ's initial decision because of a clerical error, the party may ask for a corrected decision from the ALJ as provided in WAC 170-03-0560.

(2) If a party disagrees with the reasoning and result of an initial decision and wants it changed, the party must request review by the review judge as provided in WAC 170-03-0570 through 170-03-0620.

NEW SECTION

WAC 170-03-0560 Correcting clerical errors in ALJ's decisions. (1) A clerical error is a mistake that does not change the result or intent of the decision. Some examples of clerical error are:

(a) Missing or incorrect words or numbers;

(b) Dates inconsistent with the decision or evidence in the record such as using May 3, 1989, instead of May 3, 1998; or

(c) Math errors when adding the total of an overpayment.

(2) A party may ask for a corrected ALJ decision by making the request in writing and sending it to the OAH office that held the hearing. A copy of the request must be sent to the other parties or their representatives.

(3) A request to correct a clerical error must be made within ten days of the date the decision was mailed to the parties by OAH.

(4) When asking for a corrected decision, a party must clearly identify the clerical error.

(5) When a party requests a corrected initial or final order, the ALJ must either:

(a) Send all parties a corrected order; or

(b) Deny the request within three business days of receiving it.

(6) If the ALJ corrects an initial order and a party does not request review, the corrected initial order becomes final twenty-one calendar days after the original initial order was mailed.

(7) Requesting a corrected initial order for a case does not extend the deadline to request review of the initial decision by the review judge.

If a party wants to stay the DEL action until review of the initial order is completed, the party must request a stay from the review judge.

VIII. REVIEW

NEW SECTION

WAC 170-03-0570 Appeal of the initial decision. (1) Review or appeal of the initial decision may occur when a party disagrees or wants a change in an initial order, other than correcting a clerical error.

(2) A party must request review of an initial order from the DEL review judge as provided in WAC 170-03-0580 through 170-03-0640.

(3) If more than one party requests review, each request must meet the deadlines in WAC 170-03-0580.

(4) The review judge considers the request, the initial order, and record, before deciding if the initial order may be changed.

(5) Review does not include another hearing by the DEL review judge.

NEW SECTION

WAC 170-03-0580 Time for requesting review. (1) The review judge must receive the written petition for review on or before the twenty-first calendar day after the initial order was mailed.

(2) A review judge may extend the deadline if a party both:

(a) Asks for more time before the deadline expires; and

(b) Shows good cause for requesting more time.

(3) A review judge may accept a review request after the twenty-one calendar day deadline only if:

(a) The review judge receives the review request on or before the thirtieth calendar day after the deadline; and

(b) A party shows good cause for missing the deadline.

(4) Good cause means a substantial reason or legal justification for failing to appear, to act, or respond to an action required under these rules.

NEW SECTION

WAC 170-03-0590 Petition for review. (1) A party must make the review request (petition for review) in writing and clearly identify the:

(a) Parts of the initial order with which the party disagrees; and

(b) Evidence supporting the party's position.

(2) The petition for review must be filed with the review judge and a copy sent to the other parties and their representatives.

(3) The review judge can be contacted at the following address or at the address stated on the letter containing instructions for obtaining review mailed with the initial decision:

Review Judge
Department of Early Learning
P.O. Box 45480
Olympia, WA 98504-5480
360-725-4665

(4) After receiving a party's review request, the review judge will send a copy to the other parties, their representatives and OAH.

NEW SECTION

WAC 170-03-0600 Response to petition for review. (1) A party does not have to respond to the review request. A response is optional.

(2) If a party responds, that party must send the response so that the review judge receives it on or before the seventh business day after the date a copy of the petition for review was mailed to the party by the review judge.

(3) The responding party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, the party must contact the review judge by the deadline in subsection (2) of this section and give a good reason.

(5) A review judge may accept and consider a party's response even if it is received after the deadline.

NEW SECTION

WAC 170-03-0610 Decision process. (1) After the response deadline, the record on review is closed unless there is a good reason to keep it open.

(2) A review judge is assigned to the review after the record is closed.

(3) The review judge only considers evidence given at the original hearing.

(4) The review judge will decide the appeal without oral argument, unless the review judge determines that oral argument is necessary for resolution of the appeal.

(5) The review judge enters a final order that affirms, changes, dismisses or reverses the initial order, or remands (returns) the case to OAH for further specified action.

NEW SECTION

WAC 170-03-0620 Authority of the review judge. (1) The review judge has the same decision-making authority as an ALJ, but must consider the ALJ's opportunity to observe the witnesses.

(2) The review judge's decision is the final decision of the agency in the case.

IX. REVIEW OF THE FINAL DECISION

NEW SECTION

WAC 170-03-0630 Request for reconsideration. (1) If a party disagrees with the final decision issued by a review judge and wants it reconsidered, the party may ask the review judge to reconsider the decision because the party believes the review judge made a mistake.

(2) If a party asks for reconsideration of the final decision, the reconsideration process must be completed before judicial review is sought.

(3) A request for reconsideration must be made in writing and must clearly state the reasons why the party wants the final decision reconsidered.

(4) The review judge must receive the written reconsideration request on or before the tenth calendar day after the final decision was mailed by the review judge to the parties. The party requesting reconsideration must send a copy of the request to all parties or, if the parties are represented, to their representatives.

(5) If a reconsideration request is received by the review judge after the deadline, the final decision will not be reconsidered. However, the review judge may extend its deadline if a party:

(a) Asks for more time before the deadline expires; and

(b) Gives a good reason for the extension.

(6) After receiving a reconsideration request, the review judge will send a copy to the other parties and representatives giving them time to respond.

(7) If a party does not request reconsideration or ask for an extension within the deadline, the final order may not be reconsidered and it becomes the final agency decision.

NEW SECTION

WAC 170-03-0640 Response to a request for reconsideration. (1) A party does not have to respond to a request. A response is optional.

(2) If a party responds, that party must send a response to the review judge by or before the seventh business day after the date OAH or the review judge mailed the request to the party.

(3) A party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, OAH or the review judge may extend its deadline if the party gives a good reason within the deadline in subsection (2) of this section.

NEW SECTION

WAC 170-03-0650 Ruling on request for reconsideration. (1) After the review judge receives a reconsideration request, within twenty calendar days the review judge must either:

(a) Write a reconsideration decision; or

(b) Send all parties an order denying the request.

