

**WSR 10-20-060**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
(Economic Services Administration)

[Filed September 27, 2010, 3:34 p.m., effective October 1, 2010]

Effective Date of Rule: October 1, 2010.

Purpose: The department is amending WAC 388-432-0005 Can I get help from DSHS for a family emergency without receiving cash assistance?, 388-310-0100 WorkFirst—Purpose, 388-310-0800 WorkFirst—Support services, 388-310-1800 WorkFirst—Post employment services, 388-310-1600 WorkFirst—Sanctions, 388-310-0200 WorkFirst—Activities, 388-310-0400 WorkFirst—Entering the WorkFirst program as a mandatory participant, 388-310-1300 Community jobs, and 388-310-2100 Career services program.

These amendments will:

- Decrease the diversion cash assistance expenditures by reducing maximum allotment from \$1500 to \$1250;
- Reduce child care cost by allowing qualifying two-parent families to have the option of excluding one parent from WorkFirst participation requirements;
- No longer provide career services, tuition assistance and support services payments to former TANF families; and
- Eliminate administrative costs associated with the external three-person sanction review panel.

These changes in addition to other administrative reductions are necessary to contain costs and ensure program's fiscal stability. These adjustments are necessary for the program to stay within the budget and to prevent more severe cuts.

Citation of Existing Rules Affected by this Order: Repealing WAC 388-310-2100; and amending WAC 388-310-0100, 388-310-0800, 388-310-1800, 388-310-1600, 388-310-0200, 388-310-0400, 388-310-1300, and 388-432-0005.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.055, 74.08.090, chapters 74.08A and 74.12 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; 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 department needs to make immediate cuts to TANF-related programs in order to stay within the current budget. Based on the current rate of expenditures (SP to Budget Bill 9-27-10), the TANF/WorkFirst biennial budget faces a shortfall of no less than ninety-three million dollars for the remainder of the 09-11 biennium. In

part, this shortfall is the result of increased demand for TANF benefits due to the economic recession. In the last two years, the WorkFirst caseload has grown by more than thirty percent, from 51,106 cases in July 2008 to 66,634 cases in June of this year.

In addition, revenue forecasts for Washington state government show decreased general fund revenue for the two-year period ending June 30, 2011. The governor has determined that a budget shortfall is imminent and has directed agencies to implement cuts by October 1 to avoid running out of state general funds. In particular, the governor's Executive Order 10-04 (Ordering Expenditure Reductions in Allotments of State General Fund Appropriations), signed on September 13, 2010, found that:

- Revenues have fallen short of projections;
- The current official state economic and revenue forecast of general fund revenues is less than the official estimate upon which the state's 2009-2011 biennial operating budget and supplemental operating budget were enacted; and
- The anticipated revenues combined with the beginning cash balance of the general fund are insufficient to meet anticipated expenditures from this fund for the remainder of the current fiscal period.

Accordingly, the governor has ordered across-the-board reductions of state general fund allotments by 6.287%, effective October 1, 2010. The revenue shortfall will add an additional nineteen million dollars for a possible total shortfall of one hundred twelve million dollars.

In addition to this budget shortfall, the department does not expect to receive sixty-two million dollars in federal ARRA contingency funds. This is likely to have a significant increase to the shortfall that is specific to the TANF/WorkFirst budget for fiscal year 2011.

The timing of the proposed budget reductions will lessen the adverse impact on families. If immediate budget reductions are not realized, the department will have to make additional cuts in the future to TANF/WorkFirst assistance programs to stay within budget. Additional cuts could include greater reduction in services than those currently proposed, and/or eliminating benefits rather than reducing them. These reductions would have a much greater detrimental effect on vulnerable families with children in need.

The department is concurrently working on the permanent rule-making process and has filed preproposal statement of inquiries, CR-101, as WSR 10-16-144, 10-16-145, 10-16-147, 10-17-115, and 10-17-116. The department started filing proposed rule-making notices on [in] September and plans to complete all notices by the first week of October.

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 8, Repealed 1.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 8, Repealed 1.

Date Adopted: September 27, 2010.

Katherine I. Vasquez  
Rules Coordinator

**AMENDATORY SECTION** (Amending WSR 99-08-051, filed 4/1/99, effective 5/2/99)

**WAC 388-310-0100 WorkFirst—Purpose.** (1) **What is the WorkFirst program?**

The WorkFirst program offers services and activities to help people in low-income families find jobs, keep their jobs, find better jobs and become self-sufficient. The program links families to a variety of state, federal and community resources to meet this goal. When you enter the WorkFirst program, you will be asked to work, look for work and/or prepare for work.

(2) **Who does the WorkFirst program serve?**

The WorkFirst program serves ~~((three))~~ two groups:

(a) Parents and children age sixteen or older who receive cash assistance under the temporary assistance for needy families (TANF), general assistance for pregnant women (GA-S) or state family assistance (SFA) programs; and

~~(b) ((Parents who no longer receive cash assistance and need some continuing support to remain self-sufficient; and~~

~~(e)))~~ Low income parents who support their family without applying for or relying on cash assistance.

**AMENDATORY SECTION** (Amending WSR 09-06-053, filed 2/26/09, effective 4/1/09)

**WAC 388-310-0800 WorkFirst—Support services.**

(1) **Who can get support services?**

People who can get support services include:

(a) WorkFirst participants who receive a TANF cash grant;

(b) Sanctioned WorkFirst participants during the required participation before the sanction is lifted or applicants who were terminated ~~((by a sanction review panel))~~ while in noncompliance sanction who are doing activities required to reopen cash assistance (WAC 388-310-1600);

(c) Unmarried or pregnant minors who are income eligible to receive TANF and are:

(i) Living in a department approved living arrangement (WAC 388-486-0005) and are meeting the school requirements (WAC 388-486-0010); or

(ii) Are actively working with a social worker and need support services to remove the barriers that are preventing them from living in a department approved living arrangement and/or meeting the school requirements.

~~(d) ((Former WorkFirst recipients who are working at least twenty hours or more per week for up to six months after leaving TANF if they need support services to meet a temporary emergency. This can include up to four weeks of support services if they lose a job and are looking for another one (see also WAC 388-310-1800);~~

~~(e)))~~ American Indians who receive a TANF cash grant and have identified specific needs due to location or employment.

(2) **Why do I receive support services?**

Although not an entitlement, you may receive support services for the following reasons:

(a) To help you participate in work and WorkFirst activities that lead to independence.

(b) To help you to participate in job search, accept a job, keep working, advance in your job, and/or increase your wages.

(c) You can also get help in paying your child care expenses through the working connections child care assistance program. (Chapter 170-290 WAC describes the rules for this child care assistance program.)

(3) **What type of support services may I receive and what limits apply?**

There is a limit of three thousand dollars per person per program year (July 1st to June 30th) for WorkFirst support services you may receive. Most types of support services have dollar limits.

The chart below shows the types of support services that are available for the different activities (as indicated by an "x") and the limits that apply.

Definitions:

- Work-related activities include looking for work or participating in workplace activities, such as community jobs or a work experience position.

- Safety-related activities include meeting significant or emergency family safety needs, such as dealing with family violence. When approved, safety-related support services can exceed the dollar or category limits listed below.

- Some support services are available if you need them for other required activities in your IRP.

Type of support service	Limit	• Work	•• Safety	••• Other
Reasonable accommodation for employment	\$1,000 for each request	x		
Clothing/uniforms	\$75 per adult per program year	x		
Diapers	\$50 per child per month	x		
Haircut	\$40 per each request	x		
Lunch	Same rate as established by OFM for state employees	x		
Personal hygiene	\$50 per adult per program year	x		

Type of support service	Limit	• Work	•• Safety	••• Other
Professional, trade, association, union and bonds	\$300 for each fee	x		
Relocation related to employment (can include rent, housing, and deposits)	\$1,000 per program year	x		
Short-term lodging and meals in connection with job interviews/tests	Same rate as established by OFM for state employees	x		
Tools/equipment	\$500 per program year	x		
Car repair needed to restore car to operable condition	\$250 per program year	x	x	
License/fees	\$130 per program year	x	x	
Mileage, transportation, and/or public transportation	Same rate as established by OFM for state employees	x	x	
Transportation allotment	Up to: \$25 for immediate need, or \$40 twice a month if you live within 40 miles of your local WorkFirst office, or \$60 twice a month if you live more than 40 miles from your local WorkFirst office.	x	x	
Counseling	No limit	x	x	x
Educational expenses	\$300 for each request if it is an approved activity in your IRP and you do not qualify for sufficient student financial aid to meet the cost	x		x
Medical exams (not covered by medicaid)	\$150 per exam	x	x	x
Public transportation	\$150 per month	x	x	x
Testing-diagnostic	\$200 each	x	x	x

**(4) What are the other requirements to receive support services?**

Other restrictions on receiving support services are determined by the department or its agents. They will ~~((decide what support services you receive, as follows))~~ consider whether:

- (a) It is within available funds; and
- (b) It does not assist, promote, or deter religious activity; and
- (c) There is no other way to meet the cost.

**(5) What happens to my support services if I do not participate as required?**

The department will give you ten days notice, following the rules in WAC 388-310-1600, then discontinue your support services until you participate as required.

AMENDATORY SECTION (Amending WSR 08-15-136, filed 7/22/08, effective 8/22/08)

**WAC 388-310-1800 WorkFirst—Post employment services. (1) What is the purpose of post employment services?**

Post employment services help ~~((low-income))~~ TANF or SFA parents who are working twenty hours or more a week keep and cope with their current jobs, look for better jobs, gain work skills for a career and become self sufficient.

**(2) How do I obtain post employment services?**

(a) You can obtain post employment services by:

- (i) Asking for a referral from the local community service office;
- (ii) Contacting community or technical colleges; or
- (iii) Contacting the employment security department.

~~((Employment security department staff may also telephone you if you got a job while you were on TANF or SFA to see if you are interested in receiving these services.~~

~~((b) You may qualify for different services (from various state or federal programs) depending on whether you:~~

- ~~((i) Are a mandatory participant (that is, you currently receive TANF or SFA benefits);~~
- ~~((ii) Used to receive TANF or SFA benefits; or~~
- ~~((iii) Have never been on TANF or SFA.))~~

**(3) Who provides post employment services and what kind of services do they provide?**

(a) The employment security department can help you increase your wages, increase your job skills or find a better job by providing you with:

- (i) Employment and career counseling;
- (ii) Labor market information;
- (iii) Job leads for a better job (sometimes called job development);
- (iv) On the job training;
- (v) Help with finding a job that matches your interests, abilities and skills (sometimes called job matching); and

(vi) Help with finding a new job after job loss (sometimes called reemployment).

