

WSR 10-04-055
EMERGENCY RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES

(Health and Recovery Services Administration)

[Filed January 29, 2010, 8:57 a.m., effective February 1, 2010]

Effective Date of Rule: February 1, 2010.

Purpose: These amendments are necessary to meet the legislative requirements of sections 201 and 209 of the operating budget for fiscal years 2010 and 2011 for durable medical equipment. Specifically, the department is eliminating coverage for transcutaneous electrical neural stimulation (TENS) devices and supplies (including battery chargers and supplies for client-owned devices) for in-home use and the instruction in the application of TENS.

Citation of Existing Rules Affected by this Order: Amending WAC 388-543-1150, 388-543-1300, 388-543-1600, 388-543-2800, 388-545-300, and 388-545-500.

Statutory Authority for Adoption: RCW 74.08.090.

Other Authority: Section 1109, chapter 564, Laws of 2009 (ESHB 1244), WAC 388-501-0055.

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

Reasons for this Finding: Emergency rule adoption is required in order for the department to fully meet the legislatively mandated appropriation reduction in section 1109, chapter 564, Laws of 2009 (ESHB 1244) for durable medical equipment for fiscal years 2010-2011.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 6, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 6, Repealed 0.

Date Adopted: January 20, 2010.

Don Goldsby, Manager
Rules and Policies Assistant Unit

AMENDATORY SECTION (Amending WSR 09-22-047, filed 10/28/09, effective 11/28/09)

WAC 388-543-1150 Limits and limitation extensions.

The department covers non-DME (MSE), DME, and related supplies, prosthetics, orthotics, medical supplies, and related

services as described in WAC 388-543-1100(1). The department limits the amount, frequency, or duration of certain covered MSE, DME, and related supplies, prosthetics, orthotics, medical supplies, and related services, and reimburses up to the stated limit without requiring prior authorization. These limits are designed to avoid the need for prior authorization for items normally considered medically necessary and for quantities sufficient for a thirty-day supply for one client. In order to exceed the stated limits, the provider must request a limitation extension (LE), which is a form of prior authorization (PA). The department evaluates such requests for LE under the provisions of WAC 388-501-0169. Procedures for LE are found in department billing instructions. The following items and quantities do not require prior authorization; requests to exceed the stated quantities require LE:

(1) Antiseptics and germicides:

(a) Alcohol (isopropyl) or peroxide (hydrogen) - one pint per month;

(b) Alcohol wipes (box of two hundred) - one box per month;

(c) Betadine or pHisoHex solution - one pint per month;

(d) Betadine or iodine swabs/wipes (box of one hundred) - one box per month; or

(e) Periwash (when soap and water are medically contraindicated) - one five-ounce bottle of concentrate solution per six-month period.

(2) Blood monitoring/testing supplies:

(a) Replacement battery of any type, used with a client-owned, medically necessary home or specialized blood glucose monitor - one in a three-month period;

(b) Spring-powered device for lancet - one in a six-month period.

(c) Test strips and lancets for an insulin dependent diabetic - one hundred of each, per month; and

(d) Test strips and lancets for a noninsulin dependent diabetic - one hundred of each, per three-month period.

(3) Braces, belts and supportive devices:

(a) Knee brace (neoprene, nylon, elastic, or with a hinged bar) - two per twelve-month period;

(b) Ankle, elbow, or wrist brace - two per twelve-month period;

(c) Lumbosacral brace, rib belt, or hernia belt - one per twelve-month period;

(d) Cervical head harness/halter, cervical pillow, pelvic belt/harness/boot, or extremity belt/harness - one per twelve-month period.

(4) Decubitus care products:

(a) Cushion (gel, sacroiliac, or accuback) and cushion cover (any size) - one per twelve-month period;

(b) Synthetic or lambs wool sheepskin pad - one per twelve-month period;

(c) Heel or elbow protectors - four per twelve-month period.

(5) Ostomy supplies:

(a) Adhesive for ostomy or catheter: Cement; powder; liquid (e.g., spray or brush); or paste (any composition, e.g., silicone or latex) - four total ounces per month.

(b) Adhesive or nonadhesive disc or foam pad for ostomy pouches - ten per month.

(c) Adhesive remover or solvent - three ounces per month.

(d) Adhesive remover wipes, fifty per box - one box per month.

(e) Closed pouch, with or without attached barrier, with a one- or two-piece flange, or for use on a faceplate - sixty per month.

(f) Closed ostomy pouch with attached standard wear barrier, with built-in one-piece convexity - ten per month.

(g) Continent plug for continent stoma - thirty per month.

(h) Continent device for continent stoma - one per month.

(i) Drainable ostomy pouch, with or without attached barrier, or with one- or two-piece flange - twenty per month.

(j) Drainable ostomy pouch with attached standard or extended wear barrier, with or without built-in one-piece convexity - twenty per month.

(k) Drainable ostomy pouch for use on a plastic or rubber faceplate (only one type of faceplate allowed) - ten per month.

(l) Drainable urinary pouch for use on a plastic, heavy plastic, or rubber faceplate (only one type of faceplate allowed) - ten per month.

(m) Irrigation bag - two every six months.

(n) Irrigation cone and catheter, including brush - two every six months.

(o) Irrigation supply, sleeve - one per month.

(p) Ostomy belt (adjustable) for appliance - two every six months.

(q) Ostomy convex insert - ten per month.

(r) Ostomy ring - ten per month.

(s) Stoma cap - thirty per month.

(t) Ostomy faceplate - ten per month. The department does not allow the following to be used on a faceplate in combination with drainable pouches (refer to the billing instructions for further details):

(i) Drainable pouches with plastic face plate attached; or

(ii) Drainable pouches with rubber face plate.

(6) ~~((Supplies associated with client owned transectaneous electrical nerve stimulators (TENS):~~

~~(a) For a four-lead TENS unit - two kits per month. (A kit contains two leads, conductive paste or gel, adhesive, adhesive remover, skin preparation material, batteries, and a battery charger for rechargeable batteries.)~~

~~(b) For a two-lead TENS unit - one kit per month.~~

~~(c) TENS tape patches (for use with carbon rubber electrodes only) are allowed when they are not used in combination with a kit(s).~~

~~(d) A TENS stand alone replacement battery charger is allowed when it is not used in combination with a kit(s).~~

~~(7)) Urological supplies - diapers and related supplies:~~

(a) The standards and specifications in this subsection apply to all disposable incontinent products (e.g., briefs, diapers, pull-up pants, underpads for beds, liners, shields, guards, pads, and undergarments). See subsections (b), (c), (d), and (e) of this section for additional standards for specific products. All of the following apply to all disposable incontinent products:

(i) All materials used in the construction of the product must be safe for the client's skin and harmless if ingested;

(ii) Adhesives and glues used in the construction of the product must not be water-soluble and must form continuous seals at the edges of the absorbent core to minimize leakage;

(iii) The padding must provide uniform protection;

(iv) The product must be hypoallergenic;

(v) The product must meet the flammability requirements of both federal law and industry standards; and

(vi) All products are covered for client personal use only.

(b) In addition to the standards in subsection (a) of this section, diapers must meet all the following specifications. They must:

(i) Be hourglass shaped with formed leg contours;

(ii) Have an absorbent filler core that is at least one-half inch from the elastic leg gathers;

(iii) Have leg gathers that consist of at least three strands of elasticized materials;

(iv) Have an absorbent core that consists of cellulose fibers mixed with absorbent gelling materials;

(v) Have a backsheet that is moisture impervious and is at least 1.00 mm thick, designed to protect clothing and linens;

(vi) Have a topsheet that resists moisture returning to the skin;

(vii) Have an inner lining that is made of soft, absorbent material; and

(viii) Have either a continuous waistband, or side panels with a tear-away feature, or refastenable tapes, as follows:

(A) For child diapers, at least two tapes, one on each side.

(B) The tape adhesive must release from the backsheet without tearing it, and permit a minimum of three fastening/unfastening cycles.

(c) In addition to the standards in subsection (a) of this section, pull-up pants and briefs must meet the following specifications. They must:

(i) Be made like regular underwear with an elastic waist or have at least four tapes, two on each side or two large tapes, one on each side;

(ii) Have an absorbent core filler that is at least one-half inch from the elastic leg gathers;

(iii) Have an absorbent core that consists of cellulose fibers mixed with absorbent gelling;

(iv) Have leg gathers that consist of at least three strands of elasticized materials;

(v) Have a backsheet that is moisture impervious, is at least 1.00 mm thick, and is designed to protect clothing and linens;

(vi) Have an inner lining made of soft, absorbent material; and

(vii) Have a top sheet that resists moisture returning to the skin.

(d) In addition to the standards in subsection (a) of this section, underpads are covered only for incontinent purposes in a client's bed and must meet the following specifications:

(i) Have an absorbent layer that is at least one and one-half inches from the edge of the underpad;

(ii) Be manufactured with a waterproof backing material;

(iii) Be able to withstand temperatures not to exceed one hundred-forty degrees Fahrenheit;

(iv) Have a covering or facing sheet that is made of non-woven, porous materials that have a high degree of permeability, allowing fluids to pass through and into the absorbent filler. The patient contact surface must be soft and durable;

(v) Have filler material that is highly absorbent. It must be heavy weight fluff filler or the equivalent; and

(vi) Have four-ply, nonwoven facing, sealed on all four sides.

(e) In addition to the standards in subsection (a) of this section, liners, shields, guards, pads, and undergarments are covered for incontinence only and must meet the following specifications:

(i) Have channels to direct fluid throughout the absorbent area, and leg gathers to assist in controlling leakage, and/or be contoured to permit a more comfortable fit;

(ii) Have a waterproof backing designed to protect clothing and linens;

(iii) Have an inner liner that resists moisture returning to the skin;

(iv) Have an absorbent core that consists of cellulose fibers mixed with absorbent gelling materials;

(v) Have pressure-sensitive tapes on the reverse side to fasten to underwear; and

(vi) For undergarments only, be contoured for good fit, have at least three elastic leg gathers, and may be belted or unbelted.

(f) The department covers the products in this subsection only when they are used alone; they cannot be used in combination with each other. The department approves a client's use of a combination of products only when the client uses different products for daytime and nighttime use (see department billing instructions for how to specify this when billing). The total quantity of all products in this section used in combination cannot exceed the monthly limitation for the product with the highest limit (see subsections (g), (h), (i), (j), (k), (l), and (m) of this section for product limitations). The following products cannot be used together:

(i) Disposable diapers;

(ii) Disposable pull-up pants and briefs;

(iii) Disposable liners, shields, guards, pads, and undergarments;

(iv) Rented reusable diapers (e.g., from a diaper service); and

(v) Rented reusable briefs (e.g., from a diaper service), or pull-up pants.

(g) Purchased disposable diapers (any size) are limited to:

(i) Two hundred per month for a child three to eighteen years of age; and

(ii) Two hundred per month for an adult nineteen years of age and older.

(h) Reusable cloth diapers (any size) are limited to:

(i) Purchased - thirty-six per year; and

(ii) Rented - two hundred per month.

(i) Disposable briefs and pull-up pants (any size) are limited to:

(i) Two hundred per month for a child age three to eighteen years of age; and

(ii) One hundred fifty per month for an adult nineteen years of age and older.

(j) Reusable briefs, washable protective underwear, or pull-up pants (any size) are limited to:

(i) Purchased - four per year.

(ii) Rented - one hundred fifty per month.

(k) Disposable pant liners, shields, guards, pads, and undergarments are limited to two hundred per month.

(l) Underpads for beds are limited to:

(i) Disposable (any size) - one hundred eighty per month.