(2) If the review judge does not send a reconsideration decision or an order denying the request within twenty days of receipt of the reconsideration request, the request is denied.

(3) The review judge decision is final when the reconsideration decision is mailed or the date the reconsideration request is denied.

NEW SECTION

WAC 170-03-0660 Judicial review. (1) Judicial review is the process of appealing a final order to a court.

(2) Any party, except DEL, may appeal a final order by filing a written petition for judicial review that meets the requirements of RCW 34.05.546. The petition must be properly filed and served within thirty calendar days of the date OAH or the review judge mails the final decision in the case.

(3) RCW 34.05.510 through 34.05.598 contains further details of the judicial review process.

WSR 06-22-022
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-279—Filed October 24, 2006, 1:13 p.m., effective October 26, 2006, 7:00 a.m.]

Effective Date of Rule: October 26, 2006, 7:00 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-04000A; 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: Pot limit changes 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 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: October 21, 2006.

J. P. Koenings
Director

NEW SECTION

WAC 220-52-04000B Commercial crab fishery—Lawful and unlawful gear, methods, and other unlawful acts. Notwithstanding the provisions of WAC 220-52-040:

(1) 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 Crab Management Region 1 (which includes Marine Fish Shellfish Catch Reporting Areas 20A, 20B, 21A, 21B, 22A, and 22B. The remaining 50 buoy tags per license must be onboard the designated vessel and available for inspection in the pot-limited areas.

(2) Effective immediately until further notice, it is unlawful for any person to fish for crabs for commercial purposes with more than 75 pots per license, per buoy tag number in Crab Management Region 2 East (which includes Marine Fish Shellfish Catch Reporting Areas 24A, 24B, 24C, 24D, 26A-E). The remaining 25 buoy tags per license must be onboard the designated vessel and available for inspection in the pot-limited areas.

(3) Effective 7:00 a.m. October 26, 2006 until further notice, no commercial crab pots are allowed to be set, pulled or fished west of the longitude line 123°7.0' projected from the southern shoreline of Dungeness Spit due south to the shore of Dungeness Bay.

REPEALER

The following section of the Washington Administrative Code is repealed effective 7:00 a.m. October 26, 2006:

WAC 220-52-04000A	Commercial crab fishery—Lawful and unlawful gear, methods, and other unlawful acts. (06-272)

WSR 06-22-027
EMERGENCY RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Aging and Disability Services Administration)

[Filed October 25, 2006, 1:48 p.m., effective October 25, 2006]

Effective Date of Rule: Immediately.

Purpose: Amending WAC 388-515-1550 Medically needy in-home waiver (MNIW), to increase the personal needs allowance (PNA) from an amount equal to the one-person medically needy income level (MNIL) to the one-person federal poverty level (FPL) per order of the United States Ninth Circuit Court of Appeals in Number 01-35689.

Citation of Existing Rules Affected by this Order: Amending WAC 388-515-1550.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.057, 74.09.500, 74.09.520, and 74.09.530.

Other Authority: Section 206 (6)(b), chapter 276, Laws of 2004; and *Townsend vs. Quasim (DSHS),* United States District Court, Western District of Washington, No. CV-00-00944 TSZ.

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: Immediate adoption, amendment, or repeal of the rule is necessary for the preservation of the public health, safety, or general welfare, and observing the time requirements of notice and opportunity to comment upon adoption of the permanent rule would be contrary to the public interest because (1) no person will be adversely affected by the adoption of the rule amendment, and thus no public comment is reasonably likely; (2) the proposed rule amendment will benefit current participants in the medically needy in-home waiver program, and immediate adoption will allow the participants to enjoy a benefit at an earlier date than would be the case if the effective date of implementation were deferred until the regular rule-making process is complete; and (3) the failure to implement this rule on an expedited basis may jeopardize the department's legal position in pending litigation. This filing continues the emergency rule filed as WSR 06-14-038 while DSHS completes adoption of permanent rules initiated under WSR 06-21-069. The department will file a CR-102 on this WAC by December 2006.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, 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 1, Repealed 0.

Date Adopted: October 20, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-11-082, filed 5/17/05, effective 6/17/05)

WAC 388-515-1550 Medically needy in-home waiver (MNIW) effective May 1, 2004. This section describes the financial eligibility requirements for waiver services under the medically needy in-home waiver (MNIW) and the rules used to determine a client's responsibility in the total cost of care.

(1) To be eligible for MNIW, a client must:

(a) Not meet financial eligibility for Medicaid personal care or the COPES program;

(b) Be eighteen years of age or older;

(c) Meet the SSI-related criteria described in WAC 388-475-0050(1);

(d) Require the level of care provided in a nursing facility as described in WAC 388-106-0355;

(e) In the absence of waiver services described in WAC 388-106-0500, continue to reside in a medical facility as defined in WAC 388-513-1301, or will likely be placed in one within the next thirty days;

(f) Have attained institutional status as described in WAC 388-513-1320;

(g) Have been determined to be in need of waiver services as described in WAC 388-106-0510;

(h) Be able to live at home with community support services and choose to remain at home;

(i) Not be subject to a penalty period of ineligibility for the transfer of an asset as described in WAC 388-513-1364, 388-513-1365 and 388-513-1366; and

(j) Meet the resource and income requirements described in subsections (2) through (6) of this section.

(2) The department determines a client's nonexcluded resources under MNIW as described in WAC 388-513-1350 (1) through (4)(a) and 388-513-1360;

(3) Nonexcluded resources, after disregarding excess resources described in subsection (4) of this section, must be at or below the resource standard described in WAC 388-513-1350 (1) and (2).

(4) In determining a client's resource eligibility, the department disregards excess resources above the standard described in subsection (3) of this section:

(a) In an amount equal to incurred medical expenses such as:

(i) Premiums, deductibles, and co-insurance/co-payment charges for health insurance and Medicare premiums;

(ii) Necessary medical care recognized under state law, but not covered under the state's Medicaid plan; or

(iii) Necessary medical care covered under the state's Medicaid plan.

(b) As long as the incurred medical expenses:

(i) Are not subject to third-party payment or reimbursement;

(ii) Have not been used to satisfy a previous spenddown liability;

(iii) Have not previously been used to reduce excess resources;

(iv) Have not been used to reduce client responsibility toward cost of care; and

(v) Are amounts for which the client remains liable.