(b) Any Washington state technical and community college can approve a skill-training program for you that will help you advance up the career ladder. Their staff will talk to you, help you decide what training would work best for you and then help you get enrolled in these programs. The college may approve the following types of training for you at any certified institution:

- (i) High school/GED,
- (ii) Vocational education training,
- (iii) Job skills training,
- (iv) Adult basic education,
- (v) English as a second language training, or
- (vi) Preemployment training.

**(4) What other services are available while you receive post employment services?**

While you receive post employment services, you may qualify for:

(a) Working connections childcare if you meet the criteria for this program (described in chapter 170-290 WAC).

(b) Other support services, such as help in paying for transportation or work expenses if you meet the criteria for this program (WAC 388-310-0800).

(c) Other types of assistance for low-income families such as food stamps, medical assistance or help with getting child support that is due to you and your children.

**(5) Who is eligible for post employment ~~((service, support services and childcare))~~ services?**

~~If you are a current TANF or SFA recipient, you may qualify for post employment services~~~~((support services and childcare))~~ if you are working twenty hours or more a week, ~~(and:~~

~~(a) You are current TANF or SFA recipient. You qualify for:~~

- ~~(i) All types of post employment services;~~) unless you are in sanction status(;
- ~~(ii) Tuition assistance from the community and technical college system;~~
- ~~(iii) WorkFirst support services; and~~
- ~~(iv) Working connections childcare.~~

~~(b) You are a former TANF or SFA recipient. You qualify for:~~

~~(i) Employment retention services (help with keeping a job) for up to twelve months after exiting TANF or SFA.~~

~~(ii) Wage and skill progression services (help with finding a better job and/or obtaining better wages) for up to twelve months after exiting TANF or SFA.~~

~~(iii) Tuition assistance or preemployment training from the community and technical college system;~~

~~(iv) Working connections childcare assistance; and/or~~

~~(v) WorkFirst support services for up to six months after exiting TANF or SFA.~~

~~(e) You are a low wage earner (that is, your family income does not exceed one hundred seventy five percent of the federal poverty level) who has never received TANF or SFA benefits, and are in a community or technical college approved skill training program. You may qualify for:~~

~~(i) Tuition assistance or preemployment training from the community and technical college system; or~~

~~(ii) Working connections childcare while you are in training or school for up to a total of thirty six months)).~~

**(6) What if I lose my job while I am receiving post employment services?**

If you now receive ~~((or used to receive))~~ TANF or SFA, help is available to you ~~((for up to four weeks))~~ so that you can find another job and continue in your approved post employment services.

(a) The employment security department will provide you with reemployment services.

(b) At the same time, your case manager can approve ~~((up to four weeks of))~~ support services and childcare for you.

AMENDATORY SECTION (Amending WSR 09-15-084, filed 7/14/09, effective 8/14/09)

**WAC 388-310-0200 WorkFirst—Activities. (1) Who is required to participate in WorkFirst activities?**

(a) You are required to participate in the WorkFirst activities in your individual responsibility plan, and become what is called a "mandatory participant," if you:

(i) Are receiving TANF or SFA cash assistance because you are pregnant or the parent or adult in the home; and

(ii) Are not exempt. For exemptions see WAC 388-310-0300 and 388-310-0350.

(b) Participation is voluntary for all other WorkFirst participants (those who no longer receive or have never received TANF or SFA cash assistance).

**(2) What activities do I participate in when I enter the WorkFirst program?**

When you enter the WorkFirst program, you will participate in one or more of the following activities (which are described in more detail in other sections of this chapter):

(a) Paid employment (see WAC 388-310-0400 (2)(a) and 388-310-1500);

(b) Self employment (see WAC 388-310-1700);

(c) Job search (see WAC 388-310-0600);

(d) Community jobs (see WAC 388-310-1300)

(e) Work experience (see WAC 388-310-1100);

(f) On-the-job training (see WAC 388-310-1200);

(g) Vocational educational training (see WAC 388-310-1000);

(h) Basic education activities (see WAC 388-310-0900);

(i) Job skills training (see WAC 388-310-1050);

(j) Community service (see WAC 388-310-1400);

(k) Activities provided by tribal governments for tribal members and other American Indians (see WAC 388-310-1400(1) and 388-310-1900);

(l) Other activities identified by your case manager on your individual responsibility plan that will help you with situations such as drug and/or alcohol abuse, homelessness, or mental health issues; and/or

(m) Activities identified by your case manager on your individual responsibility plan to help you cope with family violence as defined in WAC 388-61-001; and/or

(n) Up to ten hours of financial literacy activities to help you become self-sufficient and financially stable.

**(3) If I am a mandatory participant, how much time must I spend doing WorkFirst activities?**

If you are a mandatory participant, you will be required to participate in the activities in your individual responsibility plan, and may be required to participate full time, working, looking for work or preparing for work. You might be required to participate in more than one part-time activity at the same time that add up to full time participation. You will have an individual responsibility plan (described in WAC 388-310-0500) that includes the specific activities and requirements of your participation.

**(4) What activities do I participate in after I get a job?**

You ~~((will))~~ may be required to participate in other activities, such as job search or training once you are working twenty hours or more a week in a paid unsubsidized job, to bring your participation up to full time.

You may also engage in activities if you are working full time and want to get a better job.

~~((Post employment services (described in WAC 388-310-1800) include:~~

~~(a) Activities that help you keep a job (called an "employment retention" service); and/or~~

~~(b) Activities that help you get a better job or better wages (called a "wage and skill progression" service).))~~

AMENDATORY SECTION (Amending WSR 09-14-019, filed 6/22/09, effective 7/23/09)

**WAC 388-310-0400 WorkFirst—Entering the WorkFirst program as a mandatory participant. (1) What happens when I enter the WorkFirst program as a mandatory participant?**

If you are a mandatory participant, you must follow instructions as written in your individual responsibility plan (see WAC 388-310-0500), which is written after you have participated in a comprehensive evaluation of elements related to your employability. If you have been identified as someone who needs necessary supplemental accommodation (NSA) services (defined in chapter 388-472 WAC) your case manager will first develop an accommodation plan to help you access WorkFirst services. The case manager will use the accommodation plan to help develop your IRP with you. If you have been identified as a victim of family violence (defined in WAC 388-61-001), you and your case manager will develop an IRP to help you with your situation, including referrals to appropriate services.

If you are a mandatory participant, your case manager will refer you to WorkFirst activities unless any of the following applies to you:

(a) You work thirty-two or more hours a week (or, if you are a member of a two-parent family, you work thirty-five hours or more a week). "Work" means to engage in any legal, income generating activity which is taxable under the United States tax code or which would be taxable with or without a treaty between an Indian Nation and the United States;

(b) You participate the equivalent of twenty or more hours a week (or if you are a member of a two-parent family, you participate the equivalent of thirty or more hours a week)

in job search, vocational education, issue resolution, or paid or unpaid work that meets the federal definition of core activities, which may include work of sixteen or more hours a week in the federal or state work study program, and you attend a Washington state community or technical college at least half time;

(c) You work twenty or more hours a week (or if you are a member of a two-parent family, you work thirty or more hours a week) in unsubsidized employment and attend a Washington state community or technical college at least half time;

(d) You are under the age of eighteen, have not completed high school, GED or its equivalent and are in school full time;

(e) You are eighteen or nineteen years of age and are attending high school or an equivalent full time;

(f) You are pregnant or have a child under the age of twelve months, and are participating in other pregnancy to employment activities. See WAC 388-310-1450;

(g) Your situation prevents you from looking for a job and you are conducting activities identified on your IRP to help you with your situation. (For example, you may be unable to look for a job while you have health problems or you are homeless); or

(h) Your situation prevents you from looking for work because you are a victim of family violence and you are conducting activities on your IRP to help you with your situation.

**(2) How will I know what my participation requirements are?**

(a) Your individual responsibility plan will describe what you need to do to be able to enter job search or other WorkFirst activities and then find a job (see WAC 388-310-0500 and 388-310-0700).

(b) If you enter the pregnancy to employment pathway (described in WAC 388-310-1450(3)), you must take part in an assessment.

**(3) What happens if I do not follow my WorkFirst requirements?**

If you do not participate in creating an individual responsibility plan, job search, or in the activities listed in your individual responsibility plan, and you do not have a good reason, the department will follow the sanction rules in WAC 388-310-1600.

AMENDATORY SECTION (Amending WSR 02-20-073, filed 9/30/02, effective 10/1/02)

**WAC 388-310-1300 Community jobs. (1) What is the community jobs program?**

Community jobs is a paid work experience that assists you to gain work skills and experience. You are placed in a community job (up to twenty hours per week) where your wages are paid by the community jobs program. If you participate in the program, you are eligible for support services that assist you in moving into a job where your employer pays all your wages.

**(2) What is career jump?**

Career jump offers job-ready community jobs participants an opportunity to gain paid work experience that leads to a permanent job. This program is a subset of community

jobs and will be referred to as such. Career jump places you in a part time (up to twenty hours per week), community job where your earnings are paid by the community jobs program, for up to five months, at which time you will transition to the employer's payroll. You will be provided with support services to assist you in retaining your job through the ninth month of the program. At or before the fifth month, the employment opportunity will be above minimum wage, thirty-two or more hours per week and include wage progression and benefits comparable to other employees.

**(3) Who administers the community jobs program?**

The state department of community, trade, and economic development (DCTED) administers the community jobs program. DCTED contract with local agencies throughout the state, known as community jobs contractors who develop and manage the community jobs positions, pay the wages, provide support services and act as the "employer of record" while you are enrolled in a community job.

**(4) What types of work sites are used to provide community jobs?**

The following work sites may be used to provide community jobs:

- (a) Federal, state or local governmental agencies and tribal governments;
- (b) Private and tribal nonprofit businesses, organizations and educational institutions;
- (c) Private for profit businesses for career jump placements.

**(5) What are the requirements for the work sites?**

Work sites for community jobs and career jump:

- (a) Must assist in strengthening work ethics, improve workplace skills and help you gain skills to move into a job where the employer pays all your wages. If they do not meet this requirement, they will not be considered for additional community jobs/career jump placements.

(b) We will follow the employment rules described in WAC 388-310-1500. In any situation where training is inconsistent with the terms of a collective bargaining agreement, your community jobs contractor will obtain written approval from the labor organization concerned. Career jump employers will remain neutral with regard to neutralization in the worksite.