(ii) Purchased, reusable (large) - forty-two per year.

(iii) Rented, reusable (large) - ninety per month.

~~((8))~~ (7) Urological supplies - urinary retention:

(a) Bedside drainage bag, day or night, with or without anti-reflux device, with or without tube - two per month. This cannot be billed in combination with any of the following:

(i) With extension drainage tubing for use with urinary leg bag or urostomy pouch (any type, any length), with connector/adaptor; and/or

(ii) With an insertion tray with drainage bag, and with or without catheter.

(b) Bedside drainage bottle, with or without tubing - two per six month period.

(c) Extension drainage tubing (any type, any length), with connector/adaptor, for use with urinary leg bag or urostomy pouch. This cannot be billed in combination with a vinyl urinary leg bag, with or without tube.

(d) External urethral clamp or compression device (not be used for catheter clamp) - two per twelve-month period.

(e) Indwelling catheters (any type) - three per month.

(f) Insertion trays:

(i) Without drainage bag and catheter - one hundred and twenty per month. These cannot be billed in combination with other insertion trays that include drainage bag, catheters, and/or individual lubricant packets.

(ii) With indwelling catheters - three per month. These cannot be billed in combination with: Other insertion trays without drainage bag and/or indwelling catheter; individual indwelling catheters; and/or individual lubricant packets.

(g) Intermittent urinary catheter - one hundred twenty per month. These cannot be billed in combination with: An insertion tray with or without drainage bag and catheter; or other individual intermittent urinary catheters.

(h) Irrigation syringe (bulb or piston) - cannot be billed in combination with irrigation tray or tubing.

(i) Irrigation tray with syringe (bulb or piston) - thirty per month. These cannot be billed in combination with irrigation syringe (bulb or piston), or irrigation tubing set.

(j) Irrigation tubing set - thirty per month. These cannot be billed in combination with an irrigation tray or irrigation syringe (bulb or piston).

(k) Leg straps (latex foam and fabric). Allowed as replacement only.

(l) Male external catheter, specialty type, or with adhesive coating or adhesive strip - sixty per month.

(m) Urinary suspensory with leg bag, with or without tube - two per month. This cannot be billed in combination with: a latex urinary leg bag; urinary suspensory without leg bag; extension drainage tubing; or a leg strap.

(n) Urinary suspensory without leg bag, with or without tube - two per month.

(o) Urinary leg bag, vinyl, with or without tube - two per month. This cannot be billed in combination with: A leg strap; or an insertion tray with drainage bag and without catheter.

(p) Urinary leg bag, latex - one per month. This cannot be billed in combination with an insertion tray with drainage bag and with or without catheter.

~~((9))~~ (8) Miscellaneous supplies:

(a) Bilirubin light therapy supplies - five days' supply. The department reimburses only when these are provided with a prior authorized bilirubin light.

(b) Continuous passive motion (CPM) softgoods kit - one, with rental of CPM machine.

(c) Eye patch with elastic, tied band, or adhesive, to be attached to an eyeglass lens - one box of twenty.

(d) Eye patch (adhesive wound cover) - one box of twenty.

(e) Nontoxic gel (e.g., LiceOut TM) for use with lice combs - one bottle per twelve month period.

(f) Nonsterile gloves - one hundred per box, two box per month.

(g) Sterile gloves - thirty pair, per month.

~~((10))~~ (9) Miscellaneous DME:

(a) Bilirubin light or light pad - five days rental per twelve-month period.

(b) Blood glucose monitor (specialized or home) - one in a three-year period.

(c) Continuous passive motion (CPM) machine - up to ten days rental and requires prior authorization.

(d) Lightweight protective helmet/soft shell (including adjustable chin/mouth strap) - two per twelve-month period.

(e) Lightweight ventilated hard-shell helmet (including unbreakable face bar, woven chin strap w/adjustable buckle and snap fastener, and one set of cushion pads for adjusting fit to head circumference) - two per twelve-month period.

(f) Pneumatic compressor - one in a five-year period.

(g) Positioning car seat - one in a five-year period.

~~((11))~~ (10) Prosthetics and orthotics:

(a) Thoracic-hip-knee-ankle orthosis (THKAO) standing frame - one every five years.

(b) Preparatory, above knee "PTB" type socket, non-alignable system, pylon, no cover, SACH foot plaster socket, molded to model - one per lifetime, per limb.

(c) Preparatory, below knee "PTB" type socket, non-alignable system, pylon, no cover, SACH foot thermoplastic or equal, direct formed - one per lifetime, per limb.

(d) Socket replacement, below the knee, molded to patient model - one per twelve-month period.

(e) Socket replacement, above the knee/knee disarticulation, including attachment plate, molded to patient model - one per twelve-month period.

(f) All other prosthetics and orthotics are limited to one per twelve-month period per limb.

~~((12))~~ (11) Positioning devices:

(a) Positioning system/supine boards (small or large), including padding, straps adjustable armrests, footboard, and support blocks - one in a five-year period.

(b) Prone stander (child, youth, infant or adult size) - one in a five-year period.

(c) Adjustable standing frame (for child/adult thirty - sixty-eight inches tall), including two padded back support blocks, a chest strap, a pelvic strap, a pair of knee blocks, an abductor, and a pair of foot blocks - one in a five-year period.

~~((13))~~ (12) Beds, mattresses, and related equipment:

(a) Pressure pad, alternating with pump - one in a five-year period.

(b) Dry pressure mattress - one in a five-year period.

(c) Gel or gel-like pressure pad for mattress - one in a five-year period.

(d) Gel pressure mattress - one in a five-year period.

(e) Water pressure pad for mattress - one in a five-year period.

(f) Dry pressure pad for mattress - one in a five-year period.

(g) Mattress, inner spring - one in a five-year period.

(h) Mattress, foam rubber - one in a five-year period.

(i) Hospital bed, semi-electric - one in a ten-year period.

(j) Bedside rails - one in a ten-year period.

~~((14))~~ (13) Other patient room equipment:

(a) Patient lift, hydraulic, with seat or sling - one in a five-year period.

(b) Traction equipment - one in a five year period.

(c) Trapeze bars - one in a five-year period.

(d) Fracture frames - one in a five-year period.

(e) Transfer board or devices - one in a five-year period.

~~((15))~~ (14) Noninvasive bone growth(~~/nerve~~) stimulators(=

~~(a) Transcutaneous electrical nerve stimulation device (TNS) - one in a five-year period.~~

~~(b))~~ (such as osteogenesis stimulators) - one in a five-year period.

~~((16))~~ (15) Communication devices - artificial larynx, any type - one in a five-year period.

~~((17))~~ (16) Ambulatory aids:

(a) Canes - one in a five-year period.

(b) Crutches - one in a five-year period.

(c) Walkers - one in a five-year period.

AMENDATORY SECTION (Amending WSR 09-22-047, filed 10/28/09, effective 11/28/09)

WAC 388-543-1300 Equipment, related supplies, or other nonmedical supplies, and devices that are not covered. (1) The department pays only for DME and related supplies, medical supplies and related services that are medically necessary, listed as covered in this chapter, and meet the definition of DME and medical supplies as defined in WAC 388-543-1000 and prescribed per WAC 388-543-1100 and 388-543-1200.

(2) The department pays only for prosthetics or orthotics that are listed as such by the Centers for Medicare and Medicaid Services (CMS) that meet the definition of prosthetic and orthotic as defined in WAC 388-543-1000 and are prescribed per WAC 388-543-1100 and 388-543-1200.

(3) The department considers all requests for covered DME, related supplies and services, medical supplies, pros-

thetics, orthotics, and related services under the provisions of WAC 388-501-0165.

(4) The department evaluates a request for any DME item listed as noncovered in this chapter under the provisions of WAC 388-501-0160. When early and periodic screening, diagnosis and treatment (EPSDT) applies, the department evaluates a noncovered service, equipment, or supply according to the process in WAC 388-501-0165 to determine if it is medically necessary, safe, effective, and not experimental (see WAC 388-543-0100 for EPSDT rules).

(5) The department specifically excludes services and equipment in this chapter from fee-for-service (FFS) scope of coverage when the services and equipment do not meet the definition for a covered item, or the services are not typically medically necessary. This exclusion does not apply if the services and equipment are:

(a) Included as part of a managed care plan service package;

(b) Included in a waived program;

(c) Part of one of the Medicare programs for qualified Medicare beneficiaries; or

(d) Requested for a child who is eligible for services under the EPSDT program. The department reviews these requests according to the provisions of chapter 388-534 WAC.

(6) Excluded services and equipment include, but are not limited to:

(a) Services, procedures, treatment, devices, drugs, or the application of associated services that the Food and Drug Administration (FDA) and/or the Centers for Medicare and Medicaid Services (CMS) consider investigative or experimental on the date the services are provided;

(b) Any service specifically excluded by statute;

(c) A client's utility bills, even if the operation or maintenance of medical equipment purchased or rented by the department for the client contributes to an increased utility bill (refer to the aging and disability services administration's (ADSA) COPES program for potential coverage);

(d) Hairpieces or wigs;

(e) Material or services covered under manufacturers' warranties;

(f) Shoe lifts less than one inch, arch supports for flat feet, and nonorthopedic shoes;

(g) Outpatient office visit supplies, such as tongue depressors and surgical gloves;

(h) Prosthetic devices dispensed solely for cosmetic reasons;

(i) Home improvements and structural modifications, including but not limited to the following:

(i) Automatic door openers for the house or garage;

(ii) Saunas;

(iii) Security systems, burglar alarms, call buttons, lights, light dimmers, motion detectors, and similar devices;

(iv) Swimming pools;

(v) Whirlpool systems, such as jacuzzies, hot tubs, or spas; or

(vi) Electrical rewiring for any reason;

(vii) Elevator systems and elevators; and

(viii) Lifts or ramps for the home; or

(ix) Installation of bathtubs or shower stalls.

(j) Nonmedical equipment, supplies, and related services, including but not limited to, the following:

(i) Back-packs, pouches, bags, baskets, or other carrying containers;

(ii) Bed boards/conversion kits, and blanket lifters (e.g., for feet);

(iii) Car seats for children under five, except for positioning car seats that are prior authorized. Refer to WAC 388-543-1700(13) for car seats;

(iv) Cleaning brushes and supplies, except for ostomy-related cleaners/supplies;

(v) Diathermy machines used to produce heat by high frequency current, ultrasonic waves, or microwave radiation;

(vi) Electronic communication equipment, installation services, or service rates, including but not limited to, the following:

(A) Devices intended for amplifying voices (e.g., microphones);

(B) Interactive communications computer programs used between patients and healthcare providers (e.g., hospitals, physicians), for self care home monitoring, or emergency response systems and services (refer to ADSA COPES or outpatient hospital programs for emergency response systems and services);

(C) Two-way radios; and

(D) Rental of related equipment or services;

(vii) Environmental control devices, such as air conditioners, air cleaners/purifiers, dehumidifiers, portable room heaters or fans (including ceiling fans), heating or cooling pads, and light boxes;

(viii) Ergonomic equipment;

(ix) Exercise classes or equipment such as exercise mats, bicycles, tricycles, stair steppers, weights, trampolines;

(x) Generators;

(xi) Computer software other than speech generating, printers, and computer accessories (such as anti-glare shields, backup memory cards);

(xii) Computer utility bills, telephone bills, internet service, or technical support for computers or electronic notebooks;

(xiii) Any communication device that is useful to someone without severe speech impairment (e.g., cellular telephone, walkie-talkie, pager, or electronic notebook);

(xiv) Racing strollers/wheelchairs and purely recreational equipment;

(xv) Room fresheners/deodorizers;

(xvi) Bidet or hygiene systems, sharp containers, paraffin bath units, and shampoo rings;

(xvii) Timers or electronic devices to turn things on or off, which are not an integral part of the equipment;

(xviii) Vacuum cleaners, carpet cleaners/deodorizers, and/or pesticides/insecticides; or

(xix) Wheeled reclining chairs, lounge and/or lift chairs (e.g., geri-chair, posture guard, or lazy boy).