(5) The department determines a client's countable income under MNIW in the following way:

(a) Considers income available described in WAC 388-513-1325 and 388-513-1330 (1), (2), and (3);

(b) Excludes income described in WAC 388-513-1340;

(c) Disregards income described in WAC 388-513-1345;

(d) Deducts monthly health insurance premiums, except Medicare premiums, not used to reduce excess resources in subsection (4) of this section;

(e) Allows an income deduction for a nonapplying spouse, equal to the one person medically needy income level (MNIL) less the nonapplying spouse's income, if the nonapplying spouse is living in the same home as the applying person.

(6) A client whose countable income exceeds the MNIL may become eligible for MNIW:

(a) When they have or expect to have medical expenses to offset their income which is over the MNIL; and

(b) Subject to availability in WAC 388-106-0535.

(7) The portion of a client's countable income over the MNIL is called "excess income."

(8) A client who has or will have "excess income" is not eligible for MNIW until the client has medical expenses which are equal in amount to that excess income. This is the process of meeting "spenddown." The excess income from each of the months in the base period is added together to determine the total "spenddown" amount.

(9) The following medical expenses may be used to meet spenddown if not already used in subsection (4) of this section to disregard excess resources or to reduce countable income as described in subsection (5)(d) of this section:

(a) An amount equal to incurred medical expenses such as:

(i) Premiums, deductibles, and co-insurance/co-payment charges for health insurance and Medicare premiums;

(ii) Necessary medical care recognized under state law, but not covered under the state's Medicaid plan; and

(iii) Necessary medical care covered under the state's Medicaid plan.

(b) The cost of waiver services authorized during the base period.

(c) As long as the incurred medical expenses:

(i) Are not subject to third-party payment or reimbursement;

(ii) Have not been used to satisfy a previous spenddown liability;

(iii) Have not been used to reduce client responsibility toward cost of care; and

(iv) Are amounts for which the client remains liable.

(10) Eligibility for MNIW is effective the first full month the client has met spenddown.

(11) In cases where spenddown has been met, medical coverage and MNIW begin the day services are authorized.

(12) A client who meets the requirements for MNIW chooses a three or six month base period. The months must be consecutive calendar months.

(13) The client's income that remains after determining available income in WAC 388-513-1325 and 388-513-1330 (1), (2), (3) and excluded income in WAC 388-513-1340 is

paid towards the cost of care after deducting the following amounts in the order listed:

(a) An earned income deduction of the first sixty-five dollars plus one-half of the remaining earned income;

(b) Personal needs allowance (PNA) in an amount equal to the one-person ((~~MNIL~~)) Federal Poverty Level (FPL) described in WAC ((~~388-478-0070 (1)(a)~~)) 388-478-0075(4);

(c) Medicare and health insurance premiums not used to meet spenddown or reduce excess resources;

(d) Incurred medical expenses described in subsection (4) of this section not used to meet spenddown or reduce excess resources.

WSR 06-22-028
EMERGENCY RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Aging and Disability Services Administration)

[Filed October 25, 2006, 1:50 p.m., effective October 25, 2006]

Effective Date of Rule: Immediately.

Purpose: Amending WAC 388-513-1380 Determining a client's financial participation in the cost of care for long-term care (LTC) services:

- To increase the personal needs allowance (PNA) for clients residing in medical institutions to $53.68 effective July 1, 2006.
- To increase the community spouse income and family allowance to $1,650 per month effective July 1, 2006.
- To increase the community spouse housing allowance to $495 per month effective July 1, 2006.
- To change the community spouse maintenance allowance to $2,541 effective January 1, 2007, due to federal standard change.

Citation of Existing Rules Affected by this Order: Amending WAC 388-513-1380.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.530.

Other Authority: 2005-07 omnibus operating budget (2006 supplement) DSHS (chapter 372, Laws of 2006).

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

Reasons for this Finding: The standards increase per the 2005-07 revised omnibus operating budget (2006 supplement) DSHS (chapter 372, Laws of 2006) was effective July 1, 2006. The federal increase in the spousal impoverishment standard needed to be effective July 1, 2006, in order to continue receiving federal funds. This filing continues the emergency rule filed as WSR 06-14-039 while the department completes adoption of permanent rules initiated under WSR 06-17-070. DSHS will file a CR-102 proposed rule on this WAC by December 2006.

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

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

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

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

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

Date Adopted: October 20, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 06-07-144, filed 3/21/06, effective 4/21/06)

WAC 388-513-1380 Determining a client's financial participation in the cost of care for long-term care (LTC) services. This rule describes how the department allocates income and excess resources when determining participation in the cost of care (in the post-eligibility process). The department applies rules described in WAC 388-513-1315 to define which income and resources must be used in this process.

(1) For a client receiving institutional or hospice services in a medical institution, the department applies all subsections of this rule.

(2) For a client receiving waiver services at home or in an alternate living facility, the department applies only those subsections of this rule that are cited in the rules for those programs.

(3) For a client receiving hospice services at home, or in an alternate living facility, the department applies rules used for the community options program entry system (COPES) for hospice applicants with income under the Medicaid special income level (SIL), if the client is not otherwise eligible for another noninstitutional categorically needy Medicaid program. (Note: For hospice applicants with income over the Medicaid SIL, medically needy Medicaid rules apply.)

(4) Excess resources are reduced in an amount equal to medical expenses incurred by the client (for definition see WAC 388-519-0110(10)) that are not subject to third-party payment and for which the client is liable, including:

(a) Health insurance and Medicare premiums, deductions, and co-insurance charges;

(b) Necessary medical care recognized under state law, but not covered under the state's Medicaid plan; and

(c) The amount of excess resources is limited to the following amounts:

(i) For LTC services provided under the categorically needy (CN) program, the amount described in WAC 388-513-1315(3); or

(ii) For LTC services provided under the medically needy (MN) program, the amount described in WAC 388-513-1395 (2)(a) or (b).