- (c) You will not be required to do work related to religious, electoral or partisan political activities.

**(6) What are the benefits of community jobs?**

You benefit from community jobs by:

- (a) Learning work skills;
- (b) Getting work experience;
- (c) Working twenty hours per week, while being paid federal or state minimum wage, whichever is higher; and
- (d) Earning paid personal leave as determined by DCTED.

**(7) How do I get into community jobs?**

You will be placed into community jobs after you and your DSHS case manager decide:

- (a) You would benefit from community jobs after you have participated in job search without finding a job; and/or
- (b) You need a supportive work environment to help you become more employable.

**(8) What happens after I am placed in the community jobs program?**

When you are placed in the community jobs program by DSHS:

(a) You will be assigned to a community job by the community jobs contractor for no more than nine months. You will work twenty hours a week and participate in any other unpaid activities for twelve to twenty additional hours per week as required in your individual responsibility plan;

(b) Your placement in community jobs will be reviewed by your DSHS case manager every three months during your nine-month placement for the following:

- (i) To ensure you are TANF/SFA eligible; and
- (ii) To verify any earned or unearned income received by you or another member of your assistance unit (that is, you and other people in your household who are included on your cash grant).

(c) Your community jobs contractor will review your case each month to ensure you are following your IRP and IDP, participating full time, and becoming more employable because of your community job;

(d) If you request a different community jobs placement, we do not consider your request a refusal to participate without good cause under WAC 388-310-1600. You may be asked to explain why you want a different placement;

(e) Grievance policies are in place for your protection. You will be required to sign an acknowledgment that you received a copy of this policy at the time of placement with the employer.

**(9) How does community jobs affect my TANF benefits?**

The amount of your TANF/SFA monthly grant will be determined by following the rules in WAC 388-450-0050 and 388-450-0215 (1), (3), (4), (5) and (6). WAC 388-450-0215(2), does not apply to your community jobs wages.

**(10) What can I expect from my career jump placement?**

(a) You cannot represent more than ten percent of the total labor force for an employer that has ten or more employees.

(b) No more than one community jobs participant shall be allowed per private for profit worksite supervisor.

(c) You will participate in developing a career progression plan that will include health care benefits comparable to other employees.

(d) You may be eligible for unemployment benefits if you have participated in community jobs' career jump and have worked at least six hundred eighty hours in a base year. You will gain unemployment insurance credits for all hours worked under your career jump placement.

(e) Your employer and your community jobs contractor will be required to follow DCTED's contractual agreements for career jump.

**REPEALER**

The following section of the Washington Administrative Code is repealed:

WAC 388-310-2100

Career services program.

AMENDATORY SECTION (Amending WSR 10-12-044, filed 5/26/10, effective 7/1/10)

**WAC 388-310-1600 WorkFirst—Sanctions.** Effective July 1, 2010.

**(1) What WorkFirst requirements do I have to meet?**

You must do the following when you are a mandatory WorkFirst participant:

(a) Give the department the information we need to develop your individual responsibility plan (IRP) (see WAC 388-310-0500);

(b) Show that you are participating fully to meet all of the requirements listed on your individual responsibility plan;

(c) Go to scheduled appointments listed in your individual responsibility plan;

(d) Follow the participation and attendance rules of the people who provide your assigned WorkFirst services or activities; and

(e) Accept available paid employment when it meets the criteria in WAC 388-310-1500.

**(2) What happens if I don't meet WorkFirst requirements?**

(a) If you do not meet WorkFirst requirements, we will send you a letter telling you what you did not do, and inviting you to a noncompliance sanction case staffing.

(i) A noncompliance case staffing is a meeting with you, your case manager, and other people who are working with your family, such as representatives from tribes, community or technical colleges, employment security, the children's administration, family violence advocacy providers or limited-English proficient (LEP) pathway providers to review your situation and compliance with your participation requirements.

(ii) You will be notified when your noncompliance sanction case staffing is scheduled so you can attend.

(iii) You may invite anyone you want to come with you to your case staffing.

(b) You will have ten days to contact us so we can talk with you about your situation. You can contact us in writing, by phone, by going to the noncompliance sanction case staffing appointment described in the letter, or by asking for an individual appointment.

(c) If you do not contact us within ten days, we will make sure you have been screened for family violence and other barriers to participation. We will use existing information to decide whether:

(i) You were unable to do what was required; or

(ii) You were able, but refused, to do what was required.

(d) If you had a good reason not to do a required activity we will work with you and may change the requirements in your individual responsibility plan if a different WorkFirst activity would help you move towards independence and employment sooner. If you have been unable to meet your WorkFirst requirements because of family violence, you and your case manager will develop an IRP to help you with your situation, including referrals to appropriate services.

**(3) What is considered a good reason for not doing what WorkFirst requires?**

You have a good reason if you were not able to do what WorkFirst requires (or get an excused absence, described in WAC 388-310-0500(5)) due to a significant problem or event

outside your control. Some examples of good reasons include, but are not limited to:

(a) You had an emergent or severe physical, mental or emotional condition, confirmed by a licensed health care professional that interfered with your ability to participate;

(b) You were threatened with or subjected to family violence;

(c) You could not locate child care for your children under thirteen years that was:

(i) Affordable (did not cost you more than your copayment would under the working connections child care program in chapter 170-290 WAC);

(ii) Appropriate (licensed, certified or approved under federal, state or tribal law and regulations for the type of care you use and you were able to choose, within locally available options, who would provide it); and

(iii) Within a reasonable distance (within reach without traveling farther than is normally expected in your community).

(iv) You could not locate other care services for an incapacitated person who lives with you and your children.

(d) You had an immediate legal problem, such as an eviction notice; or

(e) You are a person who gets necessary supplemental accommodation (NSA) services under chapter 388-472 WAC and your limitation kept you from participating. If you have a good reason because you need NSA services, we will review your accommodation plan.

**(4) What happens in my noncompliance sanction case staffing?**

(a) At your noncompliance case staffing we will ensure you were offered the opportunity to participate and discuss with you:

(i) What happens if you are sanctioned and stay in sanction;

(ii) How you can participate and get out of sanction;

(iii) How you and your family benefit when you participate in WorkFirst activities;

(iv) That if you continue to refuse to participate, without good cause, ~~((a sanction review panel may review))~~ your case ~~(, and decide to close your case)~~ may be closed after you have been in sanction status for four months in a row;

(v) How you plan to care for and support your children if ~~((a sanction review panel closed))~~ your case is closed. We will also discuss the safety of your family, as needed, using the guidelines under RCW 26.44.030; and

(vi) How to reapply if ~~((a sanction review panel closes))~~ your case is closed.

(b) If you do not come to your noncompliance sanction case staffing, we will make a decision based on the information we have.

**(5) What if we decide that you did not have a good reason for not meeting WorkFirst requirements?**

(a) Before you are placed in sanction, a supervisor will review your case to make sure:

(i) You knew what was required;

(ii) You were told how to end your sanction;

(iii) We tried to talk to you and encourage you to participate; and

(iv) You were given a chance to tell us if you were unable to do what we required.

(b) If we decide that you did not have a good reason for not meeting WorkFirst requirements, and a supervisor approves the sanction, we will send you a letter that tells you:

- (i) What you failed to do;
- (ii) That you are in sanction status;
- (iii) Penalties that will be applied to your grant;
- (iv) When the penalties will be applied;
- (v) How to request a fair hearing if you disagree with this decision; and
- (vi) How to end the penalties and get out of sanction status.

(c) We will also provide you with information about resources you may need if ~~((a sanction review panel closes))~~ your case is closed. If you are sanctioned, then we will actively attempt to contact you another way so we can talk to you about the benefits of participation and how to end your sanction.

**(6) What is sanction status?**

When you are a mandatory WorkFirst participant, you must follow WorkFirst requirements to qualify for your full grant. If you or someone else on your grant doesn't do what is required and you can't prove that you had a good reason, you do not qualify for your full grant. This is called being in WorkFirst sanction status.

**(7) Are there penalties when you or someone in your household goes into sanction status?**

(a) When someone in your household is in sanction status, we impose penalties. The penalties last until you or the household member meet WorkFirst requirements.

(b) Your grant is reduced by one person's share or forty percent, whichever is more.

**(8) How do I end the penalties and get out of sanction status?**

To stop the penalties and get out of sanction status:

- (a) You must provide the information we requested to develop your individual responsibility plan; and/or
- (b) Start and continue to do your required WorkFirst activities for four weeks in a row (that is, twenty-eight calendar days).

(c) When you leave sanction status, your grant will be restored to the level you are eligible for beginning the first of the month following your four weeks of participation. For example, if you finished your four weeks of participation on June 15, your grant would be restored on July 1.

**(9) What if I reapply for TANF or SFA and I was in sanction status when my case closed?**

If your case closes while you are in sanction status and is reopened, you will start out where you left off in sanction.

That is, if you were in month two of sanction when your case closed, you will be in month three of sanction when you are approved for TANF or SFA.

**(10) What happens if I stay in sanction status?**

(a) We will send information to a ~~((sanction review panel))~~ supervisor or designee with a recommendation to close your case.

(b) ~~((The sanction review panel))~~ A supervisor or designee will ~~((review your case and))~~ make the final decision.

~~((the sanction review panel))~~ the supervisor or designee approves case closure, your case will be closed after you have been in sanction for four months in a row.

**(11) ~~((What is a sanction review panel?))~~**

~~((a))~~ A sanction review panel is a small group of people who are independent of your local community services office and do a thorough, objective review of your sanction.

~~((b))~~ The sanction review panel makes the final decision about whether to close your case after receiving a recommendation from your case manager and reviewing your case to make sure the original sanction was appropriate and we made attempts to reengage you in the program.

**~~((12))~~ What happens when a ((sanction review panel decides to close)) supervisor or designee approves closure of my case?**

When a ~~((sanction review panel decides to close))~~ supervisor or designee approves closure of your case, we will send you a letter to tell you:

- (a) What you failed to do;
- (b) When your case will be closed;
- (c) How to request a fair hearing if you disagree with this decision;
- (d) How to end your penalties and keep your case open (if you are able to participate for four weeks in a row before we close your case); and

(e) How your participation before your case is closed can be used to meet the participation requirement in subsection ~~((13))~~ (12).

**~~((13))~~ (12) What if I reapply for TANF or SFA after a ((sanction review panel closed)) supervisor or designee approved case closure and my case was closed?**

If a ~~((sanction review panel closes))~~ supervisor or designee approves case closure and we close your case, you must participate for four weeks in a row before you can receive cash. Once you have met your four week participation requirement, your cash benefits will start, going back to the date we had all the other information we needed to make an eligibility decision.