(k) Blood monitoring:

(i) Sphygmomanometer/blood pressure apparatus with cuff and stethoscope;

(ii) Blood pressure cuff only; and

(iii) Automatic blood pressure monitor.

(l) Bathroom equipment:

- (i) Bath stools;
- (ii) Bathtub wall rail (grab bars);
- (iii) Bed pans;
- (iv) Control unit for electronic bowel irrigation/evacuation system;
- (v) Disposable pack for use with electronic bowel system;
- (vi) Potty chairs;
- (vii) Raised toilet seat;
- (viii) Safety equipment (e.g. belt, harness or vest);
- (ix) Shower/commode chairs;
- (x) Sitz type bath or equipment;
- (xi) Standard and heavy duty bath chairs;
- (xii) Toilet rail;
- (xiii) Transfer bench tub or toilet;
- (xiv) Urinal male/female.
- (m) Disinfectant spray - one twelve-ounce bottle or can per six-month period.
- (n) Personal and **comfort items** including but not limited to the following:
 - (i) Bathroom items, such as antiperspirant, astringent, bath gel, conditioner, deodorant, moisturizer, mouthwash, powder, shampoo, shaving cream, shower cap, shower curtains, soap (including antibacterial soap), toothpaste, towels, and weight scales;
 - (ii) Bedding items, such as bed pads, blankets, mattress covers/bags, pillows, pillow cases/covers, sheets, and bumper pads;
 - (iii) Bedside items, such as bed trays, carafes, and over-the-bed tables;
 - (iv) Clothing and accessories, such as coats, gloves (including wheelchair gloves), hats, scarves, slippers, socks, custom vascular supports (CVS), surgical stockings, gradient compression stockings, and graduated compression stockings for pregnancy support (pantyhose style);
 - (v) Clothing protectors, surgical masks, and other protective cloth furniture coverings;
 - (vi) Cosmetics, including corrective formulations, hair depilatories, and products for skin bleaching, commercial sun screens, and tanning;
 - (vii) Diverter valves and handheld showers for bathtub;
 - (viii) Eating/feeding utensils;
 - (ix) Emesis basins, enema bags, and diaper wipes;
 - (x) Health club memberships;
 - (xi) Hot or cold temperature food and drink containers/holders;
 - (xii) Hot water bottles and cold/hot packs or pads not otherwise covered by specialized therapy programs;
 - (xiii) Impotence devices;
 - (xiv) Insect repellants;
 - (xv) Massage equipment;
 - (xvi) Medication dispensers, such as med-collars and count-a-dose, except as obtained under the compliance packaging program. See chapter 388-530 WAC;
 - (xvii) Medicine cabinet and first-aid items, such as adhesive bandages (e.g., Band-Aids, Curads), cotton balls, cotton-tipped swabs, medicine cups, thermometers, and tongue depressors;
 - (xviii) Page turners;
 - (xix) Radio and television;

- (xx) Telephones, telephone arms, cellular phones, electronic beepers, and other telephone messaging services; and
- (xxi) Toothettes and toothbrushes, waterpics, and periodontal devices whether manual, battery-operated, or electric.

(o) Certain wheelchair features and options are not considered by the department to be medically necessary or essential for wheelchair use. This includes, but is not limited to, the following:

- (i) Attendant controls (remote control devices);
- (ii) Canopies, including those for strollers and other equipment;
- (iii) Clothing guards to protect clothing from dirt, mud, or water thrown up by the wheels (similar to mud flaps for cars);
- (iv) Identification devices (such as labels, license plates, name plates);
- (v) Lighting systems;
- (vi) Speed conversion kits; and
- (vii) Tie-down restraints, except where medically necessary for client-owned vehicles.

(p) Electrical neural stimulation devices and supplies for in-home use, including battery chargers.

AMENDATORY SECTION (Amending WSR 09-22-047, filed 10/28/09, effective 11/28/09)

WAC 388-543-1600 Items and services which require prior authorization. (1) The department bases its determination about which DME and related supplies, prosthetics, orthotics, medical supplies and related services require **prior authorization (PA)** or **expedited prior authorization (EPA)** on utilization criteria. (See WAC 388-543-1000 for PA and WAC 388-543-1800 for EPA.) The department considers all of the following when establishing utilization criteria:

- (a) High cost;
 - (b) Potential for utilization abuse;
 - (c) Narrow therapeutic indication; and
 - (d) Safety.
- (2) The department requires providers to obtain prior authorization for certain items and services, except for dual-eligible medicare/medicaid clients when medicare is the primary payer. This includes, but is not limited to, the following:
- (a) Augmentative communication devices (ACDs);
 - (b) Certain by report (BR) DME and supplies as specified in the department's published issuances, including billing instructions and numbered memoranda;
 - (c) Blood glucose monitors requiring special features;
 - (d) Certain equipment rentals and certain prosthetic limbs, as specified in the department's published issuances, including billing instructions and numbered memoranda;
 - (e) Decubitus care products and supplies;
 - (f) Decubitus care mattresses, including flotation or gel mattress, if the provider fails to meet the criteria in WAC 388-543-1900;
 - (g) Equipment parts and labor charges for repairs or modifications and related services;
 - (h) Hospital beds, if the provider fails to meet the requirements in WAC 388-543-1900;

- (i) Low air loss flotation system, if the provider fails to meet the requirements in WAC 388-543-1900;
- (j) Orthopedic shoes and selected orthotics;
- (k) Osteogenic stimulator, noninvasive, if the provider fails to meet the requirements in WAC 388-543-1900;
- (l) Positioning car seats for children under five years of age;
- (m) ~~((Transcutaneous electrical nerve stimulators, if the provider fails to meet the requirements in WAC 388-543-1900;~~
- ~~((n)))~~ Wheelchairs, wheelchair accessories, wheelchair modifications, air, foam, and gel cushions, and repairs;
- ~~((o)))~~ (n) Other DME not specifically listed in the department's published issuances, including billing instructions and numbered memoranda, and submitted as a miscellaneous procedure code; and
- ~~((p)))~~ (o) Limitation extensions.

AMENDATORY SECTION (Amending WSR 07-17-062, filed 8/13/07, effective 9/13/07)

WAC 388-543-2800 Reusable and disposable medical supplies. (1) The department requires that a physician, advanced registered nurse practitioner (ARNP), or physician's assistant certified (PAC) prescribe reusable and disposable medical supplies. Except for dual eligible medicare/medicaid clients, the prescription must:

- (a) Be dated and signed by the prescriber;
 - (b) Be less than six months in duration from the date the prescriber signs the prescription; and
 - (c) State the specific item or service requested, diagnosis, estimated length of need (weeks, months, or years), and quantity.
- (2) The department bases its determination about which DME and related supplies, prosthetics, orthotics, medical supplies and related services require prior authorization (PA) or expedited prior authorization (EPA) on utilization criteria (see WAC 388-543-1000 for PA and WAC 388-543-1800 for EPA). The department considers all of the following when establishing utilization criteria:
- (a) High cost;
 - (b) The potential for utilization abuse;
 - (c) A narrow therapeutic indication; and
 - (d) Safety.
- (3) The department requires a provider to obtain a limitation extension in order to exceed the stated limits for non-durable medical equipment and medical supplies. See WAC 388-501-0165.
- (4) The department categorizes medical supplies and non-DME (MSE) as follows (see WAC 388-543-1150, 388-543-1600, and department's billing instructions for further information about specific limitations and requirements for PA and EPA):
- (a) Antiseptics and germicides;
 - (b) Bandages, dressings, and tapes;
 - (c) Blood monitoring/testing supplies;
 - (d) Braces, belts, and supportive devices;
 - (e) Decubitus care products;
 - (f) Ostomy supplies;

- (g) Pregnancy-related testing kits and nursing equipment supplies;
- (h) ~~((Supplies associated with transcutaneous electrical nerve stimulators (TENS);~~
- ~~((i)))~~ Syringes and needles;
- ~~((j)))~~ (i) Urological supplies (e.g., diapers, urinary retention catheters, pant liners, and doublers); and
- ~~((k)))~~ (j) Miscellaneous supplies.

AMENDATORY SECTION (Amending WSR 01-02-075, filed 12/29/00, effective 1/29/01)

WAC 388-545-300 Occupational therapy. (1) The following providers are eligible to enroll with ~~((medical assistance administration (MAA)))~~ the department to provide occupational therapy services:

- (a) A licensed occupational therapist;
 - (b) A licensed occupational therapy assistant supervised by a licensed occupational therapist; and
 - (c) An occupational therapy aide, in schools, trained and supervised by a licensed occupational therapist.
- (2) Clients in the following ~~((MAA))~~ department programs are eligible to receive occupational therapy services described in this chapter:
- (a) Categorically needy;
 - (b) Children's health;
 - (c) General assistance unemployable (within Washington state or border areas only);
 - (d) Alcoholism and drug addiction treatment and support act (ADATSA) (within Washington state or border areas only);
 - (e) Medically indigent program for emergency hospital-based services only; or
 - (f) Medically needy program only when the client is either:
 - (i) Twenty years of age or younger and referred by a screening provider under the early and periodic screening, diagnosis and treatment program (healthy kids program) as described in chapter 388-534 WAC; or
 - (ii) Receiving home health care services as described in chapter 388-551 WAC, subchapter II.
- (3) Occupational therapy services received by ~~((MAA))~~ department eligible clients must be provided:
- (a) As part of an outpatient treatment program for adults and children;
 - (b) By a home health agency as described under chapter 388-551 WAC, subchapter II;
 - (c) As part of the physical medicine and rehabilitation (PM&R) program as described in WAC 388-550-2551;
 - (d) By a neurodevelopmental center;
 - (e) By a school district or educational service district as part of an individual education program or individualized family service plan as described in WAC 388-537-0100; or
 - (f) When prescribed by a provider for clients age twenty-one or older. The therapy must:
 - (i) Prevent the need for hospitalization or nursing home care;
 - (ii) Assist a client in becoming employable;

(iii) Assist a client who suffers from severe motor disabilities to obtain a greater degree of self-care or independence; or

(iv) Be a part of a treatment program intended to restore normal function of a body part following injury, surgery, or prolonged immobilization.

(4) ((MAA)) The department pays only for covered occupational therapy services listed in this section when they are:

(a) Within the scope of an eligible client's medical care program;

(b) Medically necessary, when prescribed by a provider; and

(c) Begun within thirty days of the date prescribed.