(5) The department allocates nonexcluded income in the following order and the combined total of (5)(a), (b), (c), and (d) cannot exceed the medically needy income level (MNIL):

(a) A personal needs allowance (PNA) of:

(i) One hundred sixty dollars for a client living in a state veterans' home;

(ii) Ninety dollars for a veteran or a veteran's surviving spouse, who receives the ninety dollar VA improved pension and does not live in a state veterans' home; or

(iii) Forty-one dollars and sixty-two cents for all clients in a medical institution receiving general assistance.

(iv) Effective July 1, ((~~2005~~)) 2006, ((~~fifty-one~~)) fifty-three dollars and ((~~sixty-two~~)) sixty-eight cents for all other clients in a medical institution.

(b) Federal, state, or local income taxes owed by the client.

(c) Wages for a client who:

(i) Is related to the supplemental security income (SSI) program as described in WAC 388-503-0510(1); and

(ii) Receives the wages as part of a department-approved training or rehabilitative program designed to prepare the client for a less restrictive placement. When determining this deduction employment expenses are not deducted.

(d) Guardianship fees and administrative costs including any attorney fees paid by the guardian, after June 15, 1998, only as allowed by chapter 388-79 WAC.

(6) The department allocates nonexcluded income after deducting amounts described in subsection (5) in the following order:

(a) Income garnisheed for child support:

(i) For the time period covered by the PNA; and

(ii) Not deducted under another provision in the post-eligibility process.

(b) A monthly maintenance needs allowance for the community spouse not to exceed, effective January 1, 2006, two thousand four hundred eighty-nine dollars, unless a greater amount is allocated as described in subsection (8) of this section. The community spouse maintenance allowance is increased each January based on the consumer price index increase (from September to September, http://www.bls.gov/cpi/). Effective January 1, 2007 this standard will increase to two thousand five hundred forty-one dollars. The monthly maintenance needs allowance:

(i) Consists of a combined total of both:

(A) An amount added to the community spouse's gross income to provide a total of one thousand six hundred ((~~four~~)) fifty dollars((~~, effective April 1, 2005~~)). This standard is based on one hundred fifty percent of the two person federal poverty level and increases annually on July 1st (http://aspe.os.dhhs.gov/poverty/); and

(B) Excess shelter expenses as described under subsection (7) of this section; and

(ii) Is allowed only to the extent the client's income is made available to the community spouse.

(c) A monthly maintenance needs amount for each minor or dependent child, dependent parent or dependent sibling of the community spouse or institutionalized person who:

(i) Resides with the community spouse:

(A) In an amount equal to one-third of one thousand six hundred ((~~four~~)) fifty dollars less the dependent family member's income. This standard is based on one hundred fifty percent of the two person federal poverty level and increases annually on July 1st (http://aspe.os.dhhs.gov/poverty/).((~~; and~~

~~(B) Is effective April 1, 2005.~~))

(ii) Does not reside with the community spouse or institutionalized person, in an amount equal to the MNIL for the number of dependent family members in the home less the dependent family member's income.

(iii) Child support received from noncustodial parent is the child's income.

(d) Incurred medical expenses described in subsections (4)(a) and (b) not used to reduce excess resources with the following exceptions:

(i) Private health insurance premiums for Medicare/Medicaid integration project (MMIP); and

(ii) Managed care health insurance premiums for program of all-inclusive care for the elderly (PACE).

(e) Maintenance of the home of a single client or institutionalized couple:

(i) Up to one hundred percent of the one-person federal poverty level per month;

(ii) Limited to a six-month period;

(iii) When a physician has certified that the client is likely to return to the home within the six-month period; and

(iv) When social services staff documents initial need for the income exemption.

(7) For the purposes of this section, "excess shelter expenses" means the actual expenses under subsection (7)(b) less the standard shelter allocation under subsection (7)(a). For the purposes of this rule:

(a) The standard shelter allocation is four hundred ((~~eighty-one~~)) ninety-five dollars((~~, effective April 1, 2005~~)). This standard is based on thirty percent of one hundred fifty percent of the two person federal poverty level. This standard increases annually on July 1st (http://aspe.os.dhhs.gov/poverty/); and

(b) Shelter expenses are the actual required maintenance expenses for the community spouse's principal residence for:

(i) Rent;

(ii) Mortgage;

(iii) Taxes and insurance;

(iv) Any maintenance care for a condominium or cooperative; and

(v) The food stamp standard utility allowance for four persons, provided the utilities are not included in the maintenance charges for a condominium or cooperative.

(8) The amount allocated to the community spouse may be greater than the amount in subsection (6)(b) only when:

(a) A court enters an order against the client for the support of the community spouse; or

(b) A hearings officer determines a greater amount is needed because of exceptional circumstances resulting in extreme financial duress.

(9) A client who is admitted to a medical facility for ninety days or less and continues to receive full SSI benefits is not required to use the SSI income in the cost of care for medical services. Income allocations are allowed as described in this section from non-SSI income.

WSR 06-22-043
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-281—Filed October 27, 2006, 8:35 a.m., effective October 28, 2006, 8:00 a.m.]

Effective Date of Rule: October 28, 2006, 8:00 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-04600R; and 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: Changes in the above limited commercial crab zones at this time are to comply with current state/tribal management plans. 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: October 26, 2006.

J. P. Koenings
Director

NEW SECTION

WAC 220-52-04600S Crab fishery—Seasons and areas. Notwithstanding the provisions of WAC 220-52-046:

(1) Effective 8:00 a.m. October 28, 2006 until further notice, it will be lawful to fish for Dungeness crab for commercial purposes in the following areas:

a) That portion of Catch Area 26A east of a line projected from the outermost tip of the ferry dock at Mukilteo projected to the green #3 buoy at the mouth of the Snohomish River and west of a line projected from that #3 buoy southward to the oil boom pier on the shoreline.

b) The area between the line from the western boundary of Birch Bay State Park to the western point of the entrance of the Birch Bay Marina and a line from the western boundary of Birch Bay State Park to Birch Point.

c) That portion of Marine Fish/Shellfish Catch Area 22A in Deer Harbor north of a line from Steep Point to Pole.

d) That portion of Marine Fish/Shellfish Catch Area 22B in Fidalgo Bay south of a line from the red #4 buoy at the Cap Sante Marina entrance to the northern end of the eastern most oil dock and thence to shore.

REPEALER

The following section of the Washington Administrative Code is repealed effective 8:00 a.m. October 28, 2006:

WAC 220-52-04600R	Crab fishery—Seasons and areas. (06-245)

WSR 06-22-056
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-280—Filed October 27, 2006, 2:43 p.m., effective October 30, 2006, 12:01 a.m.]