**AMENDATORY SECTION** (Amending WSR 01-03-066, filed 1/12/01, effective 3/1/01)

**WAC 388-432-0005 Can I get help from DSHS for a family emergency without receiving monthly cash assistance?** DSHS has a program called diversion cash assistance (DCA). If your family needs an emergency cash payment but does not need ongoing monthly cash assistance, you may be eligible for this program.

(1) To get DCA, you must:

- (a) Meet all the eligibility rules for temporary assistance for needy families (TANF)/state family assistance (SFA) except:

- (i) You do not have to participate in WorkFirst requirements as defined in chapter 388-310 WAC; and

- (ii) You do not have to assign child support rights or cooperate with division of child support as defined in chapter 388-422 WAC.

- (b) Have a current bona fide or approved need for living expenses;

- (c) Provide proof that your need exists; and



(d) Have or expect to get enough income or resources to support yourselves for at least twelve months.

(2) You may get DCA to help pay for one or more of the following needs:

- (a) Child care;
- (b) Housing;
- (c) Transportation;
- (d) Expenses to get or keep a job;
- (e) Food costs, but not if an adult member of your family has been disqualified for food stamps; or
- (f) Medical costs, except when an adult member of your family is not eligible because of failure to provide third party liability (TPL) information as defined in WAC 388-505-0540.

(3) DCA payments are limited to:

(a) One thousand (~~five hundred~~) two hundred fifty dollars once in a twelve-month period which starts with the month the DCA benefits begin; and

(b) The cost of your need.

(4) We do not budget your income or make you use your resources to lower the amount of DCA payments you can receive.

(5) DCA payments can be paid:

- (a) All at once; or
- (b) As separate payments over a thirty-day period. The thirty-day period starts with the date of your first DCA payment.

(6) When it is possible, we pay your DCA benefit directly to the service provider.

(7) You are not eligible for DCA if:

(a) Any adult member of your assistance unit got DCA within the last twelve months;

(b) Any adult member of your assistance unit gets TANF/SFA;

(c) Any adult member of your assistance unit is not eligible for cash assistance for any reason unless one parent in a two-parent-assistance unit is receiving SSI; or

(d) Your assistance unit does not have a needy adult (such as when you do not receive TANF/SFA payment for yourself but receive it for the children only).

(8) If you apply for DCA after your TANF/SFA grant has been terminated, we consider you an applicant for DCA.

(9) If you apply for TANF/SFA and you received DCA less than twelve months ago:

- (a) We set up a DCA loan.
  - (i) The amount of the loan is one-twelfth of the total DCA benefit times the number of months that are left in the twelve-month period.
  - (ii) The first month begins with the month DCA benefits began.

(b) We collect the loan only by reducing your grant. We take five percent of your TANF/SFA grant each month.

(10) If you stop getting TANF/SFA before you have repaid the loan, we stop collecting the loan unless you get back on TANF/SFA.

## WSR 10-20-104

### EMERGENCY RULES

#### DEPARTMENT OF REVENUE

[Filed October 1, 2010, 10:34 a.m., effective October 1, 2010, 10:34 a.m.]

Effective Date of Rule: Immediately.

Purpose: Part I of chapter 23, Laws of 2010 1st sp. sess. (2ESSB 6143) changed the apportionment and nexus requirements for apportionable activities, effective June 1, 2010. The department has adopted the following emergency rules to explain how these requirements apply: WAC 458-20-19401 Minimum nexus thresholds for apportionable activities, 458-20-19402 Single factor receipts apportionment—Generally, 458-20-19403 Single factor receipts apportionment—Royalties, and 458-20-19404 Financial institutions—Income apportionment.

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

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

Reasons for this Finding: An emergency adoption of these new rules is necessary because permanent rules cannot be adopted at this time. This is the second emergency adoption of these rules. These drafts are the same as the previously adopted emergency rules, except that typographical errors noted by the code reviser have been corrected.

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 4, 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 4, Amended 0, Repealed 0.

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

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

Date Adopted: October 1, 2010.

Alan R. Lynn  
Rules Coordinator

#### NEW SECTION

**WAC 458-20-19401 Minimum nexus thresholds for apportionable activities. (1) Introduction.**

(a) Business and occupation (B&O) taxes may not be imposed on a business unless that business has a substantial nexus with this state. The terms "nexus" and "substantial nexus" are used interchangeably in this rule.

Section 104, chapter 23, Laws of 2010 1st sp. sess. establishes, effective June 1, 2010, minimum nexus thresholds for the B&O taxation of apportionable activities. The minimum

nexus thresholds are determined on a tax year basis. Generally, a tax year is the same as a calendar year. For the purposes of this rule, tax years will be referred to as calendar years. This means that if a taxpayer's activities in Washington meet the minimum nexus thresholds in a calendar year, the taxpayer is subject to B&O taxes for the entire calendar year. For 2010, the minimum nexus thresholds are based on the entire 2010 calendar year, but taxes are only due under the new thresholds from June 1, 2010, forward. Whether a taxpayer had substantial nexus with Washington prior to June 1, 2010, is determined by a physical presence standard. See WAC 458-20-194 for more information.

(b) Taxpayers may also find helpful information in the following rules:

(i) WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property.

(ii) WAC 458-20-194 Doing business inside and outside the state. This rule describes separate accounting and cost apportionment and applies only to tax liability incurred from January 1, 2006 through May 31, 2010.

(c) Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances.

(2) **Definitions.** Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this rule.

(a) "Apportionable activities" include only those activities subject to business and occupation tax under the following classifications:

- (i) Service and other activities,
- (ii) Royalties (see WAC 458-20-19403 for apportionment of royalties),
- (iii) Travel agents and tour operators,
- (iv) International steamship agent, international customs house broker, international freight forwarder, vessel and/or cargo charter broker in foreign commerce, and/or international air cargo agent,
- (v) Stevedoring and associated activities,
- (vi) Disposing of low-level waste,
- (vii) Title insurance producers, title insurance agents, or surplus line brokers,
- (viii) Public or nonprofit hospitals,
- (ix) Real estate brokers,
- (x) Research and development performed by nonprofit corporations or associations,
- (xi) Inspecting, testing, labeling, and storing canned salmon owned by another person,
- (xii) Representing and performing services for fire or casualty insurance companies as an independent resident managing general agent licensed under the provisions of chapter 48.17 RCW,
- (xiii) Contests of chance,
- (xiv) Horse races,
- (xv) International investment management services,
- (xvi) Room and domiciliary care to residents of a boarding home;
- (xvii) Aerospace product development,
- (xviii) Printing or publishing a newspaper (but only with respect to advertising income),

(xix) Printing materials other than newspapers and publishing periodicals or magazines (but only with respect to advertising income), and

(xx) Cleaning up radioactive waste and other by-products of weapons production and nuclear research and development, but only with respect to activities that would be taxable as an "apportionable activity" under any of the tax classifications listed in (a)(i) through (xviii) of this subsection (2) if this special tax classification did not exist.

(b) "Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(c)(i) "Property" means tangible, intangible, and real property owned or rented and used in this state during the calendar year, except as provided in (ii) of this subsection (2)(c).

(ii) Property does not include ownership of or rights in computer software, including computer software used in providing a digital automated service; master copies of software; and digital goods or digital codes residing on servers located in this state. Refer to RCW 82.04.192 and 82.04.215 for definitions of the terms "computer software," "digital automated services," "digital goods," "digital codes," and "master copies."

(d) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.

(3) **How is substantial nexus for apportionable activities determined?** A person is deemed to have substantial nexus for apportionable activities with this state in any calendar year if the person is:

(a) An individual and is a resident or domiciliary of this state during the calendar year;

(b) A business entity and is organized or commercially domiciled in this state during the calendar year; or

(c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and in any calendar year the person has:

(i) More than fifty thousand dollars of property in this state;

(ii) More than fifty thousand dollars of payroll in this state;

(iii) More than two hundred fifty thousand dollars of receipts from this state; or

(iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

(d) The Department will adjust the amounts listed in (c) of this subsection (3) based on changes in the consumer price index as required by section 104(5), chapter 23, Laws of 2010 1st sp. sess.

**(4) How is the property threshold determined?**

(a) The value of property is determined by averaging the values at the beginning and ending of the calendar year; but the department may require the averaging of monthly values during the calendar year if reasonably required to properly reflect the average value of the taxpayer's property in this state throughout the taxable period.

(b) What value is placed on property?

(i) Property the taxpayer owns and uses in this state, other than loans and credit card receivables, is valued at its original cost basis.

(ii) Loans and credit card receivables owned by the taxpayer are valued at their outstanding principal balance, without regard to any reserve for bad debts. However, if a loan or credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the loan or credit card receivable charged off is deducted from the outstanding principal balance.

(A) A loan is located in this state if:

(I) More than fifty percent (50%) of the fair market value of the real and/or personal property securing the loan is located in this state. The determination of whether the real or personal property securing a loan is located within this state must be made as of the time the original agreement was made, and any and all subsequent substitutions of collateral must be disregarded; or

(II) The borrower is located in this state, but only if a loan is:

- unsecured; or
- secured and there is no state where more than fifty percent (50%) of the fair market value of property securing the loan is located.

A borrower that is engaged in business is located in this state if the borrower's commercial domicile is located in this state. A borrower who is not engaged in business is located in this state if the borrower's billing address is located in this state.

(B) Credit card receivables are located in this state if the billing address of the card holder is located in this state.

(iii) Property the taxpayer rents and uses in this state is valued at eight times the net annual rental rate.

(c) For purposes of this subsection, the following definitions apply:

(i) "Credit card" means a card or device existing for the purpose of obtaining money, property, labor, or services on credit.

(ii) "Net annual rental rate" means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

**(5) How is the payroll threshold determined?** "Payroll" is the total compensation (wages, salaries, commissions, and any other form of remuneration defined as gross income under 26 U.S.C. Sec. 61 of the federal internal revenue code of 1986, as of June 1, 2010) paid during the calendar year to employees and non-employees (third-party representatives) who represent the taxpayer in interactions with the taxpayer's clients and includes sales commissions.

(a) Employee compensation is paid in this state if the compensation is properly reportable to this state for unem-

ployment compensation tax purposes, regardless of whether the compensation was actually reported to this state.

(b) Nonemployee compensation is paid in this state if the service performed by the representative third party occurs entirely or primarily within this state.