(5) ((MAA)) The department covers the following occupational therapy services per client, per calendar year:

(a) Unlimited occupational therapy program visits for clients twenty years of age or younger;

(b) One occupational therapy evaluation. The evaluation is in addition to the twelve program visits allowed per year;

(c) Two durable medical equipment needs assessments. The assessments are in addition to the twelve program visits allowed per year;

(d) Twelve occupational therapy program visits;

(e) Twenty-four additional outpatient occupational therapy program visits when the diagnosis is any of the following:

(i) A medically necessary condition for developmentally delayed clients;

(ii) Surgeries involving extremities, including:

(A) Fractures; or

(B) Open wounds with tendon involvement;

(iii) Intracranial injuries;

(iv) Burns;

(v) Traumatic injuries;

(f) Twenty-four additional occupational therapy program visits following a completed and approved inpatient PM&R program. In this case, the client no longer needs nursing services but continues to require specialized outpatient therapy for any of the following:

(i) Traumatic brain injury (TBI);

(ii) Spinal cord injury (paraplegia and quadriplegia);

(iii) Recent or recurrent stroke;

(iv) Restoration of the levels of function due to secondary illness or loss from multiple sclerosis (MS);

(v) Amyotrophic lateral sclerosis (ALS);

(vi) Cerebral palsy (CP);

(vii) Extensive severe burns;

(viii) Skin flaps for sacral decubitus for quads only;

(ix) Bilateral limb loss; or

(x) Acute, infective polyneuritis (Guillain-Barre' syndrome).

(g) Additional medically necessary occupational therapy services, regardless of the diagnosis, must be approved by ((MAA)) the department.

(6) ((MAA will pay for one visit to instruct in the application of transectaneous neurostimulator (TENS), per client, per lifetime.

(7) ((MAA)) The department does not cover occupational therapy services that are included as part of the reimburse-

ment for other treatment programs. This includes, but is not limited to, hospital inpatient and nursing facility services.

AMENDATORY SECTION (Amending WSR 01-02-075, filed 12/29/00, effective 1/29/01)

WAC 388-545-500 Physical therapy. (1) The following providers are eligible to provide physical therapy services:

(a) A licensed physical therapist or physiatrist; or

(b) A physical therapist assistant supervised by a licensed physical therapist.

(2) Clients in the following ((MAA)) department programs are eligible to receive physical therapy services described in this chapter:

(a) Categorically needy (CN);

(b) Children's health;

(c) General assistance-unemployable (GA-U) (within Washington state or border areas only);

(d) Alcoholism and drug addiction treatment and support act (ADATSA) (within Washington state or border areas only);

(e) Medically indigent program (MIP) for emergency hospital-based services only; or

(f) Medically needy program (MNP) only when the client is either:

(i) Twenty years of age or younger and referred under the early and periodic screening, diagnosis and treatment program (EPSDT/healthy kids program) as described in WAC 388-86-027; or

(ii) Receiving home health care services as described in chapter 388-551 WAC.

(3) Physical therapy services that ((MAA)) department eligible clients receive must be provided as part of an outpatient treatment program:

(a) In an office, home, or outpatient hospital setting;

(b) By a home health agency as described in chapter 388-551 WAC;

(c) As part of the acute physical medicine and rehabilitation (acute PM&R) program as described in the acute PM&R subchapter under chapter 388-550 WAC;

(d) By a neurodevelopmental center;

(e) By a school district or educational service district as part of an individual education or individualized family service plan as described in WAC 388-537-0100; or

(f) For disabled children, age two and younger, in natural environments including the home and community settings in which children without disabilities participate, to the maximum extent appropriate to the needs of the child.

(4) ((MAA)) The department pays only for covered physical therapy services listed in this section when they are:

(a) Within the scope of an eligible client's medical care program;

(b) Medically necessary and ordered by a physician, physician's assistant (PA), or an advanced registered nurse practitioner (ARNP);

(c) Begun within thirty days of the date ordered;

(d) For conditions which are the result of injuries and/or medically recognized diseases and defects; and

(e) Within accepted physical therapy standards.

(5) Providers must document in a client's medical file that physical therapy services provided to clients age twenty-one and older are medically necessary. Such documentation may include justification that physical therapy services:

- (a) Prevent the need for hospitalization or nursing home care;
- (b) Assist a client in becoming employable;
- (c) Assist a client who suffers from severe motor disabilities to obtain a greater degree of self-care or independence; or

(d) Are part of a treatment program intended to restore normal function of a body part following injury, surgery, or prolonged immobilization.

(6) ~~((MAA))~~ The department determines physical therapy program units as follows:

- (a) Each fifteen minutes of timed procedure code equals one unit; and
- (b) Each nontimed procedure code equals one unit, regardless of how long the procedure takes.

(7) ~~((MAA))~~ The department does not limit coverage for physical therapy services listed in subsections (8) through (10) of this section if the client is twenty years of age or younger.

(8) ~~((MAA))~~ The department covers, without requiring prior authorization, the following ordered physical therapy services per client, per diagnosis, per calendar year, for clients twenty-one years of age and older:

- (a) One physical therapy evaluation. The evaluation is in addition to the forty-eight program units allowed per year;
- (b) Forty-eight physical therapy program units;
- (c) Ninety-six additional outpatient physical therapy program units when the diagnosis is any of the following:
 - (i) A medically necessary condition for developmentally delayed clients;
 - (ii) Surgeries involving extremities, including:
 - (A) Fractures; or
 - (B) Open wounds with tendon involvement.
 - (iii) Intracranial injuries;
 - (iv) Burns;
 - (v) Traumatic injuries;
 - (vi) Meningomyelocele;
 - (vii) Down's syndrome;
 - (viii) Cerebral palsy; or
 - (ix) Symptoms involving nervous and musculoskeletal systems and lack of coordination;

(d) Two durable medical equipment (DME) needs assessments. The assessments are in addition to the forty-eight physical therapy program units allowed per year. Two program units are allowed per DME needs assessment; and

(e) One wheelchair needs assessment in addition to the two durable medical needs assessments. The assessment is in addition to the forty-eight physical therapy program units allowed per year. Four program units are allowed per wheelchair needs assessment.

(f) The following services are allowed, per day, in addition to the forty-eight physical therapy program units allowed per year:

- (i) Two program units for orthotics fitting and training of upper and/or lower extremities.

(ii) Two program units for checkout for orthotic/prosthetic use.

(iii) One muscle testing procedure. Muscle testing procedures cannot be billed in combination with each other.

(g) Ninety-six additional physical therapy program units are allowed following a completed and approved inpatient acute PM&R program. In this case, the client no longer needs nursing services but continues to require specialized outpatient physical therapy for any of the following:

- (i) Traumatic brain injury (TBI);
- (ii) Spinal cord injury (paraplegia and quadriplegia);
- (iii) Recent or recurrent stroke;
- (iv) Restoration of the levels of functions due to secondary illness or loss from multiple sclerosis (MS);
- (v) Amyotrophic lateral sclerosis (ALS);
- (vi) Cerebral palsy (CP);
- (vii) Extensive severe burns;
- (viii) Skin flaps for sacral decubitus for quadriplegics only;
- (ix) Bilateral limb loss;
- (x) Open wound of lower limb; or
- (xi) Acute, infective polyneuritis (Guillain-Barre' syndrome).

(9) For clients age twenty-one and older, ~~((MAA))~~ the department covers physical therapy services which exceed the limitations established in subsection (8) of this section if the provider requests prior authorization and ~~((MAA))~~ the department approves the request.

~~((10))~~ ~~((MAA will pay for one visit to instruct in the application of transcutaneous neurostimulator (TENS) per client, per lifetime.~~

~~((11))~~ Duplicate services for occupational therapy and physical therapy are not allowed for the same client when both providers are performing the same or similar procedure(s).

~~((12))~~ The department does not cover physical therapy services that are included as part of the reimbursement for other treatment programs. This includes, but is not limited to, hospital inpatient and nursing facility services.

~~((13))~~ The department does not cover physical therapy services performed by a physical therapist in an outpatient hospital setting when the physical therapist is not employed by the hospital. Reimbursement for services must be billed by the hospital.

WSR 10-05-023

EMERGENCY RULES DEPARTMENT OF FISH AND WILDLIFE

[Order 10-22—Filed February 5, 2010, 12:51 p.m., effective February 5, 2010, 12:51 p.m.]

Effective Date of Rule: Immediately.

Purpose: The purpose of this rule making is to allow nontreaty commercial fishing opportunity in the Columbia River while protecting fish listed as threatened or endangered under the Endangered Species Act. This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes, federal law governing Wash-

ington'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 220-33-04000F and 220-33-04000G; and amending WAC 220-33-040.

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

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

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; 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: Modifies the mainstem Columbia smelt fishery and closes those waters of SMCRA 1B that include parts of several Washington tributaries. The regulations are consistent with Level 1 fisheries in the "Washington and Oregon Eulachon Management Plan for the Columbia River." Abundance and productivity indicators project a weak return of smelt for 2010, and the minimal fishing plan adopted serves as a test fishery to monitor run strength and collect biological data. Rule is consistent with Columbia River compact action of February 4, 2010. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 5, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 220-33-04000G Smelt—Areas and seasons. Notwithstanding the provisions of WAC 220-33-040, effec-

tive immediately through March 31, 2010, the Columbia River and Washington tributaries are closed to fishing for smelt except under the following provisions:

1) Area: SMCRA 1A, 1B, 1C, 1D, and 1E, except the following waters are closed: Those waters of SMCRA 1B upstream of the markers at USCG navigation marker #16 in Deep River, those waters upstream of the outer most uplands at the mouth of the Grays River, and those waters upstream of the outer-most uplands at the mouth of the Elochoman River.

Dates: Mondays and Thursdays, 7:00 a.m. to 2:00 p.m.

Gear: Gillnets, dipnets, and trawl nets.

Allowable sales: Smelt.

Other: 24-hour quick-reporting required for Washington wholesale dealers, WAC 220-69-240.

2) Area: Cowlitz River downstream of Peterson's Eddy

Dates: Sundays, February 7, 14, 21, and 28; and Wednesdays, February 10, 17, and 24.

Hours: 7:00 p.m. to 10:00 p.m. each day.

Gear: Dipnets

Allowable sales: Smelt.

Other: 24-hour quick-reporting required for Washington wholesale dealers, WAC 220-69-240.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-33-04000F Smelt—Areas and seasons.
(10-16)

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

WAC 220-33-04000G Smelt—Areas and seasons.

WSR 10-05-034 EMERGENCY RULES DEPARTMENT OF FISH AND WILDLIFE

[Order 10-25—Filed February 9, 2010, 2:33 p.m., effective February 9, 2010, 2:33 p.m.]

Effective Date of Rule: Immediately.

Purpose: Commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-04600N; and amending WAC 220-52-046.

Statutory Authority for Adoption: RCW 77.12.047, 77.04.020, and 77.70.430.

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

Reasons for this Finding: State crab harvest has reached agreed upon regional quotas. This closure complies with the

state/treaty management plans for these regions. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 9, 2010.

Philip Anderson
Director

NEW SECTION

WAC 220-52-04600Q Puget Sound crab fishery—Seasons and areas. Notwithstanding the provisions of WAC 220-52-046:

1) Effective immediately until further notice, it will be unlawful to fish for Dungeness Crab for commercial purposes in those waters of Crab Management Region 2 East (Marine Fish Shellfish Management and Catch Reporting Areas 24A, 24B, 24C, 24D, and 26A East).

2) Effective 7:00 p.m. February 15, 2010 until further notice, it will be unlawful to fish for Dungeness Crab for commercial purposes in those waters of Crab Management Region 2 West (Marine Fish Shellfish Management and Catch Reporting Areas 25B, 25D, and 26A West).