Effective Date of Rule: October 30, 2006, 12:01 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-47-31100I and 220-47-41100J; 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: It is estimated that there are sufficient harvestable fish remaining in the nontreaty share to sustain fishing five days per week at expected effort and catch levels. Treaty-tribe comanagers have been consulted and agreed to this increase in fishing. This fishery is not expected to exceed chinook or summer chum by-catch levels modeled during the preseason process. There is insufficient time to make this a part of the permanent rules process.

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: October 26, 2006.

J. P. Koenings
Director

NEW SECTION

WAC 220-47-31100I Purse seine—Open periods. (1) Notwithstanding the provisions of Chapter 220-47-311 WAC, effective 12:01 a.m. October 30 through 11:59 p.m. November 10, 2006, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas 7 or 7A except in accordance with the open periods, mesh size, areas, species restrictions, notification, and landing requirements set forth in this chapter, provided that unless otherwise amended, all permanent rules for all other catch reporting areas remain in effect:

AREA	TIME	-		DATE(S)
7&7A:	7AM	-	5PM with use of operating recovery box	10/30, 10/31, 11/1, 11/2, 11/3, 11/6, 11/7, 11/8, 11/9, 11/10
	7AM	-	2:30PM without recovery box	10/30, 10/31, 11/1, 11/2, 11/3, 11/6, 11/7, 11/8, 11/9, 11/10

Chinook and Coho salmon must be released or placed in an operating recovery box until the fish has recovered or death has occurred. All Chinook and coho must be released alive or dead.

(2) Fishing vessel operators must be in possession of a "Fish Friendly" Best Fishing Practices certification card documenting attendance of a Best Fishing Practices workshop to participate in any area 7 or 7A salmon fishery.

NEW SECTION

WAC 220-47-41100J Gill net—Open periods. (1) Notwithstanding the provisions of Chapter 220-47-411 WAC, effective 12:01 a.m. October 30 through 11:59 p.m. November 10, 2006, it is unlawful to take, fish for or possess salmon taken for commercial purposes in Puget Sound Salmon Management and Catch Reporting Areas 7 and 7A except in accordance with the open periods, mesh size, areas, species restrictions, notification, and landing requirements set forth in this chapter, provided that unless otherwise amended, all permanent rules for all other catch reporting areas remain in effect:

AREA	TIME	-		DATE(S)	MINIMUM MESH
7, 7A:	7AM	-	7PM	10/30, 10/31, 11/1, 11/2, 11/3, 11/6, 11/7, 11/8, 11/9, 11/10	6 1/4"

(2) Fishing vessel operators must be in possession of a "Fish Friendly" Best Fishing Practices certification card documenting attendance of a Best Fishing Practices workshop to participate in any area 7 or 7A salmon fishery.

REPEALER

The following sections of the Washington Administrative Code are repealed effective 7:01 p.m. November 10, 2006:

WAC 220-47-31100I	Purse seine—Open periods.
WAC 220-47-41100J	Gill net—Open periods.

WSR 06-22-061
EMERGENCY RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)

[Filed October 30, 2006, 11:25 a.m., effective November 1, 2006]

Effective Date of Rule: November 1, 2006.

Purpose: To comply with the requirements of the 2005 legislature, the department is adding new section WAC 388-550-2650, to adopt two separate base community psychiatric hospital payments. One is for Medicaid clients and the other is for non-Medicaid clients. The new rule also clarifies that both Involuntary Treatment Act (ITA)-certified hospitals and hospitals that have ITA-certified beds that have been used to treat ITA patients are included in the base community psychiatric hospitalization payment method for Medicaid and non-Medicaid clients.

This emergency rule replaces the emergency filing for WAC 388-550-2650, under WSR 06-14-086.

Statutory Authority for Adoption: RCW 74.08.090, 74.09.500.

Other Authority: Section 204, chapter 518, Laws of 2005 (ESSB 6090), Part II.

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

Reasons for this Finding: The legislature appropriated funds for fiscal year 2006 and 2007 to establish a separate based community psychiatric hospitalization payment rate for Medicaid and non-Medicaid clients at hospitals that accept commitments under the ITA and free-standing psychiatric hospitals that accept commitments under the ITA and also hospitals that have ITA-certified beds that have been used to treat ITA patients. This rule replaces the emergency rule filed under WSR 06-14-086. The new rule carries out the legislature's directive while the department completes the permanent rule-making process begun under WSR 05-14-145 and filed on July 5, 2005.

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 0, Repealed 0.

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

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

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

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

Date Adopted: October 23, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

NEW SECTION

WAC 388-550-2650 Base community psychiatric hospitalization payment method for Medicaid and non-Medicaid clients. (1) Effective July 1, 2005 and in accordance with legislative directive, the department implemented two separate base community psychiatric hospitalization payment rates, one for Medicaid clients and one for non-Medicaid clients. (For the purpose of this section, a "non-Medicaid client" is defined as a client eligible under the general assistance unemployable (GAU) program, the Alcoholism and Drug Addiction Treatment and Support Act (ADATSA), the psychiatric indigent inpatient (PII) program, or other state-administered programs, as determined by the department.)

(a) The Medicaid base community psychiatric hospitalization payment rate is a minimum per diem allowable calculated for claims for psychiatric services provided to Medicaid covered patients, to pay hospitals that accept commitments under the involuntary treatment act (ITA).

(b) The non-Medicaid base community psychiatric hospitalization payment rate is a minimum per diem allowable calculated for claims for psychiatric services provided to indigent patients to pay hospitals that accept commitments under the ITA.

(2) A client's inpatient psychiatric hospitalization must have a root cause that is psychiatric in nature. The department:

(a) Defines "root cause" as the reason the client was admitted based on the principal diagnosis and the department's review of the client's medical record; and

(b) Does not consider detoxification to be psychiatric in nature.

(3) All inpatient hospital psychiatric admissions require regional support network (RSN) prior authorization. The RSN-approved length of stay (LOS) is based on a client's discharge diagnosis.

(a) The number of department-covered days that are linked to claims paid under the DRG payment method becomes the RSN-approved LOS for those claims. If the case is a transfer case, the DRG average LOS becomes the LOS that is used to determine the allowable on the claim. See WAC 388-550-3600.