**(6) How is the receipts threshold determined?** The receipts threshold includes only the taxpayer's gross income assigned to this state from engaging in apportionable activities. The gross income of the business is attributed to this state if it is part of the numerator of the apportionment calculation as explained in WAC 458-20-19402, 19403, or 19404.

**(7) If an out-of-state taxpayer does not meet the \$50,000 property, \$50,000 payroll, or \$250,000 receipts nexus thresholds, can it still have substantial nexus with Washington?** Yes. If twenty-five percent (25%) of an out-of-state taxpayer's property, payroll, or receipts from apportionable activities is in Washington, then the taxpayer has substantial nexus with Washington. The twenty-five percent (25%) threshold is determined by dividing the value of property located in Washington by the total value of taxpayer's property, payroll located in Washington by taxpayer's total payroll, or the receipts attributed to Washington by total receipts.

**(8) Do the minimum nexus thresholds explained in this rule apply to local gross receipts business and occupations taxes?** No. Taxpayers must still comply with their local business and occupations tax nexus laws. This rule does not apply to the nexus requirements for local gross receipts business and occupation taxes.

**(9) Once established, how long does nexus continue?**

A person who establishes substantial nexus with this state in any calendar year will be deemed to have a substantial nexus with this state for the following calendar year. This applies for all taxpayers, regardless of the business and occupation tax classification(s) they are subject to, e.g. service and other activities, retailing, or wholesaling.

**(10) Do the nexus thresholds in subsection (3) of this rule apply to non-apportionable activities?** No. The nexus thresholds in subsection (3) of this rule apply only with respect to apportionable activities.

(a) A person engaged in non-apportionable activities is subject to B&O tax on a non-apportionable activity only if the person has a physical presence in this state, which need only be demonstrably more than a slightest presence. This is true even if the person is engaged in apportionable activities in this state and has nexus under the thresholds in subsection (3) of this rule. A person is physically present in this state if the person has property or employees in this state. A person is also physically present in this state if the person, either directly or through an agent or other representative, engages in activities in this state that are significantly associated with the person's ability to establish or maintain a market for its products in this state.

(b) Non-apportionable activities include those activities taxed under the following B&O tax classifications: Retailing, wholesaling, manufacturing, processing for hire, extracting, extracting for hire, printing and publishing (except for advertising), government contracting, public road construction, the classifications in RCW 82.04.280 (2) and (6), and

any other activity not specifically included in the definition of apportionable activities in subsection (3) of this rule.

(11) **Examples.** For each of the examples in this subsection (11), gross income received by the taxpayer is from engaging in apportionable activities. Also, the examples have no applicability to tax liability prior to June 1, 2010.

(a) **Example 1:** Company A is domiciled in State X. In a calendar year it has \$150,000 in royalty receipts attributed to Washington per WAC 458-20-19403 and \$150,000 in gross income from other apportionable activities attributed to Washington per WAC 458-20-19402.

Company A has substantial nexus with Washington because it has a total of \$300,000 in receipts attributed to Washington in a calendar year. It does not matter that the receipts were from apportionable activities that are subject to tax under different B&O tax classifications. Substantial nexus is determined by the totality of the taxpayer's apportionable activities in Washington.

(b) **Example 2:** Company B is domiciled in state Y. In a calendar year it has \$45,000 in property, \$45,000 in payroll, and \$240,000 in gross income attributed to Washington. Its total property is valued at \$200,000; its world-wide payroll is \$200,000; and its total gross income is \$2,000,000. Company B does not have substantial nexus with Washington during the calendar year based on the minimum thresholds listed in subsection (3) above.

(c) **Example 3:** Assume the same facts as Example 2 except world-wide payroll is \$150,000. With the changed facts, Company B has substantial nexus with Washington because thirty percent (30%) of its payroll is located in Washington.

(d) **Example 4:** Company C is domiciled in Canada. It has \$200,000 of gross income attributed to Washington and \$300,000 of gross income attributed to Canada. Company C has no property or payroll located in Washington. Company C has substantial nexus with Washington because forty percent of its receipts are attributed to Washington.

(e) **Example 5:** Company D has no property located in Washington on January 1st and on December 31st of a calendar year. However, it brought \$100,000 in property into Washington on January 15th and removed it from Washington on November 15th of that calendar year. The department may compute the value of Company D's property on a monthly basis in this situation because it is required to properly reflect the average value of Company D's property in Washington (\$100,000 multiplied by ten divided by 12 which is \$83,333). Company D has nexus with Washington based on the value of the property averaged over the calendar year.

(f) **Example 6:** Company E receives \$100,000 in gross income attributed to Washington on each of March 15, 2010; July 12, 2010; and November 1, 2010. Company E has substantial nexus with Washington for the period June 1, 2010, through December 31, 2010, because it received \$300,000 in gross income during 2010. Company E will also have substantial nexus with Washington for 2011 regardless of the amount of gross income attributed to Washington in 2011.

## NEW SECTION

### **WAC 458-20-19402 Single factor receipts apportionment—Generally. (1) Introduction.**

(a) Section 105, chapter 23, Laws of 2010 1st sp. sess. establishes a new apportionment method for businesses engaged in apportionable activities and that have nexus with Washington. The new apportionment method explained in this rule only applies to business and occupation (B&O) tax liability incurred after May 31, 2010. This rule does not apply to the apportionment of income of financial institutions taxable under RCW 82.04.290, which is governed by WAC 458-20-19404, nor the receipt of royalty income from granting the right to use intangible property under WAC 458-20-19403.

(b) Taxpayers may also find helpful information in the following sections:

(i) WAC 458-20-19401 Minimum nexus thresholds for apportionable activities. This rule describes minimum nexus thresholds that are effective June 1, 2010.

(ii) WAC 458-20-19403 Single factor receipts apportionment—Royalties. This rule describes the application of single factor receipts apportionment to gross income from royalties and applies only to tax liability incurred after May 31, 2010.

(iii) WAC 458-20-19404 Single factor receipts apportionment—Financial institutions. This rule describes the application of single factor receipts apportionment to certain income of financial institutions and applies only to tax liability incurred after May 31, 2010.

(iv) WAC 458-20-194 Doing business inside and outside the state. This rule describes separate accounting and cost apportionment and applies only to tax liability incurred from January 1, 2006 through May 31, 2010.

(v) WAC 458-20-14601 Financial institutions—Income apportionment. This rule describes the apportionment of income for financial institutions for tax liability incurred prior to June 1, 2010.

(c) Examples included in this rule identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances.

(2) **Definitions.** The following definitions apply to this rule:

(a) "Apportionable income" means gross income of the business generated from engaging in apportionable activities, including income received from apportionable activities performed outside this state if the income would be taxable under this chapter if received from activities in this state, less the exemptions and deductions allowable under chapter 82.04 RCW.

(i) Example 1. Corporation A received \$2,000,000 in gross income from its world-wide apportionable activities, including \$500,000 in world-wide bona fide initiation fees deductible under RCW 82.04.4282. Corporation A's apportionable income would be \$1,500,000.

(b) "Apportionable activities" means only those activities subject to B&O tax under the following classifications:

(i) Service and other activities,

(ii) Royalties (see WAC 458-20-19403 for apportionment of royalties),

- (iii) Travel agents and tour operators,
  - (iv) International steamship agent, international customs house broker, international freight forwarder, vessel and/or cargo charter broker in foreign commerce, and/or international air cargo agent,
  - (v) Stevedoring and associated activities,
  - (vi) Disposing of low-level waste,
  - (vii) Title insurance producers, title insurance agents, or surplus line brokers,
  - (viii) Public or nonprofit hospitals,
  - (ix) Real estate brokers,
  - (x) Research and development performed by nonprofit corporations or associations,
  - (xi) Inspecting, testing, labeling, and storing canned salmon owned by another person,
  - (xii) Representing and performing services for fire or casualty insurance companies as an independent resident managing general agent licensed under the provisions of chapter 48.17 RCW,
  - (xiii) Contests of chance,
  - (xiv) Horse races,
  - (xv) International investment management services,
  - (xvi) Room and domiciliary care to residents of a boarding home;
  - (xvii) Aerospace product development,
  - (xviii) Printing or publishing a newspaper (but only with respect to advertising income),
  - (xix) Printing materials other than newspapers and publishing periodicals or magazines (but only with respect to advertising income), and
  - (xx) Cleaning up radioactive waste and other by-products of weapons production and nuclear research and development, but only with respect to activities that would be taxable as an "apportionable activity" under any of the tax classifications listed in (a)(i) through (xviii) of this subsection (2) if this special tax classification did not exist.
- (c) "Business activities tax" means a tax measured by the amount of, or economic results of, business activity conducted in a state. The term includes taxes measured in whole or in part on net income or gross income or receipts. The term includes personal income taxes if the gross income from apportionable activities is included in the gross income subject to the personal income tax. The term "business activities tax" does not include a sales tax, use tax, or similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a gross receipts tax or a tax imposed on the privilege of doing business.
- (d) "Customer" means a person or entity to whom the taxpayer makes a sale or renders services or from whom the taxpayer otherwise receives gross income of the business.
- (e) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.
- (f) "Taxable in another state" means either:
- (i) The taxpayer is actually subject to a business activities tax by another state on its income received from engaging in apportionable activity; or
  - (ii) The taxpayer is not subject to a business activities tax by another state on its income received from engaging in

apportionable activity, but the other state has jurisdiction to subject the taxpayer to a business activities tax on such income under the substantial nexus thresholds described in WAC 458-20-19401.

(3) **Apportionment general:** Persons earning apportionable income subject to B&O tax and that are also taxable in another state are entitled to determine their taxable income for B&O tax purposes by using the apportionment method provided in this rule. Taxable income is determined by multiplying apportionable income from each apportionable activity by its receipts factor.

(4) **Receipts Factor.** The receipts factor is a fraction that applies to all apportionable income for each calendar year. Separate receipts factors must be calculated for each apportionable activity taxed under a separate business and occupation tax classification.

(a) The numerator of the receipts factor is the total gross income of the business of the taxpayer attributable to this state during the calendar year from engaging in an apportionable activity.

(b) The denominator of the receipts factor is the total gross income of the business of the taxpayer from engaging in an apportionable activity everywhere in the world during the tax year, less amounts that are attributed to states where the taxpayer is not taxable and at least some of the activity is performed in Washington.