REPEALER

The following section of the Washington Administrative Code is repealed effective immediately:

| | |
|-------------------|---|
| WAC 220-52-04600N | Commercial crab fishery— Lawful and unlawful gear, methods, and other unlawful acts. (10-02) |
|-------------------|---|

WSR 10-05-044

EMERGENCY RULES

DEPARTMENT OF

FISH AND WILDLIFE

[Order 10-27—Filed February 10, 2010, 8:56 a.m., effective February 12, 2010]

Effective Date of Rule: February 12, 2010.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: Allowable impacts to natural origin steelhead due to angling on the Wenatchee River will be met by the end of February, and the fishery will close at midnight February 28, 2010. In addition, sections of the Okanogan River around the mouths of Omak and Tonasket creeks are closed to protect natural origin steelhead staging prior to spawning in those tributaries. Anglers may retain hatchery adipose fin-clipped steelhead, with circular (hole) punches in the caudal (tail) fin, in areas of the Columbia River that remain open to steelhead fishing. Circular (hole) punches were put in the caudal (tail) fin for sampling and monitoring purposes at Priest Rapids Dam, and these fish are no longer needed for monitoring and can now be legally retained. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 10, 2010.

Joe Stohr
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900S Exceptions to statewide rules—Columbia, Entiat, Methow, Okanogan, Similkameen and Wenatchee rivers. Notwithstanding the provisions of WAC 232-28-619:

(1) Mainstem Columbia River from Rock Island Dam to 400 feet below Chief Joseph Dam. Open through March 31, 2010. Night closure and selective gear rules apply, except motorized vessels and bait is allowed.

(a) Anglers may retain hatchery-origin adipose fin-clipped steelhead with circular (hole) punches in the caudal (tail) fin, only in areas of the Columbia River and tributaries that remain open to steelhead fishing.

(2) Entiat River upstream from the Alternate Highway 97 Bridge near the mouth of the Entiat River, approximately 6 miles to 800 feet downstream of the Entiat National Fish Hatchery outfall. Open through March 31, 2010. Night closure and selective gear rules apply, except motorized vessels allowed.

(3) Methow River from the Hwy 97 Bridge in Pateros upstream to the confluence with the Chewuch River in Winthrop, WA. Open through March 31, 2010. Night closure and selective gear rules apply, except motorized vessels allowed.

(4) Okanogan River from the mouth upstream to Hwy 97 Bridge in Oroville. Open through March 31, 2010. Night closure and selective gear rules apply, except motorized vessels allowed. CLOSED WATERS: effective March 15, 2010, from the first powerline crossing downstream of the Hwy 155 Bridge in Omak (Coulee Dam Credit Union Building) to the mouth of Omak Creek; and from the Tonasket Bridge (4th Street) downstream to the Tonasket Lagoons Park boat launch.

(5) Similkameen River, from its mouth to 400 feet below Enloe Dam. Open through March 31, 2010. Night closure and selective gear rules apply.

(6) Wenatchee River from the mouth to 800 feet below Tumwater Dam, including the Icicle River from the mouth to 500 feet downstream of the Leavenworth National Fish Hatchery Barrier Dam. Open through February 28, 2010. Night closure and selective gear rules apply.

REPEALER

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

WAC 232-28-61900S Columbia, Entiat, Methow, Okanogan, Similkameen and Wenatchee rivers.

WSR 10-05-055
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 10-26—Filed February 11, 2010, 11:14 a.m., effective February 13, 2010]

Effective Date of Rule: February 13, 2010.

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 and 77.04.020.

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

Reasons for this Finding: Right ventral fin marked steelhead are surplus to broodstock needs. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 11, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900R Exceptions to statewide rules—Cowlitz River. Notwithstanding the provisions of WAC 232-28-619, effective February 13, 2010, until further notice, in waters of the Cowlitz River from the boundary markers at the mouth to the Mayfield Dam, a person may retain steelhead with a clipped right ventral fin and a healed scar at the location of the clipped fin.

WSR 10-05-056
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 10-29—Filed February 11, 2010, 11:16 a.m., effective February 21, 2010, 12:01 a.m.]

Effective Date of Rule: February 21, 2010, 12:01 a.m.

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

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

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

Other Authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon Management Agreement* (Aug. 12, 2008) (Doc. No.

2546); *Northwest Gillnetters Ass'n v. Sandison*, 95 Wn.2d 638, 628 P.2d 800 (1981); Washington fish and wildlife commission policies concerning Columbia River fisheries; 40 Stat. 515 (Columbia River compact).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; 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: The closure date for retention of sturgeon was adopted because Washington and Oregon fish managers estimate that the harvest guideline of 1,400 fish will be reached on February 20, 2010. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 11, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900T Exceptions to statewide rules—Columbia River sturgeon. Notwithstanding the provisions of WAC 232-28-619, effective 12:01 a.m. February 21, 2010 until further notice, it is unlawful to retain sturgeon caught in those waters of the Columbia River and tributaries from Bonneville Dam upstream to The Dalles Dam.

WSR 10-05-058
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 10-28—Filed February 11, 2010, 1:59 p.m., effective February 11, 2010, 6:00 p.m.]

Effective Date of Rule: February 11, 2010, 6:00 p.m.

Purpose: The purpose of this rule making is to provide for treaty Indian fishing opportunity in the Columbia River

while protecting salmon listed as threatened or endangered under the Endangered Species Act (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes and federal law governing Washington's relationship with Oregon.

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

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

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

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; 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: Closes the gillnet fishery in the Bonneville Pool (1F) as the pool specific sturgeon guideline has been met. Prohibits the sale of sturgeon harvest in the Bonneville Pool (1F) using subsistence gear (platform/hook and line). Continues to allow sales of fish caught with platform and hook and line gear with the exclusion of sturgeon in Bonneville Pool. Allows the Yakama Nation to conduct ceremonial and subsistence fisheries in the area below Bonneville Dam consistent with the 2007 memorandum of agreement (MOA) between Washington and Yakama Nation. Fisheries are consistent with the 2008-2017 interim management agreement and the associated biological opinion. Rule is consistent with the 2007 MOA between Yakama Nation and Washington state. Rule is consistent with action of the Columbia River compact in January 2008 and February 11, 2010. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

The Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the congressionally ratified Columbia River compact. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The tribes and the states adopt parallel regulations for treaty Indian fisheries under the supervision of the federal courts. A court order sets the current parameters. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon Management Agreement* (Aug. 12, 2008) (Doc. No. 2546). Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allow for some

incidental take of these species in the fisheries as described in the 2008-2017 *U.S. v. Oregon Management Agreement*.

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

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

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

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

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

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

Date Adopted: February 11, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 220-32-05100B Columbia River salmon seasons above Bonneville Dam. Notwithstanding the provisions of WAC 220-32-050, WAC 220-32-051, WAC 220-32-052 and WAC 220-32-058, effective immediately until further notice, it is unlawful for a person to take or possess Salmon, steelhead, sturgeon, shad, carp, walleye, bass, or yellow perch, catfish taken for commercial purposes in Columbia River Salmon Management Catch Reporting Areas 1F, 1G, and 1H; except that those individuals possessing treaty fishing rights under the Yakima, Warm Springs, Umatilla, and Nez Perce treaties may fish for Salmon, steelhead, sturgeon, shad, carp, walleye, bass, or yellow perch under the following provisions:

1. Open Areas: SMCRA 1F, 1G, 1H:

a. Season: 6:00 p.m. February 11, 2010 through 6:00 p.m. March 21, 2010.

b. Gear: Hoop nets, dip bag nets, and rod and reel with hook and line.

c. Allowable sale: Salmon, steelhead, sturgeon, shad, carp, walleye, bass, yellow perch and catfish. However, sturgeon caught in the Bonneville pool (1F) may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools (1G-1H) may be sold or retained for subsistence purposes. Sturgeon between 38-54 inches in fork length in the Bonneville Pool (1F) may only be retained for

subsistence purposes. Live release of all oversize and under-size sturgeon is required. Sale of platform or hook-and-line-caught fish is allowed during open commercial seasons.

2. Open Areas: SMCRA 1G, 1H:

a. Season: 6:00 p.m. February 11, 2010 through 6:00 p.m. March 21, 2010.

b. Gear: Gill nets. No mesh restriction on gillnets.

c. Allowable sale: Salmon, steelhead, sturgeon, shad, carp, walleye, bass, yellow perch and catfish. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools may be sold or retained for subsistence purposes. Live release of all oversize and under-size sturgeon is required. Fish landed during an open commercial period may be sold at any time. Sale of platform or hook-and-line-caught fish is allowed during open commercial seasons.

d. River mouth sanctuaries (WAC 220-32-058) remain in effect, except for the Spring Creek Hatchery sanctuary (section 5).

3. Open Area: On the Washington shoreline from 600 feet below the fish ladder at the Bonneville Dam North shore powerhouse, downstream to Beacon Rock (bank fishing only), for enrolled Yakama Nation members. Consistent with the 2007 MOA between Washington and the Yakama Nation.

a. Season: 6:00 p.m. February 11, 2010 through 6:00 p.m. March 21, 2010.

b. Gear: Hoop nets, dip bag nets, and rod and reel with hook-and-line.

c. Allowable Sales: Salmon, steelhead, shad, carp, walleye, bass, yellow perch and catfish. **Sturgeon retention is prohibited**, and may not be sold nor retained for ceremonial & subsistence purposes. Fish landed during an open commercial period may be sold at any time. Sale of platform or hook-and-line-caught fish is allowed during open commercial seasons. Sales may not occur on USACE property.

4. 24-hour quick reporting required for Washington wholesale dealers, WAC 220-69-240, for all areas.

REPEALER

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

WAC 220-32-05100A Columbia River salmon seasons above Bonneville Dam.

The following section of the Washington Administrative Code is repealed effective 6:01 p.m. March 21, 2010:

WAC 220-32-05100B Columbia River salmon seasons above Bonneville Dam.

**WSR 10-05-066
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 10-30—Filed February 12, 2010, 11:19 a.m., effective February 15, 2010, 8:00 a.m.]

Effective Date of Rule: February 15, 2010, 8:00 a.m.

Purpose: Commercial fishing rules.

Citation of Existing Rules Affected by this Order:
Repealing WAC 220-52-04000P and 220-52-04600P; and amending WAC 220-52-046.

Statutory Authority for Adoption: RCW 77.12.047, 77.04.020, and 77.70.430.

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

Reasons for this Finding: Special management area openings are in line with management measures provided for in state-tribal harvest management plans for 2009-2010 season. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 12, 2010.

Philip Anderson
Director

NEW SECTION

WAC 220-52-04600R Coastal crab seasons. Notwithstanding the provisions of WAC 220-52-046, effective immediately until further notice, it is unlawful to fish for Dungeness crab in Washington coastal waters, the Pacific Ocean, Grays Harbor, Willapa Bay, or the Columbia River, except as provided for in this section.

(1) The area from Klipsan Beach (46°28.00) to the WA/OR border (46°15.00) and Willapa Bay: Open.

(2) For the purposes of this order, the waters of Willapa Bay are defined to include the marine waters east of a line connecting 46°44.76 N, 124°05.76 W and 46°38.93 N, 124°04.33 W.

(3) It is permissible to pull crab gear in the area between Klipsan Beach and Destruction Island and Grays Harbor.

(4) It is permissible to pull crab gear in the area between Destruction Island and the U.S./Canada Border.