(b) The RSN-approved LOS for claims paid using a non-DRG payment method is established by the RSN in conjunction with the mental health division.

(4) Payment for claims is based on covered days within a client's approved LOS, subject to client eligibility and department-covered services.

(5) The Medicaid base community psychiatric hospitalization payment rate applies only to a Medicaid client admitted to a nonstate-owned free-standing psychiatric hospital located in Washington state.

(6) The non-Medicaid base community psychiatric hospitalization payment rate applies only to a non-Medicaid client admitted to a hospital:

(a) Designated by the department as an Involuntary Treatment Act (ITA)-certified hospital; or

(b) That has a department certified ITA bed that has been used to provide ITA services at the time of the non-Medicaid admission.

(7) For inpatient hospital psychiatric services provided to eligible clients on and after July 1, 2005, the department pays:

(a) A hospital's DOH-certified distinct psychiatric unit, as follows:

(i) For Medicaid clients, the department pays inpatient hospital psychiatric claims using the department-specific non-DRG payment method.

(ii) For non-Medicaid clients, the department uses as the allowable for inpatient hospital psychiatric claims, the greater of:

(A) The state-only diagnostic-related group (DRG) allowable (including the high cost outlier allowable, of applicable), or the department-specified non-DRG payment method if no relative weight exists for the DRG in the department's payment system; or

(B) The non-Medicaid base community psychiatric hospitalization payment rate multiplied by the covered days.

(b) A hospital without a DOH-certified distinct psychiatric unit, as follows:

(i) For Medicaid clients, the department pays inpatient hospital psychiatric claims using:

(A) The DRG payment method; or

(B) The department-specified non-DRG payment method if no relative weight exists for the DRG in the department's payment system.

(ii) For non-Medicaid clients, the department uses as the allowable for inpatient hospital psychiatric claims, the greater of:

(A) The state-only diagnostic-related group (DRG) allowable (including the high cost outlier allowable, if applicable), or the department-specified non-DRG payment method if no relative weight exists for the DRG in the department's payment system; or

(B) The non-Medicaid base community psychiatric hospitalization payment rate multiplied by the covered days.

(c) A non-state-owned free-standing psychiatric hospital, as follows:

(i) For Medicaid clients, the department uses as the allowable for inpatient hospital psychiatric claims, the greater of:

(A) The RCC allowable; or

(B) The Medicaid base community psychiatric hospitalization payment rate multiplied by covered days.

(ii) For non-Medicaid clients, the department pays inpatient hospital psychiatric claims the same as for Medicaid clients, except the base community psychiatric hospitalization payment rate is the non-Medicaid rate, and the RCC allowable is the state-only RCC allowable.

(d) A hospital, or a distinct psychiatric unit of a hospital, that is participating in the CPE payment program, as follows:

(i) For Medicaid clients, the department pays inpatient hospital psychiatric claims using the methods identified in WAC 388-550-4650.

(ii) For non-Medicaid clients, the department pays inpatient hospital psychiatric claims using the methods identified in WAC 388-550-4650, except that the allowable to which the federal financial participation (FFP) percentage is applied is the greater of:

(A) The RCC allowable; or

(B) The non-Medicaid base community psychiatric hospitalization payment rate multiplied by covered days.

(e) A hospital, or a distinct psychiatric unit of a hospital that is participating in the CAH program, as follows:

(i) For Medicaid clients, the department pays inpatient hospital psychiatric claims using the department-specified non-DRG payment method.

(ii) For non-Medicaid clients, the department pays inpatient hospital psychiatric claims using the department-specified non-DRG payment method.

WSR 06-22-065

EMERGENCY RULES

SECRETARY OF STATE

(Elections Division)

[Filed October 30, 2006, 1:15 p.m., effective October 30, 2006]

Effective Date of Rule: Immediately.

Purpose: To implement the felon screening process required by RCW 29A.08.520 and in accordance with the King County Superior Court ruling on felon voters in *Madison v. State of Washington.*

Citation of Existing Rules Affected by this Order: Amending WAC 434-324-106.

Statutory Authority for Adoption: RCW 29A.04.611.

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

Reasons for this Finding: RCW 29A.08.520 requires the office of the secretary of state (OSOS) to screen the statewide list of registered voters for felons. This rule establishes the process for notifying the felons in addition to the process county auditors must use if a felon disputes the pending cancellation of voter registration.

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 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, 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 1, Repealed 0.

Date Adopted: October 30, 2006.

Steve Excell

Assistant Secretary of State

AMENDATORY SECTION (Amending WSR 05-24-039, filed 11/30/05, effective 12/31/05)

WAC 434-324-106 Felony conviction—Secretary's quarterly comparisons ((~~and pending cancellation notifications~~)). (1) Once a quarter, the secretary must perform comparisons with the ((~~Washington state patrol, the office of the administrator for the courts, and other appropriate state agencies~~)) department of corrections, as authorized in RCW 29A.08.520, to search for registration records of felons((~~. The quarterly comparison must be performed prior to the first extraction or pull of absentee ballots for a primary, special, or general election~~)) who are under the legal custody of the department of corrections due to an adult felony conviction. The secretary must create a list of ((~~matches by confirming that~~)) felon voters by matching the first name, last name, ((~~and~~)) date of birth ((~~match~~)), and other identifying information.

(2) ((~~The list of matches must be compared to information provided by the office of the administrator for the courts and the clemency board to identify felons who have received certificates of discharge or gubernatorial pardons for all felony convictions.~~

~~(3) The secretary must not cancel the voter registration record of a voter who has received a certificate of discharge or gubernatorial pardon for all felony convictions. The secretary must flag the voter registration record to prevent future cancellation based on these previous felony convictions.~~

~~(4) If there is no record of a certificate of discharge or gubernatorial pardon for each felony conviction~~)) For each felon voter, the secretary must change the voter's registration status to "pending cancellation." This change of status must be entered prior to the first extraction or pull of absentee or mail ballots. The official statewide voter registration data base must automatically notify the county election management system of the change. Voters with pending cancellation status must not be included in ((~~the~~)) a poll book ((~~and must not receive~~)) or be mailed an absentee or mail ballot.