(c) Example 2. XYZ Corp. is a Washington business, has no property or payroll outside of Washington, and performs all of its services inside this state. XYZ Corp. has gross income from apportionable activities that is attributed using the criteria listed in subsection (5) below as follows: Washington \$500,000; Idaho \$200,000; Oregon \$100,000; and California \$300,000. XYZ Corp. is subject to Oregon corporate income tax, but does not owe any California or Idaho business activities taxes. The \$200,000 that would be attributed to Idaho is excluded from the denominator because XYZ Corp. performs the services in Washington, and it is not subject to actual Idaho business activities taxes and does not have substantial nexus with Idaho under Washington thresholds. Although California does not impose a business activities tax on XYZ Corp., XYZ Corp. does have substantial nexus with California using Washington thresholds (more than \$250,000 in receipts). Therefore, the California attributed income is not excluded from the denominator. The Oregon receipts remain in the denominator because XYZ Corp. is subject to Oregon corporate income taxes. The receipts factor is 500,000/900,000 or 55.56%.

(d) Example 3. The same facts as Example 2 except all of XYZ's property and payroll are located in Oregon, and XYZ Corp. performs no activities in Washington related to the \$200,000 attributed to Idaho. In this situation, the \$200,000 is not excluded from the denominator. The receipts factor is 500,000/1,100,000 or 45.45%.

(5) **Attribution of income.** Income is attributed to states based on a cascading method. That is, each receipt is attributed to a state based on a series of rules. These rules are:

(a)(i) Where the customer received the benefit of the taxpayer's service. The location of the benefit of the service or services is determined on an activity by activity basis. A taxpayer receives the benefit of a service in this state when:

(A) The service relates to real property that is located in this state;

(B) An apportionable service relates to tangible personal property that is located in this state at the time the service is received; or

(C) The service does not relate to real or tangible personal property, and:

(I) The service is provided to a person not engaged in business who is physically present in this state at the time the service is received; or

(II) The service is provided to a person engaged in business in this state, and the service relates to the person's business activities in this state.

(ii) Examples.

(A) Example 4. Director serves on the board of directors of DEF, Inc. DEF, Inc. is commercially domiciled in State Z. DEF, Inc. is Director's customer. DEF is engaged in business in State Z, and the director's services relate to the management of DEF, Inc. Therefore, DEF, Inc. receives the benefit of Director's services in State Z.

(B) Example 5. ABC is headquartered outside of Washington and provides retail services to customers in Washington, Oregon, and Idaho. When those customers fail to pay ABC for its services, ABC contracts with Debt Collector located outside of Washington to collect the debt. ABC pays Debt Collector a percentage of the amount collected. ABC is engaged in business in Washington and the activities of Debt Collector relate to that business, therefore the benefit of the service is received by ABC in Washington when Debt Collector obtains payment from debtors located in Washington.

(b) If the customer received the benefit of the service in more than one state, gross income of the business must be attributed to the state in which the benefit of the service was primarily received.

(i) Example 6. The same facts as Example 5, except Debt Collector is paid a fixed amount per month regardless of the total amount collected from debtors, and the debtors are located in Idaho and Washington. The vast majority of debtors referred to Debt Collector are located in Idaho. Debt Collector would attribute its receipts from ABC to Idaho even though a portion of the benefit of Debt Collector's services is received by ABC in Washington.

(ii) Example 7. The same facts as Example 6, except the debtors are in every state and no state has a majority of the debtors. Because the benefit of Debt Collector's services are not primarily received by ABC in any single state, the receipts cannot be attributed using (a) or (b) of this subsection (5), and Debtor Collector will have to use the remaining rules in (c) through (g) of this subsection (5) to attribute the income from ABC.

(c) If the taxpayer is unable to attribute gross income of the business under (a) or (b) of this subsection (5), gross income of the business must be attributed to the state from which the customer ordered the service.

(d) If the taxpayer is unable to attribute gross income of the business under (a), (b), or (c) of this subsection (5), gross income of the business must be attributed to the state to which the billing statements or invoices are sent to the customer by the taxpayer.

(e) If the taxpayer is unable to attribute gross income of the business under (a), (b), (c), or (d) of this subsection (5), gross income of the business must be attributed to the state from which the customer sends payment to the taxpayer.

(f) If the taxpayer is unable to attribute gross income of the business under (a), (b), (c), (d), or (e) of this subsection (5), gross income of the business must be attributed to the state where the customer is located as indicated by the customer's address: (i) Shown in the taxpayer's business records maintained in the regular course of business; or (ii) obtained during consummation of the sale or the negotiation of the contract for services, including any address of a customer's payment instrument when readily available to the taxpayer and no other address is available.

(g) If the taxpayer is unable to attribute gross income of the business under (a), (b), (c), (d), (e) or (f) of this subsection (5), gross income of the business must be attributed to the commercial domicile of the taxpayer.

**(6) Reporting methods.**

(a) Taxpayers entitled to use the apportionment method described in this rule may report their apportionable income based on the receipts factor for the most recent calendar year for which the taxpayer has information. If a taxpayer does not calculate the receipts factor for the current tax year based on the most recent tax year for which information is available, the taxpayer must use current year information.

(b) Regardless of how a taxpayer reports its apportionable income under (a) of this subsection 6, when the taxpayer has the information from which to determine the receipts for a calendar year, it must file reconciliation and either obtain a refund or pay the additional tax. In either event (refund or additional taxes due), interest will apply retroactively to the due date of each tax return. If the reconciliation is completed prior to October 31st of the following year, no penalties will apply.

(c) Example 8: Assume that LMN is headquartered in Washington, reports B&O taxes on a quarterly basis, and its apportionable income is a constant \$300,000 per quarter. LMN's receipts factor after performing the reconciliation is as follows:

Year	Receipt factor	When Determined
Year 1	0.28	March of Year 2
Year 2	0.25	September of Year 3
Year 3	0.35	June of Year 4
Year 4	0.30	June of Year 5

The following table demonstrates how LMN should report its apportionable income for Years 3 and 4.

Tax return	Gross income	Receipt factor used	Taxable reported	Reconciliation amount
Year 3 Quarter 1	300,000	0.28 <sup>1</sup>	84,000	
Year 3 Quarter 2	300,000	0.28	84,000	
Year 3 Quarter 3	300,000	0.25 <sup>2</sup>	75,000	
Year 3 Quarter 4	300,000	0.25	75,000	

Tax return	Gross income	Receipt factor used	Taxable reported	Reconciliation amount
Year 4 Quarter 1	300,000	0.25	75,000	
Year 4 Quarter 2	300,000	0.35 <sup>3</sup>	105,000	
Year 3 reconciliation	1,200,000	0.35	420,000	102,000 <sup>4</sup>
Year 4 Quarter 3	300,000	0.35	105,000	
Year 4 Quarter 4	300,000	0.35	105,000	
Year 4 econciliation	1,200,000	0.30	360,000	(30,000) <sup>5</sup>

<sup>1</sup> LMN will be using its year 1 receipts factor for the first 2 quarters of year 3 because it is the most recent year for which it has accurate numbers.

<sup>2</sup> LMN will change its receipts factor for the third quarter to year 2's actual receipts factor because it now has that information.

<sup>3</sup> LMN will change its receipts factor for the third quarter to year 3's actual receipts factor because it now has that information.

<sup>4</sup> LMN will file its reconciliation for Year 3. The taxable amount is \$420,000 less the previously reported taxable amount of \$318,000. This means LMN will owe taxes on \$102,000 plus interest on the underpaid taxes. However, no penalties will be imposed if the reconciliation is filed with the department no later than October 31st of Year 4.

<sup>5</sup> LMN will file its reconciliation for Year 3. The taxable amount is \$360,000 less the previously reported taxable amount of \$390,000. This means LMN overpaid taxes by \$30,000. LMN will receive interest on the overpaid taxes.

## NEW SECTION

**WAC 458-20-19403 Single factor receipts apportionment—Royalties.** (1) **Introduction.** Effective June 1, 2010, section 105, chapter 23, Laws of 2010 1st sp. sess. changed Washington's method of apportioning the gross income from royalties. This rule addresses how such gross income must be apportioned when the business receives royalty payments from both within and outside the state.

(a) This rule is limited to the apportionment of gross income from royalties. This rule does not apply to apportionment or allocation of income from any other business activity.

(b) Taxpayers may also find helpful information in the following rules:

(i) WAC 458-20-19401 Minimum nexus thresholds for apportionable activities. This rule describes minimum nexus thresholds that are effective June 1, 2010.

(ii) WAC 458-20-19402 Single factor receipts apportionment—Generally. This rule describes the general application of single factor receipts apportionment that is effective June 1, 2010.

(iii) WAC 458-20-19404 Single factor receipts apportionment—Financial institutions. This rule describes the application of single factor receipts apportionment to certain income of financial institutions and applies only to tax liability incurred after May 31, 2010.

(iv) WAC 458-20-194 Doing business inside and outside the state. This rule describes separate accounting and cost apportionment and applies only to tax liability incurred from January 1, 2006 through May 31, 2010.

(v) WAC 458-20-14601 Financial institutions—Income apportionment. This rule describes the apportionment of income for financial institutions for periods prior to June 1, 2010.

(2) **Definitions for the purposes of this rule.** Unless the context clearly requires otherwise, the definitions in this subsection apply throughout this rule.

(a) "Apportionable activity" means those activities conducted by a person in the business of receiving gross income from royalties.

(b) "Apportionable income" means gross income of the business generated from engaging in apportionable activity, including income received from apportionable activity performed outside Washington if the income would be taxable under the business and occupation tax if received from activities in Washington less any allowable exemptions and deductions under chapter 82.04 RCW.

(c) "Business activities tax" means a tax measured by the amount of, or economic results of, business activity conducted in a state by a person. The term includes taxes measured in whole or in part on net income or gross income or receipts. The term includes personal income taxes if the gross income from royalties is included in the gross income subject to the personal income tax. The term "business activities tax" does not include a sales tax, use tax, or similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not referred to as a gross receipts tax or a tax imposed on the privilege of doing business.

(d) "Customer" means a person who pays royalties or charges in the nature of royalties for the use of the taxpayer's intangible property.

(e) "Gross income from royalties" means compensation for the use of intangible property, including charges in the nature of royalties regardless of where the intangible property will be used. "Gross income from royalties" does not include compensation for any natural resources, the licensing of pre-written computer software to the end user, or the licensing of digital goods, digital codes, or digital automated services to the end user as defined in RCW 82.04.190(11).

(f) "Intangible property" includes: copyrights, patents, licenses, franchises, trademarks, trade names and similar items.

(g) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.