(5) The Quinault primary special management area (PSMA) is closed to fishing for Dungeness crab until 8:00 A.M. March 1, 2010. The PSMA includes the area shoreward of a line approximating the 27-fathom depth curve between Raft River (47°28.00) and Copalis River (47°08.00) according to the following coordinates:

| | | |
|-----------------------------------|------------------|-------------------|
| Northeast Corner (Raft River): | 47°28.00 N. Lat. | 124°20.70 W. Lon. |
| Northwest Corner: | 47°28.00 N. Lat. | 124°34.00 W. Lon. |
| Southwest Corner: | 47°08.00 N. Lat. | 124°25.50 W. Lon. |
| Southeast Corner (Copalis River): | 47°08.00 N. Lat. | 124°11.20 W. Lon. |

(6) The Quinault Secondary Special Management Area (SSMA) is closed to fishing for Dungeness crab starting at 8:00 A.M., March 1, 2010 from the area shoreward of a line approximating the 27-fathom depth curve between the mouth of the Copalis River (47°08.00) and Split Rock (47°24.50). This area will be closed until further noticed. This SSMA is described by the following coordinates:

| | | |
|-------------------------------------|------------------|-------------------|
| • Northeast Corner (Split Rock): | 47°24.50 N. Lat. | 124°20.00 W. Lon. |
| • Northwest Corner: | 47°24.50 N. Lat. | 124°32.40 W. Lon. |
| • Southwest Corner: | 47°08.00 N. Lat. | 124°25.50 W. Lon. |
| • Southeast Corner (Copalis River): | 47°08.00 N. Lat. | 124°11.20 W. Lon. |

(7) It is unlawful for a vessel to use more than 200 pots in the area between Split Rock (47°24.50) to Raft River (47°28.00) shoreward of a line approximating the 27-fathom curve from 8:00 A.M. March 1, 2010 through 8:00 A.M. March 31, 2010. Fishers must pre-register with the Department of Fish and Wildlife 24 hours prior to deploying gear in this area by one of the three following methods:

- Fax transmission to Carol Henry at 360-249-1229;
- Email to Carol Henry at: Carol.Henry@dfw.wa.gov or
- Telephone call to: Carol Henry at 360-249-1296

(8) The Quileute special management area (SMA) is closed to fishing for Dungeness crab until further notice. The SMA includes the area shoreward of a line approximating the 30-fathom depth curve between Destruction Island and Cape Johnson according to the following points:

| | | |
|--|-------------------|--------------------|
| • Northeast Corner (Cape Johnson) | 47°58.00' N. Lat. | 124°40.40' W. Lon. |
| • Northwest Corner: | 47°58.00' N. Lat. | 124°49.00' W. Lon. |
| • Southwest Corner: | 47°40.50' N. Lat. | 124°40.00' W. Lon. |
| • Southeast Corner (Destruction Island): | 47°40.50' N. Lat. | 124°24.43' W. Lon. |

(9) The Makah special management area (SMA) is closed to fishing until 8:00 A.M. February 15, 2010. The SMA includes the waters between 48°02.15 N. Lat. and 48°19.50 N. Lat. east of a line connecting those points and approximating the 25-fathom line according to the following coordinates:

| | | |
|--------------------------------------|------------------|-------------------|
| • Northeast Corner (Tatoosh Island): | 48°19.50 N. Lat. | 124°50.45 W. Lon. |
| • Northwest Corner: | 48°02.15 N. Lat. | 124°50.45 W. Lon. |
| • Southwest Corner: | 48°02.15 N. Lat. | 124°50.45 W. Lon. |
| • Southeast Corner: | 48°02.15 N. Lat. | 124°41.00 W. Lon. |

(10) It is unlawful for a vessel to use more than 200 pots in the Makah SMA beginning 8:00 A.M. February 15, 2010 until 8:00 A.M. March 17, 2010. Fishers must pre-register with the Department of Fish and Wildlife 24 hours prior to

deploying gear in this area by one of the three following methods:

- Fax transmission to Carol Henry at 360-249-1229;
- Email to Carol Henry at: Carol.Henry@dfw.wa.gov or
- Telephone call to: Carol Henry at 360-249-1296

(11) All other provisions of the permanent rule remain in effect.

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

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

REPEALER

The following sections of the Washington Administrative Code are repealed effective 8:00 a.m. February 15, 2010:

| | |
|-------------------|---|
| WAC 220-52-04000P | Commercial crab fishery. Lawful and unlawful gear, methods and other unlawful acts. (10-07) |
| WAC 220-52-04600P | Coastal crab seasons (10-07) |

WSR 10-05-068

EMERGENCY RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed February 12, 2010, 12:14 p.m., effective February 13, 2010]

Effective Date of Rule: February 13, 2010.

Purpose: Amending WAC 388-106-0125 If I am age twenty-one or older, how does CARE use criteria to place me in a classification group for in-home care?, and adopting new WAC 388-106-0126 If I am under age twenty-one, how does CARE use criteria to place me in a classification group for in-home care?

These emergency rules continue rules filed as WSR 09-21-074. The department is revising WAC 388-106-0125 to amend the in-home classifications to allow for the reduction of in-home base hours for each of the seventeen classification groups. The department is adopting new WAC to comply with a United States District Court order to exclude children and youth under the age of twenty-one from the rules.

Citation of Existing Rules Affected by this Order: Amending WAC 388-106-0125.

Statutory Authority for Adoption: RCW 74.08.090, 74.09.520.

Other Authority: Washington state 2009-11 budget (ESHB 1244).

Under RCW 34.05.350 the agency for good cause finds that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; and that in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and

that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this Finding: The Washington state 2009-11 operating budget (ESHB 1244) directs the department to reduce the number of in-home hours authorized. The hours awarded for in-home long-term care for each of the seventeen CARE classification groups are reduced by a certain percentage. As instructed by the legislature, classification groups with greater care needs receive a smaller percentage reduction than classification groups with lesser care needs.

The United States District Court in Tacoma issued an order stating "that the Department will not apply the emergency rules contained in WSR 09-14-046 to the Medicaid in-home personal care services provided to children and youth under the age of 21." These emergency rules continue rules filed as WSR 09-21-074 while the department proceeds with the permanent rule-making 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 1, Amended 1, Repealed 0.

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

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

Date Adopted: February 9, 2010.

Don Goldsby, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 08-10-022, filed 4/25/08, effective 5/26/08)

WAC 388-106-0125 If I am age twenty-one or older, how does CARE use criteria to place me in a classification group for in-home care? CARE uses the criteria of cognitive performance score as determined under WAC 388-106-0090, clinical complexity as determined under WAC 388-106-0095, mood/behavior and behavior point score as determined under WAC 388-106-0100, ADLS as determined under WAC 388-106-0105, and exceptional care as determined under WAC 388-106-0110 to place you into one of the following seventeen in-home groups. CARE classification is determined first by meeting criteria to be placed into a group, then you are further classified based on ADL score or behavior point score into a classification sub-group following a classification path of highest possible base hours to lowest qualifying base hours.

(1) If you meet the criteria for exceptional care, then CARE will place you in **Group E**. CARE then further classifies you into:

(a) **Group E High** with ~~((420))~~ 416 base hours if you have an ADL score of 26-28; or

(b) **Group E Medium** with ~~((350))~~ 346 base hours if you have an ADL score of 22-25.

(2) If you meet the criteria for clinical complexity and have cognitive performance score of 4-6 or you have cognitive performance score of 5-6, then you are classified in **Group D** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

(a) **Group D High** with ~~((280))~~ 277 base hours if you have an ADL score of 25-28; or

(b) **Group D Medium-High** with ~~((240))~~ 234 base hours if you have an ADL score of 18-24; or

(c) **Group D Medium** with ~~((190))~~ 185 base hours if you have an ADL score of 13-17; or

(d) **Group D Low** with ~~((145))~~ 138 base hours if you have an ADL score of 2-12.

(3) If you meet the criteria for clinical complexity and have a CPS score of less than 4, then you are classified in **Group C** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

(a) **Group C High** with ~~((200))~~ 194 base hours if you have an ADL score of 25-28; or

(b) **Group C Medium-High** with ~~((180))~~ 174 base hours if you have an ADL score of 18-24; or

(c) **Group C Medium** with ~~((140))~~ 132 base hours if you have an ADL score of 9-17; or

(d) **Group C Low** with ~~((95))~~ 87 base hours if you have an ADL score of 2-8.

(4) If you meet the criteria for mood and behavior qualification and do not meet the classification for C, D, or E groups, then you are classified into **Group B**. CARE further classifies you into:

(a) **Group B High** with ~~((155))~~ 147 base hours if you have an ADL score of 15-28; or

(b) **Group B Medium** with ~~((90))~~ 82 base hours if you have an ADL score of 5-14; or

(c) **Group B Low** with ~~((52))~~ 47 base hours if you have an ADL score of 0-4; or

(5) If you meet the criteria for behavior points and have a CPS score of greater than 2 and your ADL score is greater than 1, and do not meet the classification for C, D, or E groups, then you are classified in **Group B**. CARE further classifies you into:

(a) **Group B High** with ~~((155))~~ 147 base hours if you have a behavior point score 12 or greater; or

(b) **Group B Medium-High** with ~~((110))~~ 101 base hours if you have a behavior point score greater than 6; or

(c) **Group B Medium** with ~~((90))~~ 82 base hours if you have a behavior point score greater than 4; or

(d) **Group B Low** with ~~((52))~~ 47 base hours if you have a behavior point score greater than 1.

(6) If you are not clinically complex and your CPS score is less than 5 and you do not qualify under either mood and behavior criteria, then you are classified in **Group A**. CARE further classifies you into:

(a) **Group A High** with ~~((78))~~ 71 base hours if you have an ADL score of 10-28; or

(b) **Group A Medium** with ~~((62))~~ 56 base hours if you have an ADL score of 5-9; or

(c) **Group A Low** with ~~((29))~~ 26 base hours if you have an ADL score of 0-4.

NEW SECTION

WAC 388-106-0126 If I am under age twenty-one, how does CARE use criteria to place me in a classification group for in-home care? CARE uses the criteria of cognitive performance score as determined under WAC 388-106-0090, clinical complexity as determined under WAC 388-106-0095, mood/behavior and behavior point score as determined under WAC 388-106-0100, ADLS as determined under WAC 388-106-0105, and exceptional care as determined under WAC 388-106-0110 to place you into one of the following seventeen in-home groups. CARE classification is determined first by meeting criteria to be placed into a group, then you are further classified based on ADL score or behavior point score into a classification sub-group following a classification path of highest possible base hours to lowest qualifying base hours.

(1) If you meet the criteria for exceptional care, then CARE will place you in **Group E**. CARE then further classifies you into:

(a) **Group E High** with 420 base hours if you have an ADL score of 26-28; or

(b) **Group E Medium** with 350 base hours if you have an ADL score of 22-25.

(2) If you meet the criteria for clinical complexity and have cognitive performance score of 4-6 or you have cognitive performance score of 5-6, then you are classified in **Group D** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

(a) **Group D High** with 280 base hours if you have an ADL score of 25-28; or

(b) **Group D Medium-High** with 240 base hours if you have an ADL score of 18-24; or

(c) **Group D Medium** with 190 base hours if you have an ADL score of 13-17; or

(d) **Group D Low** with 145 base hours if you have an ADL score of 2-12.

(3) If you meet the criteria for clinical complexity and have a CPS score of less than 4, then you are classified in **Group C** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

(a) **Group C High** with 200 base hours if you have an ADL score of 25-28; or

(b) **Group C Medium-High** with 180 base hours if you have an ADL score of 18-24; or

(c) **Group C Medium** with 140 base hours if you have an ADL score of 9-17; or

(d) **Group C Low** with 95 base hours if you have an ADL score of 2-8.