(((~~(5)~~))) (3) The secretary must mail a notification letter to each felon whose status is pending cancellation. ((~~In addition to sending a copy of the notification letter to the auditor, the secretary must also send notification of the voter's pending cancellation status to the auditor through the election management system.~~)) The notification letter must be sent to the felon's last known registration mailing address indicating that his or her voter registration is about to be canceled. The ((~~form~~)) letter must contain language notifying the felon that ((~~if the pending cancellation status is in error, the felon~~)) he or she may contact the auditor's office to ((~~reconcile the error and~~)) correct the information or request a hearing if the felon status is not correct or the right to vote has been restored. The letter must also inform the felon that he or she may request a provisional ballot for any pending elections. ((~~As outlined in RCW 29A.08.520, the form must also provide information on how the right to vote may be restored, as well as how to register to vote after the right to vote has been restored.~~)) The notification letter must contain substantially the following language:

Dear . . . . . ,

According to the Washington state Constitution, a person who has been convicted of a felony is disqualified from voting until the right has been restored. State law requires that the right be restored only after all conditions of all felony sentences have been fulfilled ((~~as outlined in the last paragraph of this letter~~)) or by a certificate of restoration issued by the governor.

Based on name ((~~and~~)), date of birth, and other identifying information maintained in state voter registration records and ((~~felony conviction~~)) department of corrections records, you have been found ineligible to vote due to a felony conviction. The felony conviction record information includes:

Felon's name
Felon's date of birth
County of conviction
((~~Date of conviction~~))
Case/cause number

Your voter registration is pending cancellation. If you would like to dispute this finding, you have ((~~thirty~~)) 30 days from the postmark date on the envelope to provide documentation that this is incorrect or request a hearing ((~~by contacting~~)). You must contact:

County auditor
County auditor's address
County auditor's phone number
((~~County auditor's e-mail address~~))

You may also request a provisional ballot for any election scheduled to occur prior to the resolution of your registration status.

If you do not contact the county elections department within 30 days to dispute ((~~this~~)) the finding ((~~within thirty days~~)), your voter registration will be canceled.

Voting before the ((~~rights are~~)) right is restored is a class C felony (((~~RCW 29A.84.660~~))). The right to vote may be restored by proof of one of the following for each felony conviction:

1. A certificate of discharge, issued by the sentencing court (((~~RCW 9.94A.637~~)));

2. A court order restoring civil right, issued by the sentencing court (((~~RCW 9.92.066~~)));

3. A final ((~~order of~~)) discharge and restoration of civil rights, issued by the indeterminate sentence review board (((~~RCW 9.96.050~~))); or

4. A certificate of restoration, issued by the ((~~governor (RCW 9.96.020)~~)) clemency and pardons board; or

5. A pardon, issued by the governor.

Further information about how to get the right to vote restored may be found at ((~~www.secstate.wa.gov/elections/restoring.aspx~~)) www.secstate.wa.gov/elections/faq. aspx.

Sincerely,

((~~. . . . . .~~)) Elections Division
Office of the Secretary of State

The secretary must provide an explanation of the requirements for restoring the right to vote. The secretary must send to each auditor the voter registration and conviction information for each matched felon registered in that county.

(4) If the felon fails to contact the auditor within thirty days, the felon's voter registration must be canceled. If an election in which the felon would otherwise be eligible to vote is scheduled to occur during the thirty days, the felon must be allowed to vote a provisional ballot.

(5) The felon's eligibility status may be resolved and the pending cancellation status reversed without scheduling a hearing if the felon provides satisfactory documentation that the felon's civil rights have been restored, the conviction is not a felony, the person convicted is not the registered voter, or the felon is otherwise eligible to vote. The auditor must notify the voter, retain a scanned copy of all documentation provided, and notify the secretary. The secretary must flag the voter registration record to prevent future cancellation based on the same felony conviction.

(6) If the felon requests a hearing, the auditor must schedule a public hearing to provide the felon an opportunity to dispute the finding. In scheduling the hearing, the auditor may take into account whether an election in which the felon would otherwise be eligible to vote is scheduled. The notice must be mailed to the felon's last known registration mailing address and must be postmarked at least seven calendar days prior to the hearing date. Notice of the hearing must also be provided to the prosecuting attorney.

(7) The auditor must provide the prosecuting attorney a copy of all relevant registration and felony conviction information. The prosecuting attorney must obtain documentation, such as a copy of the judgment and sentence, sufficient to prove the felony conviction by clear and convincing evidence. It is not necessary that the copy of the document be certified.

(8) If the prosecuting attorney is unable to obtain sufficient documentation to ascertain the felon's voting eligibility in time to hold a hearing prior to certification of an election in which the felon would otherwise be eligible to vote, the prosecuting attorney must request that the auditor dismiss the current cancellation proceedings. The auditor must reverse the voter's pending cancellation status, cancel the hearing, and notify the voter. A provisional ballot voted in the pending election must be counted if otherwise valid. The prosecuting attorney must continue to research the felon's voting eligibility. If the prosecuting attorney is unable to obtain sufficient documentation to ascertain the felon's voting eligibility prior to the next election in which the felon would otherwise be eligible to vote, the prosecuting attorney must notify the auditor. The auditor must notify the secretary, who must flag the voter registration record to prevent future cancellation based on the same felony conviction.

(9) A hearing to determine voting eligibility is an open public hearing pursuant to chapter 42.30 RCW. If the hearing occurs within thirty days before, or during the certification period of, an election in which the felon would otherwise be eligible to vote, the hearing must be conducted by the county canvassing board. If the hearing occurs at any other time, the county auditor conducts the hearing. Before a final determination is made that the felon is ineligible to vote, the prose-

cuting attorney must show by clear and convincing evidence that the voter is ineligible to vote due to a felony conviction. The felon must be provided a reasonable opportunity to respond. The hearing may be continued to a later date if continuance is likely to result in additional information regarding the felon's voting eligibility. If the felon is determined to be ineligible to vote due to felony conviction and lack of rights restoration, the voter registration must be canceled. If the voter is determined to be eligible to vote, the voter's pending cancellation status must be reversed and the secretary must flag the voter registration record to prevent future cancellation based on the same felony convictions. The felon must be notified of the outcome of the hearing and the final determination is subject to judicial review pursuant to chapter 34.05 RCW.