(h) "Taxable in another state" means either:

(i) The taxpayer is actually subject to a business activities tax by another state on its income received from engaging in apportionable activity; or

(ii) The taxpayer is not subject to a business activities tax by another state on its income received from engaging in apportionable activity, but the other state has jurisdiction to subject the taxpayer to a business activities tax on such income under the substantial nexus thresholds described in WAC 458-20-19401.

(iii) "Not Taxable" with respect to a particular state means the taxpayer is not actually subject to a business activities tax by that state on its income received from engaging in apportionable activities and that state does not have jurisdiction

tion to subject the taxpayer to a business activities tax on such income under the substantial nexus thresholds described in WAC 458-20-19401.

(3) **How does a taxpayer apportion its gross income from royalties?** A taxpayer earning gross income from royalties generated on or after June 1, 2010, must apportion such income when the taxpayer is taxable in another state. Gross income is apportioned to Washington by multiplying apportionable income by the receipts factor. The resulting amount of taxable income is then multiplied by the applicable tax rate.

(4) **What is the receipts factor?** The "receipts factor" is a fraction with the following numerator and denominator:

(a) Numerator: is the total gross income from royalties attributable to Washington during the tax year. Generally, a tax year is the same as a calendar year. For the purposes of this rule, tax years will be referred to as calendar years.

(b) Denominator: is the total gross income from royalties attributable to everywhere in the world during the calendar year, less amounts that are attributed to states where the taxpayer is not taxable if at least some of the apportionable activity is performed in Washington.

(5) **How are royalty receipts attributed to Washington?** To compute the numerator of the receipts factor, gross income from royalties is attributable to states as follows:

(a) Place of use: where the customer used the taxpayer's intangible property. The location of the use of the intangible is determined on a license use basis.

(b) Primary place of use: if the customer used the intangible property in more than one state, gross income of the business must be attributed to the state in which the intangible property was primarily used.

(c) Office of negotiation: if the taxpayer is unable to attribute gross income to a location under (a) or (b) of this subsection (5), then gross income must be attributed to the office of the customer from which the royalty agreement with the taxpayer was negotiated.

(d) Billing state: if the taxpayer is unable to attribute gross income to a location under (a), (b), or (c) of this subsection (5), then gross income must be attributed to the state to which the billing statement or invoices are sent to the customer by the taxpayer.

(e) Payment state: if the taxpayer is unable to attribute gross income to a location under (a), (b), (c), or (d) of this subsection (5), then gross income must be attributed to the state from which the customer sends payment to taxpayer.

(f) Customer's address: if the taxpayer is unable to attribute gross income under (a), (b), (c), (d), or (e) of this subsection (5), then gross income must be attributed to the state where the customer is located as indicated by customer's address:

(i) As shown in the taxpayer's business records maintained in the regular course of business; or

(ii) Obtained during negotiation of the contract for the use of the taxpayer's intangible property, including any address of a customer's payment instrument when readily available to the taxpayer and no other address is available.

(g) Taxpayer's domicile: if the taxpayer is unable to attribute gross income under (a), (b), (c), (d), (e), or (f) of this

subsection (5), then gross income must be attributed to the commercial domicile of the taxpayer.

(6) **Examples.** Examples included in this subsection identify a number of facts and then state a conclusion; they should be used only as a general guide. The tax results of all situations must be determined after a review of all the facts and circumstances.

(a) **Example 1:** Taxpayer has its domicile in California and runs a national restaurant franchising business. Taxpayer enters into a contract with Company A under which Taxpayer licenses the right to use its trademark to Company A's so that Company A can display that trademark on its restaurant, menus, marketing materials, etc. Company A has a single restaurant that is located in Washington. Company A pays Taxpayer \$500,000 per calendar year for the right to use the trademark at its restaurant in Washington. Pursuant to the first sourcing rule, the intangibles (trademark) are used in Washington. Therefore, Taxpayer would attribute the \$500,000 in receipts from Company A to Washington.

(b) **Example 2:** Same facts as Example 1 except Company A in a single contract receives the right to use Taxpayer's trademark in as many restaurants as it wants in Washington and Idaho and pays \$500,000 for each restaurant when the restaurant opens and each calendar year thereafter. Company A opens two restaurants in Idaho and one in Washington. Taxpayer would attribute \$500,000 it received from Company A to Washington and \$1,000,000 to Idaho.

(c) **Example 3:** Same facts as Example 1 above, except that Company A now has many locations in Idaho but still only one in Washington. Further, Company A enters into a new contract with Taxpayer under which Company A must now pay \$1,500,000 per calendar year for the exclusive and unlimited right to the use of the trademark in Idaho but only a single location in Washington. Because the intangible is used in more than one state, but is primarily used in Idaho, Taxpayer would attribute all receipts received from Company A, (i.e. \$1,500,000) to Idaho pursuant to the second sourcing rule.

(7) **What data can be used for calculating the receipts factor?**

(a) A taxpayer may calculate the receipts factor for the current calendar year based on the most recent calendar year for which information is available for the full calendar year. Taxpayers may refer to WAC 458-20-19402 for an example of the application of the use of the most current information available.

(b) If a taxpayer does not calculate the receipts factor for the current calendar year based on the previous calendar year information as authorized in this rule, the business must use current year information to calculate the receipts factor for the current tax year.

(c) In either case, a taxpayer must correct the reporting for the current calendar year when complete information is available to calculate the receipts factor for that year, but not later than October 31st of the following calendar year. Taxpayers may refer to WAC 458-20-19402 for an example of the reconciliation.

(8) **What interest applies to underpayments and overpayments?**



(a) Interest will apply to any additional tax due on a corrected tax return. Interest must be assessed at the rate provided for delinquent excise taxes under RCW 82.32.050 retroactively to the date the original return was due and will accrue until the additional taxes are paid.

(b) Interest as provided in RCW 82.32.060 will apply to any tax paid in excess of that properly due on a return as a result of a taxpayer using previous calendar year data or incomplete current year data to calculate the receipts factor.

(9) **What penalties may apply?** Penalties as provided in RCW 82.32.090 will apply to any additional taxes due only if the current calendar year reporting is not corrected and the additional tax is not paid by October 31st of the following calendar year.

#### NEW SECTION

#### **WAC 458-20-19404 Financial institutions—Income apportionment. (1) Introduction.**

(a) Effective June 1, 2010, section 108, chapter 23, Laws of 2010 1st sp. sess. changed Washington's method of apportioning certain gross income from engaging in business as a financial institution. This rule addresses how such gross income must be apportioned when the financial institution engages in business both within and outside the state.

(b) Taxpayers may also find helpful information in the following rules:

(i) WAC 458-20-19401 Minimum nexus thresholds for apportionable activities. This rule describes minimum nexus standards that are effective June 1, 2010.

(ii) WAC 458-20-19402 Single factor receipts apportionment—Generally. This rule describes the general application of single factor receipts apportionment that is effective June 1, 2010.

(iii) WAC 458-20-19403 Single factor receipts apportionment—Royalties. This rule describes the application of single factor receipts apportionment to gross income from royalties and applies only to tax liability incurred after May 31, 2010.

(iv) WAC 458-20-194 Doing business inside and outside the state. This rule describes separate accounting and cost apportionment. It applies only to the periods January 1, 2006, through May 31, 2010.

(v) WAC 458-20-14601 Financial institutions—Income apportionment. This rule describes the apportionment of income for financial institutions for periods prior to June 1, 2010.

(c) Financial institutions engaged in making interstate sales of tangible personal property should also refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property).

#### **(2) Apportionment and allocation.**

(a) Except as otherwise specifically provided, a financial institution taxable under RCW 82.04.290 and taxable in another state must allocate and apportion its service and other activities income as provided in this rule. Any other apportionable income must be apportioned pursuant to WAC 458-20-19402 (Single factor receipts apportionment—Generally) or WAC 458-20-19403 (Single factor receipts apportionment—Royalties). "Apportionable income" means gross

income of the business generated from engaging in apportionable activities, including income received from apportionable activities performed outside this state if the income would be taxable under chapter RCW 82.04 if received from activities in this state, less the exemptions and deductions allowable under chapter RCW 82.04. All gross income that is not includable in service and other activities income or gross income must be allocated pursuant to chapter 82.04 RCW. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States, except such institutions that are exempt under RCW 82.04.315, whose effectively connected income (as defined under the Federal Internal Revenue Code) is taxable both in this state and another state, other than the state in which it is organized, must allocate and apportion its gross income as provided in this rule.

(b) The apportionment percentage is determined by the taxpayer's receipts factor (as described in subsection (4) of this rule).

(c) The receipts factor must be computed according to the method of accounting (cash or accrual basis) used by the taxpayer for Washington state tax purposes for the taxable period. Persons should refer to WAC 458-20-197 (When tax liability arises) and WAC 458-20-199 (Accounting methods) for further guidance on the requirements of each accounting method. Generally, financial institutions are required to file returns on a monthly basis. To enable financial institutions to more easily comply with this rule, financial institutions may file returns using the receipts factor calculated based on the most recent calendar year for which information is available. If a financial institution does not calculate its receipts factor based on the previous calendar year for which information is available, it must use the current year information to make that calculation. In either event, a reconciliation must be filed for each year not later than October 31st of the following year. See WAC 458-20-19402 for an example of how to use the most recent calendar year for which information is available. In the case of consolidations, mergers, or divestitures, a taxpayer must make the appropriate adjustments to the factors to reflect its changed operations.

(d) Interest and penalties on reconciliations under (c) of this subsection (2) apply as follows:

(i) Interest must be assessed on any additional tax due at the rate provided for delinquent excise taxes under chapter 82.32 RCW, retroactively to the date the original return was due, and will accrue until the additional taxes are paid.

(ii) Interest as provided in RCW 82.32.060 will apply to any tax paid in excess of that properly due on a return as a result of a taxpayer using previous calendar year data or incomplete current year data to calculate the receipts factor.

(iii) Penalties as provided in RCW 82.32.090 will apply to any such additional tax due only if the reconciliation for a tax year is not completed and additional tax is not paid by October 31st of the following year.

(e) See WAC 458-20-19402 for an example of the reconciliation process.

(f) If the allocation and apportionment provisions of this rule do not fairly represent the extent of its business activity in this state, the taxpayer may petition for, or the department

may require, in respect to all or any part of the taxpayer's business activity:

- (i) Separate accounting;
- (ii) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (iii) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's receipts.

(3) **Definitions.** The following definitions apply throughout this rule unless the context clearly requires otherwise:

(a) "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable period (or on such later date in the taxable period when the customer relationship began) as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) "Borrower or credit card holder located in this state" means:

(i) A borrower, other than a credit card holder, that is engaged in a trade or business and maintains its commercial domicile in this state; or

(ii) A borrower that is not engaged in a trade or business or a credit card holder, whose billing address is in this state.