(4) If you meet the criteria for mood and behavior qualification and do not meet the classification for C, D, or E groups, then you are classified into **Group B**. CARE further classifies you into:

(a) **Group B High** with 155 base hours if you have an ADL score of 15-28; or

(b) **Group B Medium** with 90 base hours if you have an ADL score of 5-14; or

(c) **Group B Low** with 52 base hours if you have an ADL score of 0-4; or

(5) If you meet the criteria for behavior points and have a CPS score of greater than 2 and your ADL score is greater than 1, and do not meet the classification for C, D, or E groups, then you are classified in **Group B**. CARE further classifies you into:

(a) **Group B High** with 155 base hours if you have a behavior point score 12 or greater; or

(b) **Group B Medium-High** with 110 base hours if you have a behavior point score greater than 6; or

(c) **Group B Medium** with 90 base hours if you have a behavior point score greater than 4; or

(d) **Group B Low** with 52 base hours if you have a behavior point score greater than 1.

(6) If you are not clinically complex and your CPS score is less than 5 and you do not qualify under either mood and behavior criteria, then you are classified in **Group A**. CARE further classifies you into:

(a) **Group A High** with 78 base hours if you have an ADL score of 10-28; or

(b) **Group A Medium** with 62 base hours if you have an ADL score of 5-9; or

(c) **Group A Low** with 29 base hours if you have an ADL score of 0-4.

WSR 10-05-070
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 10-23—Filed February 12, 2010, 2:37 p.m., effective February 18, 2010]

Effective Date of Rule: February 18, 2010.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: The closure to fishing is necessary to reduce incidental mortality of wild steelhead. This action will reduce the incidental hooking mortalities of wild steelhead. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 12, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900P Exceptions to statewide rules—Stillaguamish, North Fork Stillaguamish, South Fork Stillaguamish rivers and Canyon Creek. Notwithstanding the provisions of WAC 232-28-619, effective February 18 through June 4, 2010, it is unlawful to fish in the following waters:

(1) The Stillaguamish River from sloughs south of Marine Drive to forks.

(2) The North Fork of the Stillaguamish River from the mouth to Swede Heaven Bridge.

(3) The South Fork of the Stillaguamish River from the mouth to the Mt Loop Hwy. Bridge (above Granite Falls).

(4) Canyon Creek from the mouth at the South Fork of the Stillaguamish River to the forks.

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. June 5, 2010:

| | |
|-------------------|---|
| WAC 232-28-61900P | Exceptions to statewide rules—Stillaguamish, North Fork |
|-------------------|---|

WSR 10-05-071
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 10-24—Filed February 12, 2010, 2:43 p.m., effective February 18, 2010]

Effective Date of Rule: February 18, 2010.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: To reduce incidental mortality of wild steelhead. The 2009-2010 forecast of wild steelhead returning to the Snohomish River is 2,552 fish, which is well below the spawning goal of 6,500 steelhead. This action will reduce the incidental hooking mortalities of wild steelhead. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 12, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900Q Exceptions to statewide rules—Snohomish, Snoqualmie, Skykomish, North Fork Skykomish, South Fork Skykomish, Pilchuck, Sultan, Tolt and Raging rivers. Notwithstanding the provisions of WAC 232-28-619, effective February 18 through June 4, 2010, it is unlawful to fish in the following waters:

(1) The Snohomish River from the mouth (Burlington Northern railroad bridges) to the confluence of the Skykomish and Snoqualmie rivers, including all channels, sloughs, and interconnected waterways.

(2) The Snoqualmie River from the mouth to the boat launch at Plum Landing (1/4 below Tokul Creek).

(3) The Skykomish River from the mouth to the forks.

(4) The North Fork of the Skykomish from the mouth to Deer Falls (about 1/4 mile upstream of Goblin Creek).

(5) The South Fork of the Skykomish from the mouth to the Sunset Falls Fishway.

(6) The Pilchuck River from the mouth to the Snohomish City diversion dam.

(7) The Sultan River from the mouth to the diversion dam at river mile 9.7.

(8) The Tolt River from the mouth to the confluence of the North and South Fork.

(9) The Raging River from the mouth to the Highway 18 Bridge.

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. June 5, 2010:

| | |
|-------------------|---|
| WAC 232-28-61900Q | Exceptions to statewide rules—Snohomish, Snoqualmie, Skykomish, North Fork Skykomish, South Fork Skykomish, Pilchuck, Sultan, Tolt and Raging rivers. |
|-------------------|---|

WSR 10-05-072

EMERGENCY RULES

DEPARTMENT OF FISH AND WILDLIFE

[Order 10-31—Filed February 12, 2010, 2:43 p.m., effective February 18, 2010]

Effective Date of Rule: February 18, 2010.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: The closure will reduce incidental hooking mortality on wild steelhead. The 2009/2010 return of wild winter steelhead to the Samish River is expected to be below the escapement goal. The closure will reduce incidental hooking mortality on wild steelhead. The Nooksack River basin wild steelhead returns have been trending downward and are thought to be well below escapement goals. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 12, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900U Exceptions to statewide rules—Nooksack and Samish rivers. Notwithstanding the provisions of WAC 232-28-619, effective February 18 through June 4, 2010, it is unlawful to fish in the following waters:

- (1) Nooksack River - from the mouth to the confluence of the North and South Forks
- (2) North Fork Nooksack - from the mouth to Nooksack Falls.
- (3) South Fork Nooksack - from the mouth to Skookum Creek.
- (4) Middle Fork - Nooksack from the mouth to headwaters.
- (5) Samish River - from the mouth to the Hickson Bridge.

REPEALER

The following section of the Washington Administrative Code is repealed effective June 5, 2010:

WAC 232-28-61900U Exceptions to statewide rules—Nooksack and Samish rivers.

**WSR 10-05-073
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 10-35—Filed February 12, 2010, 2:47 p.m., effective February 18, 2010]

Effective Date of Rule: February 18, 2010.

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 and 77.04.020.

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

Reasons for this Finding: The closure will reduce incidental hooking mortality on wild steelhead. The 2009/2010 forecasted return of wild winter steelhead to the Puyallup River system is expected to be below the escapement goal of 2,000 fish. There is insufficient time to adopt permanent rules.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal

Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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

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

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

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

Date Adopted: February 12, 2010.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900V Exceptions to statewide rules—Puyallup, Carbon and White (Stuck) rivers. Notwithstanding the provisions of WAC 232-28-619, effective February 18, 2010, until further notice it is unlawful to fish in the following waters:

- (1) Puyallup River from the 11th St. Bridge in Tacoma upstream to Electron Power Plant Outlet.
- (2) Carbon River from the mouth to Voights Creek.
- (3) Carbon River from Voights Creek to Hwy. 162 Bridge.
- (4) White (Stuck) River from the mouth to R Street Bridge in Auburn.

**WSR 10-05-084
EMERGENCY RULES
DEPARTMENT OF**

SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed February 15, 2010, 12:44 p.m., effective February 18, 2010]

Effective Date of Rule: February 18, 2010.

Purpose: The department is amending chapter 388-828 WAC, The division of developmental disabilities (DDD) assessment, to add the children's intensive in-home behavioral support program (CIIBS) eligibility algorithm.

Citation of Existing Rules Affected by this Order:
Amending WAC 388-828-1620.

Statutory Authority for Adoption: RCW 71A.12.30 [71A.12.030].

Other Authority: Section 205 (1)(i), chapter 329, Laws of 2008, ESHB 2687.

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 2008 supplemental budget, ESHB 2687, section (1)(i) directs the department to

develop and implement a federal HCBS waiver to provide intensive behavior support services for up to one hundred children with developmental disabilities and their families. DDD is incorporating rules for the CIIBS eligibility algorithm into chapter 388-828 WAC. An initial public notice was filed September 29, 2008, as WSR 08-20-087. This fifth emergency rule extends the emergency rule filed on October 21, 2009, as WSR 09-21-103.

CMS approved the CIIBS waiver as of May 1, 2009. DDD has completed stakeholder work and is prepared to proceed with formal adoption of these proposed rules on a permanent basis. DDD formally proposed rules in WSR 10-03-108 and a public hearing is scheduled for February 23, 2010.

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 5, Amended 1, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 5, Amended 1, Repealed 0.

Date Adopted: February 1, 2010.

Don Goldsby, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 07-10-029, filed 4/23/07, effective 6/1/07)

WAC 388-828-1620 How does DDD determine which panels are mandatory in your DDD assessment? DDD determines which panels are mandatory in your DDD assessment by assigning you to a client group using the following table:

| If you are approved by DDD to receive: | Your client group is: |
|---|-----------------------------------|
| (1) DDD ((DCBS) <u>HCBS</u>) waiver services per chapter 388-845 WAC; or (2) State-only residential services per chapter 388-825 WAC; or (3) ICF/MR services per 42 CFR 440 and 42 CFR 483. | Waiver and State-Only Residential |
| (4) Medicaid personal care (MPC) per chapter 388-106 WAC; or (5) DDD HCBS Basic, Basic Plus, <u>CIIBS</u> or Core waiver services per chapter 388-845 WAC and personal care services per chapter 388-106 WAC; or (6) Medically intensive health care program services per chapter 388-551 WAC; or (7) Adult day health services per chapter 388-106 WAC; or (8) Private duty nursing services per chapter 388-106 WAC; or (9) Community options program entry system (COPEs) services per chapter 388-106 WAC; or (10) Medically needy residential waiver services per chapter 388-106 WAC; or (11) Medicaid nursing facility care services per chapter 388-106 WAC. | Other Medicaid Paid Services |
| (12) County employment services per chapter 388-850 WAC. (13) Other DDD paid services per chapter 388-825 WAC, such as: (a) Family support services; or (b) Professional services. (14) Nonwaiver voluntary placement program services per chapter 388-826 WAC; (15) SSP only per chapter 388-827 WAC; | State-Only Paid Services |
| (16) You are not approved to receive any DDD paid services. | No Paid Services |

NEW SECTION

WAC 388-828-8500 What is the children's intensive in-home behavioral support (CIIBS) program algorithm? The children's intensive in-home behavioral support (CIIBS) program algorithm is a formula in the DDD assessment that calculates your out-of-home placement risk score to determine your eligibility for the CIIBS waiver per chapter 388-845 WAC.

NEW SECTION

WAC 388-828-8505 When does the DDD assessment run the CIIBS algorithm to determine your eligibility for the CIIBS waiver? The DDD assessment runs the CIIBS

algorithm to determine your eligibility for the CIIBS waiver when your support assessment is moved to current and:

- (1) You are the assessed age of eight or older and under age eighteen;
- (2) Your behavior acuity level is high per WAC 388-828-5640;
- (3) Your caregiver's risk score is medium, high or immediate per WAC 388-828-5300;
- (4) Your ICF/MR score is eligible per WAC 388-828-4400; and
- (5) You are not enrolled in the CIIBS waiver.

NEW SECTION

WAC 388-828-8510 What elements does the CIIBS algorithm use to calculate your out-of-home placement risk score? The CIIBS algorithm uses the following elements to determine your out-of-home placement risk score:

- (1) The DDD protective supervision acuity scale (WAC 388-828-5000 to 388-828-5100);
- (2) The DDD caregiver status acuity scale (WAC 388-828-5120 to 388-828-5360);
- (3) The DDD behavioral acuity scale (WAC 388-828-5500 to 388-828-5640);

(4) The DDD activities of daily living (ADL) acuity scale (WAC 388-828-5380 to 388-828-5480);

(5) The DDD mobility acuity scale (WAC 388-828-5380 to 388-828-5480); and

(6) Eligible condition of "autism" as indicated in the DDD determination (WAC 388-823-0500).