(10) If the felon's voter registration is canceled after the felon fails to contact the auditor within the thirty day period, the felon may contact the auditor at a later date to request a hearing to dispute the cancellation. The auditor must schedule a hearing in substantially the same manner as provided in subsections (6) through (9) of this section.

WSR 06-22-069
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-282—Filed October 30, 2006, 3:28 p.m., effective October 30, 2006]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-05100B.

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 closure of the shrimp trawl fishery in Region 3, implemented by this rule, is necessary to meet allocation, conservation, and management agreements of the 2006 state/tribal Region 3 shrimp harvest management plan. 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: October 30, 2006.

J. P. Koenings
Director

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-52-05100B	Puget Sound shrimp beam trawl fishery—Season (06-270)

WSR 06-22-075
EMERGENCY RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-283—Filed October 31, 2006, 2:19 p.m., effective November 3, 2006, 12:01 p.m.]

Effective Date of Rule: November 3, 2006, 12:01 p.m.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-36000V; 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.

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: October 31, 2006.

J. P. Koenings
Director
by Larry Peck

NEW SECTION

WAC 220-56-36000V 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 3 through 11:59 p.m. November 5, 2006, razor clam digging is allowed in Razor Clam Area 1. Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

2. Effective 12:01 p.m. November 3 through 11:59 p.m. November 6, 2006, razor clam digging is allowed in Razor Clam Area 2. Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

3. Effective 12:01 p.m. November 3 through 11:59 p.m. November 5, 2006, razor clam digging is allowed in that portion of Razor Clam Area 3 that is between the Copalis River and the southern boundary of the Quinault Indian Nation (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 7, 2006:

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

WSR 06-22-080
EMERGENCY RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Medical Assistance)

[Filed October 31, 2006, 3:14 p.m., effective October 31, 2006]

Effective Date of Rule: Immediately.

Purpose: The department is codifying new special terms and conditions in the new family planning/TAKE CHARGE waiver as set forth by the Centers for Medicare and Medicaid Services (CMS) for the state of Washington.

Citation of Existing Rules Affected by this Order: Amending WAC 388-532-050, 388-532-100, 388-532-110, 388-532-120, 388-532-520, 388-532-530, 388-532-700, 388-532-710, 388-532-720, 388-532-730, 388-532-740, 388-532-750, 388-532-760, 388-532-780, and 388-532-790.

Statutory Authority for Adoption: RCW 74.08.090 and 74.09.800.

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

Reasons for this Finding: This emergency rule adoption is necessary while the permanent rule-making process is being completed because the current rules are out of compliance with special terms and conditions of the new family planning/TAKE CHARGE waiver set forth by the CMS for the state of Washington. The waiver was signed August 31, 2006, and is retroactive effective July 1, 2006. Immediate adoption of this emergency rule is required to prevent loss of 90% federal matching funds for the family planning/TAKE CHARGE program.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 1, Amended 15, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 1, Amended 15, Repealed 0.

Date Adopted: October 30, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

Reviser's note: The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the 06-23 issue of the Register.

WSR 06-22-088
EMERGENCY RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)
(Medical Assistance)

[Filed November 1, 2006, 9:15 a.m., effective November 1, 2006]

Effective Date of Rule: Immediately.

Purpose: The Deficit Reduction Act of 2005 (Public Law 109-171, section 6036), requires states to verify citizenship status applicants for and recipients of Medicaid.

Citation of Existing Rules Affected by this Order: Amending WAC 388-490-0005.

Statutory Authority for Adoption: RCW 74.08.090, 74.04.057, 74.09.530.

Other Authority: Deficit Reduction Act of 2005 (Public Law 109-171, section 6036).

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

Reasons for this Finding: The Deficit Reduction Act of 2005 (Public Law 109-171, section 6036) states that receipt of federal funding for Medicaid is contingent upon documentation of citizenship for individuals claiming to be citizens. This action will continue the emergency rule in effect since July 5, 2006, under WSR 06-15-001, while the permanent rule-making process initiated under WSR 06-14-042 is completed. Proposed rules have been filed and a public hearing is scheduled for December 5, 2006, see WSR 06-22-031.

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

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

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

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

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

Date Adopted: November 1, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 03-21-029, filed 10/7/03, effective 11/1/03)

WAC 388-490-0005 The department requires proof before authorizing benefits for cash, medical, and Basic Food. This rule applies to cash, medical, and Basic Food.

(1) When you first apply for benefits, the department may require you to provide proof of things that help us decide if you are eligible for benefits. This is also called "verification." The types of things that need to be proven are different for each program.

(2) After that, we will ask you to give us proof when:

(a) You report a change;

(b) We find out that your circumstances have changed; or

(c) The information we have is questionable, confusing, or outdated.

(3) Whenever we ask for proof, we will give you a notice as described in WAC 388-458-0020.

(4) You must give us the proof within the time limits described in:

(a) WAC 388-406-0030 if you are applying for benefits; and

(b) WAC 388-458-0020 if you currently receive benefits.

(5) We will accept any proof that you can easily get when it reasonably supports your statement or circumstances. The proof you give to us must:

(a) Clearly relate to what you are trying to prove;

(b) Be from a reliable source; and

(c) Be accurate, complete, and consistent.

(6) We cannot make you give us a specific type or form of proof.

(7) If the only type of proof that you can get costs money, we will pay for it.

(8) If the proof that you give to us is questionable or confusing, we may:

(a) Ask you to give us more proof, which may include providing a collateral statement. A "collateral statement" is from someone outside of your residence who knows your situation;

(b) Schedule a visit to come to your home and verify your circumstances; or

(c) Send an investigator from the Division of Fraud Investigations (DFI) to make an unannounced visit to your home to verify your circumstances.

(9) By signing the application, eligibility review, or change of circumstances form, you give us permission to contact other people, agencies, or institutions.

(10) If you do not give us all of the proof that we have asked for, we will determine if you are eligible based on the information that we already have. If we cannot determine that you are eligible based on this information, we will deny or stop your benefits.

(11) For all Medicaid programs, you must provide proof of citizenship and identity as specified at Section 6036 of the Deficit Reduction Act of 2005 (PL 106-171 amending USC 1396b). Exempt from this requirement are recipients of:

(a) SSI cash benefits; or

(b) Medicare.