NEW SECTION

WAC 388-828-8515 How does DDD determine your CIIBS out-of-home placement risk score? Your CIIBS out-of-home placement risk score is calculated using the following table:

| Section and WAC reference | If you meet the following criteria: | Then adjust your score by: | Score if you meet criteria |
|--|---|---|----------------------------|
| | Clients meeting eligibility criteria in WAC 388-828-8505 | | Beginning Score = 0 |
| DDD Determination WAC 388-823-0500 | Eligible condition of autism in the DDD determination. | Adding 40 points | = |
| ADL Acuity Level WAC 388-828-5480 | Your ADL support needs level = high, medium or low | Subtracting 54 points | = |
| Behavior Acuity Scale WAC 388-828-5500 through 388-828-5640 | Your most prominent behavior = assault/injury and Severity of your most prominent behavior = "potentially dangerous" or "life threatening" | Adding 14 points | = |
| Protective Supervision Acuity Scale WAC 388-828-5060 | Your answer to the following question: "What level of monitoring does the client typically require during awake hours?" = "Line of sight/earshot" | Adding 13 points | = |
| DDD Caregiver Status Acuity WAC 388-828-5300 | Your caregiver risk level = high or immediate | Adding 136 points | = |
| Backup Caregiver Status WAC 388-828-5320 | Your answer to the following question: "Under what conditions are other caregiver(s) available?" = "No other caregiver available" | Adding 33 points | = |
| Mobility Acuity Scale WAC 388-828-5900 | Your mobility acuity level = high, medium or low | Subtracting 15 points | = |
| | | Sum of all of scores above is your CIIBS out-of-home placement risk score | = |

NEW SECTION

WAC 388-828-8520 How does DDD determine if I am eligible for the CIIBS waiver? DDD uses the following table to determine if you are eligible for the CIIBS waiver based on your CIIBS out-of-home placement risk score per WAC 388-828-8510:

| If your CIIBS out-of-home placement risk score is: | Then your CIIBS eligibility is: |
|--|---------------------------------|
| 96 or greater | Yes - Severe |
| 17 through 95 | Yes - High |

| If your CIIBS out-of-home placement risk score is: | Then your CIIBS eligibility is: |
|--|---------------------------------|
| Less than 17 | No - (not eligible) |

WSR 10-05-120
EMERGENCY RULES
DEPARTMENT OF
EARLY LEARNING

[Filed February 17, 2010, 11:44 a.m., effective February 17, 2010, 11:44 a.m.]

Effective Date of Rule: Immediately.

Purpose: The department of early learning (DEL) is amending WAC 170-151-230 School-age child care centers, 170-295-3060 Child care centers and 170-296-0870 Family home child care, regarding the use of hand sanitizer gels with children in DEL-licensed child care. The emergency rules would allow licensed child care providers to administer "over-the-counter" hand sanitizer gels with children over twelve months of age after obtaining written authorization from the child's parent or guardian. This filing continues the emergency rules filed on October 22, 2009, as WSR 09-22-011.

Citation of Existing Rules Affected by this Order: Amending WAC 170-151-230, 170-295-3060, and 170-296-0870.

Statutory Authority for Adoption: RCW 43.215.200.

Other Authority: Chapter 43.215 RCW.

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

Reasons for this Finding: Continuation of these emergency rules is needed while DEL completes the permanent rule-making process. A CR-101 preproposal notice was filed as WSR 09-22-012, and the department continues to solicit recommendations on draft rules from health professionals, child care providers, parents and the public. DEL anticipates filing proposed rules, holding public hearings, and adopting the permanent rules in spring 2010.

The rule is needed to protect the health and safety of children in DEL-licensed child care. Controlling the spread of potentially pandemic influenza - such as the H1N1 flu virus - remains a statewide, national and worldwide concern. According to the federal Centers for Disease Control and Prevention (CDC), in 2009 children under five years old had the highest hospitalization rate for H1N1 influenza nationwide, and in 2009 this age group had the second highest rates of H1N1 infection overall. The CDC also notes that children under two years old also face a highest risk of severe complications from seasonal flu viruses.*

If used when hand washing with soap and warm water is not available, alcohol-based hand sanitizer gels are considered effective in limiting the spread of viruses and bacteria. However, the current DEL child care licensing rules present a barrier to using hand sanitizing gels.

Alcohol-based hand sanitizer gels are regulated by the United States Food and Drug Administration as over-the-counter (OTC) drugs. Under DEL rules, OTC drugs are considered "nonprescription medications." The current rules list specific nonprescription medications that may be administered in DEL-licensed child care with parent or guardian written permission. The lists do not include hand sanitizing gels.

The licensee must obtain a physician's written authorization - specific to each child - before allowing the child to use hand sanitizer gels. The emergency rules would permit use of hand sanitizer gels to children over twelve months old with the child's parent or guardian written permission.

The World Health Organization (WHO) on February, 5 2010** reported that although the incidence of H1N1 flu is declining, almost half of the H1N1 deaths worldwide have occurred in North and South America. The United States is among the countries where the WHO considers the H1N1 virus to remain "widespread." WHO is continuing the worldwide Phase 6 pandemic alert for the H1N1 influenza virus issued in June 2009. The Washington state department of health has filed emergency rules (WSR 10-03-053, filed January 15, 2010) requiring heightened surveillance of H1N1 cases statewide, and DOH has urged DEL to revise its rules on an emergency basis regarding the administration of alcohol-based OTC hand sanitizer in DEL-licensed child care facilities during the current outbreak of H1N1 and other seasonal influenza.

*Source: *Technical Report for State and Local Public Health Officials and Child Care and Early Childhood Providers on CDC Guidance on Helping Child Care and Early Learning Programs Respond during the 2009-2010 Influenza Season.* Centers for Disease Control and Prevention. September 4, 2009.

**Source: "Pandemic (H1N1) 2009 - Update 86" World Health Organization. Weekly Update - February 5, 2010, http://www.who.int/csr/don/2010_02_5/en/index.html.

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 3, Repealed 0.

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 3, Repealed 0.

Date Adopted: February 17, 2010.

Dr. Elizabeth M. Hyde
 Director

AMENDATORY SECTION (Amending WSR 06-15-075, filed 7/13/06, effective 7/13/06)

WAC 170-151-230 What requirements must I meet for medication management? You may have a policy of not giving medication to the child in care. If your center's health care plan includes giving medication to the child in care, you:

(1) Must give medications, prescription and nonprescription, only on the written approval of a parent, person, or agency having authority by court order to approve medical care;

(2) Must give prescription medications:

(a) Only as specified on the prescription label; or

(b) As authorized, in writing, by a physician or other person legally authorized to prescribe medication.

(3) Must give the following classifications of nonprescription medications, with written parent authorization, only at the dose, duration, and method of administration specified on the manufacturer's label for the age or weight of the child needing the medication:

(a) Antihistamines;

(b) Nonaspirin fever reducers/pain relievers;

(c) Nonnarcotic cough suppressants;

(d) Decongestants;

(e) Anti-itching ointments or lotions, intended specifically to relieve itching;

(f) Diaper ointments and powders, intended specifically for use in the diaper area of the child; ~~((and))~~

(g) Sun screen; and

(h) Hand sanitizers.

(4) Must give other nonprescription medication:

(a) Not included in the categories listed in subsection (3) of this section; or

(b) Taken differently than indicated on the manufacturer's label; or

(c) Lacking labeled instructions, only when disbursement of the nonprescription medication is as required under subsection (4)(a), (b), and (c) of this section:

(i) Authorized, in writing, by a physician; or

(ii) Based on established medical policy approved, in writing, by a physician or other person legally authorized to prescribe medication.

(5) Must accept from the child's parent, guardian, or responsible relative only medicine in the original container, labeled with:

(a) The child's first and last names;

(b) The date the prescription was filled; or

(c) The medication's expiration date; and

(d) Legible instructions for administration, such as manufacturer's instructions or prescription label.

(6) Must keep medication, refrigerated or nonrefrigerated, in an orderly fashion and inaccessible to the child;

(7) Must store external medication in a compartment separate from internal medication;

(8) Must keep a record of medication disbursed;

(9) Must return to the parent or other responsible party, or must dispose of medications no longer being taken; and

(10) May, at your option, permit self-administration of medication by a child in care if:

(a) The child is physically and mentally capable of properly taking medication without assistance;

(b) You include in the child's file a parental or physician's written statement of the child's capacity to take medication without assistance; and

(c) You have stored the child's medications and other medical supplies so the medications and medical supplies are inaccessible to other children in care.

AMENDATORY SECTION (Amending WSR 06-15-075, filed 7/13/06, effective 7/13/06)

WAC 170-295-3060 Who can provide consent for me to give medication to the children in my care? (1) Parents must give written consent before you give any child any medication. The parent's written consent must include:

(a) Child's first and last name;

(b) Name of medication;

(c) Reason for giving medication;

(d) Amount of medication to give;

(e) How to give the medication (route);

(f) How often to give the medication;

(g) Start and stop dates;

(h) Expected side effects; and

(i) How to store the medication consistent with directions on the medication label.

(2) The parent consent form is good for the number of days stated on the medication bottle for prescriptions. You may not give medication past the days prescribed on the medication bottle even if there is medication left.

(3) You may give the following medications with written parent consent if the medication bottle label tells you how much medication to give based on the child's age and weight:

(a) Antihistamines;

(b) Nonaspirin fever reducers/pain relievers;

(c) Nonnarcotic cough suppressants;

(d) Decongestants;

(e) Ointments or lotions intended to reduce or stop itching or dry skin;

(f) Diaper ointments and nontalc powders, intended only for use in the diaper area; ~~((and))~~

(g) Sun screen for children over six months of age; and

(h) Hand sanitizers for children over twelve months of age.

(4) All other over the counter medications must have written directions from a health care provider with prescriptive authority before giving the medication.

(5) You may not mix medications in formula or food unless you have written directions to do so from a health care provider with prescriptive authority.

(6) You may not give the medication differently than the age and weight appropriate directions or the prescription directions on the medication label unless you have written directions from a health care provider with prescriptive authority before you give the medication.

(7) If the medication label does not give the dosage directions for the child's age or weight, you must have written instructions from a health care provider with prescriptive authority in addition to the parent consent prior to giving the medication.

(8) You must have written consent from a health care provider with prescriptive authority prior to providing:

(a) Vitamins;

(b) Herbal supplements; and

(c) Fluoride.

AMENDATORY SECTION (Amending WSR 06-15-075, filed 7/13/06, effective 7/13/06)

WAC 170-296-0870 How do I manage medications for children? You must meet specific requirements for managing prescription and nonprescription medication for children under your care. Only you or another, primary staff person may perform the functions described in this section.

(1) You must have written approval of the child's parent or legal guardian to give the child any medication. This approval must not exceed thirty days.

(2) You must:

(a) Keep a written record of all medications you give a child;

(b) Return any unused medication to the parent or legal guardian of the child;

(c) Give certain classifications of nonprescription medications, only with the dose and directions on the manufacturer's label for the age or weight of the child needing the medication. These nonprescribed medications include but are not limited to:

(i) Nonaspirin, fever reducers or pain relievers;

(ii) Nonnarcotic cough suppressants;

(iii) Decongestants;

(iv) Anti-itching ointments or lotions intended specifically to relieve itching;

(v) Diaper ointments and talc free powders intended specifically for use in the diaper area of children; ~~((and))~~

(vi) Sun screen; and

(vii) Hand sanitizers for children over twelve months of age.

(3) You must not administer any nonprescribed medication for the purpose of sedating a child;

(4) You must not administer any prescribed medication in an amount or frequency other than that prescribed by a physician, psychiatrist or dentist;

(5) You must not give one child's medications to another child; and

(6) You must not use any prescribed medication to control a child's behavior unless a physician prescribes the medication for management of the child's behavior.