(c) "Commercial domicile" means:

(i) The headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed; or

(ii) If a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile is deemed for the purposes of this rule to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It is presumed, subject to rebuttal by a preponderance of the evidence, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable period.

(d) "Credit card" means credit, travel or entertainment card.

(e) "Credit card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card.

(f) "Department" means the department of revenue.

(g) "Employee" means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

(h) "Financial institution" means:

(i) Any corporation or other business entity chartered under Titles 30, 31, 32, or 33 RCW, or registered under the Federal Bank Holding Company Act of 1956, as amended, or

registered as a savings and loan holding company under the Federal National Housing Act, as amended;

(ii) A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act, 12 U.S.C. Sec. 21 et seq.;

(iii) A savings association or federal savings bank as defined in the Federal Deposit Insurance Act, 12 U.S.C. Sec. 1813 (b)(1);

(iv) Any bank or thrift institution incorporated or organized under the laws of any state;

(v) Any corporation organized under the provisions of 12 U.S.C. Secs. 611 to 631;

(vi) Any agency or branch of a foreign depository as defined in 12 U.S.C. Sec. 3101 that is not exempt under RCW 82.04.315;

(vii) Any credit union, other than a state or federal credit union exempt under state or federal law;

(viii) A production credit association organized under the Federal Farm Credit Act of 1933, all of whose stock held by the Federal Production Credit Corporation has been retired.

(i) "Gross income of the business," "gross income," or "income":

(i) Has the same meaning as in RCW 82.04.080 and means the value proceeding or accruing by reason of the transaction of the business engaged in and includes compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses; and

(ii) Does not include amounts received from an affiliated person if those amounts are required to be determined at arm's length per sections 23A or 23B of the Federal Reserve Act. For the purpose of this subsection (3)(i) affiliated means the affiliated person and the financial institution are under common control. Common control means the possession (directly or indirectly), of more than fifty percent of power to direct or cause the direction of the management and policies of each entity. Control may be through voting shares, contract, or otherwise.

(iii) Financial institutions must determine their gross income of the business from gains realized from trading in stocks, bonds, and other evidences of indebtedness on a net annualized basis.

(j) "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. "Loan" includes participations, syndications, and leases treated as loans for federal income tax purposes. "Loan" does not include: futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or

other mortgage-backed or asset-backed security; and other similar items.

(k) "Loan secured by real property" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation was real property, when valued at fair market value as of the time the original loan or obligation was incurred.

(l) "Merchant discount" means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the card holder.

(m) "Participation" means an extension of credit in which an undivided ownership interest is held on a *pro rata* basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

(n) "Person" has the meaning given in RCW 82.04.030.

(o) "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(p) "Service and other activities income" means the gross income of the business taxable under RCW 82.04.290, including income received from activities outside this state if the income would be taxable under RCW 82.04.290 if received from activities in this state, less the exemptions and deductions allowable under chapter 82.04 RCW.

(q) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country.

(r) "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(s) "Taxable in another state" means either:

(i) The taxpayer is subject to business activities tax by another state on its service and other activities income; or

(ii) The taxpayer is not subject to a business activities tax by another state on its service and other activities income, but that state has jurisdiction to subject the taxpayer to a business activities tax on such income under the substantial nexus standards explained in WAC 458-20-19401. For purposes of this subsection (3)(s), "business activities tax" means a tax measured by the amount of, or economic results of, business activity conducted in a state. The term includes taxes measured in whole or in part on net income or gross income or receipts. "Business activities tax" does not include a sales tax, use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a gross receipts tax or a tax imposed on the privilege of doing business.

(t) "Taxable period" means the calendar year during which tax liability is incurred.

**(4) Receipts factor.**

(a) General. The receipts factor is a fraction, the numerator of which is the gross income of the taxpayer in this state

during the taxable period and the denominator of which is the gross income of the taxpayer inside and outside this state during the taxable period. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator.

(b) Interest from loans secured by real property.

(i) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the income described in this subsection (4)(b)(i) is included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the income described in this subsection (4)(b)(i) must be included in the numerator of the receipts factor if the borrower is located in this state.

(ii) The determination of whether the real property securing a loan is located within this state must be made as of the time the original agreement was made and any and all subsequent substitutions of collateral must be disregarded.

(c) Interest from loans not secured by real property. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state. Interest and fees on loans secured by commercial aircraft that qualifies for the exemption from business and occupation tax under section 112, chapter 23, Laws of 2010, 1st sp. sess. are not to be included in either numerator nor the denominator of the receipts factor.

(d) Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the coupon stripping rules of Section 1286 of the Federal Internal Revenue Code.

(i) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (b) of this subsection (4) and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(ii) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (c) of this subsection (4) and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(e) Receipts from credit card receivables. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and income from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state.

(f) Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains (but not less than zero) from the sale of credit card receivables

multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (e) of this subsection (4) and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(g) Credit card issuer's reimbursement fees. The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to (e) of this subsection (4) and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(h) Receipts from merchant discount. The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this state. Such receipts must be computed net of any cardholder charge backs, but must not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its card holders.

(i) Loan servicing fees.

(i)(A) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor under (b) of this subsection (4) and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor under (c) of this subsection (4) and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(ii) If the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor includes such fees if the borrower is located in this state.

(j) Receipts from services. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection (4) if the service is performed in this state. If the service is performed both inside and outside this state, the numerator of the receipts factor includes receipts from services not otherwise apportioned under this subsection (4), if a greater proportion of the activity producing the receipts is performed in this state based on cost of performance.

(k) Receipts from investment assets and activities and trading assets and activities.

(i) Interest, dividends, net gains (but not less than zero) and other income from investment assets and activities and from trading assets and activities are included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: Investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency

transactions. With respect to the investment and trading assets and activities described in (k)(i)(A) and (B) of this subsection (4), the receipts factor includes the following:

(A) The receipts factor includes the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(B) The receipts factor includes the amount by which interest, dividends, gains and other receipts from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

(ii) The numerator of the receipts factor includes interest, dividends, net gains (but not less than zero) and other receipts from investment assets and activities and from trading assets and activities described in (k)(i) of this subsection (4) that are attributable to this state.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(A) of this subsection (4) from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(C) The amount of interest, dividends, gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions, (but excluding amounts described in (k)(i)(A) and (B) of this subsection (4)), attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(B) of this subsection (4) by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(D) For purposes of this subsection (4)(k)(ii), the average value of trading assets owned by the taxpayer is the original cost or other basis of such property for federal income tax purposes without regard to depletion, depreciation, or amortization.

(iii) In lieu of using the method set forth in (k)(ii) of this subsection (4), the taxpayer may elect, or the department may

require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.

(A) The amount of interest, dividends, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross receipts from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(B) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(A) of this subsection (4) from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(C) The amount of interest, dividends, gains and other receipts from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions, (but excluding amounts described in (k)(ii)(A) or (B) of this subsection (4)), attributable to this state and included in the numerator is determined by multiplying the amount described in (k)(i)(B) of this subsection (4) by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(iv) If the taxpayer elects or is required by the department to use the method set forth in (k)(iii) of this subsection (4), it must use this method on all subsequent returns unless the taxpayer receives prior permission from the department to use, or the department requires a different method.

(v) The taxpayer has the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. If the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity is considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Such policies and guidelines are presumed, subject to rebuttal by preponderance of the evidence, to be established at the commercial domicile of the taxpayer.

(l) Attribution of certain receipts to commercial domicile. All receipts which would be assigned under this rule to

a state in which the taxpayer is not taxable are included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

(5) **Effective date.** This rule applies to gross income that is reportable with respect to tax liability beginning on and after June 1, 2010.

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

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

## WSR 10-20-167

### EMERGENCY RULES

### DEPARTMENT OF

### SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed October 6, 2010, 10:52 a.m., effective October 8, 2010]

Effective Date of Rule: October 8, 2010.

Purpose: The department will create new chapter 388-816 WAC to address agency certification and implementation of the problem and pathological gambling treatment program. Without these rules, counselors within the division of behavioral health and recovery (DBHR) certified agencies will no longer be able to provide problem and pathological treatment services effective July 1, 2010.

Statutory Authority for Adoption: RCW 43.20A.890.

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

Reasons for this Finding: This emergency filing is necessary to continue the emergency rules that are currently in effect under WSR 10-13-041. The department filed the permanent rule proposal (CR-102) on September 1, 2010, under WSR 10-18-102. The public hearing for the permanent rules is scheduled for October 26, 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 35, Amended 0, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 35, Amended 0, Repealed 0.

Date Adopted: September 30, 2010.

Katherine I. Vasquez  
Rules Coordinator

## Chapter 388-816 WAC

### Certification requirements for problem and pathological gambling treatment program

#### SECTION I—PURPOSE AND DEFINITIONS

##### NEW SECTION

**WAC 388-816-0001 What is the purpose of this chapter?** These rules describe the standards and processes necessary to be a certified problem and pathological gambling treatment program. The rules have been adopted under the authority and purposes of the following chapters of law.

(1) Chapter 43.20A RCW, department of social and health services.

(2) Chapter 49.60 RCW, Discrimination-Human rights commission.

##### NEW SECTION

**WAC 388-816-0005 What definitions are important throughout this chapter?** "Added service" means the adding of certification for problem and pathological gambling treatment levels of care to an existing certified agency at an approved location.

"Administrator" means the person designated responsible for the operation of the certified treatment program.

"Adult" means a person eighteen years of age or older.

"Assessment" means the ongoing process of identifying a diagnosis and determining the care needed by the problem gambling client. The assessment includes the requirements described in WAC 388-816-0145 in order to develop a treatment plan.

"Authenticated" means written, permanent verification of an entry in a client treatment record by an individual, by means of an original signature including first initial, last name, and professional designation or job title, or initials of the name if the file includes an authentication record, and the date of the entry. If client records are maintained electronically, unique electronic passwords, biophysical or passcard equipment are acceptable methods of authentication.

"Authentication record" means a document that is part of a client's treatment record, with legible identification of all persons initialing entries in the treatment record, and includes:

- (1) Full printed name;
- (2) Signature including the first initial and last name; and
- (3) Initials and abbreviations indicating professional designation or job title.

"Case management" means services provided to assist the client in gaining access to needed medical, social, educational, and other services. Services include case planning, case consultation, and referral, and other support services for the purpose of engaging and retaining or maintaining clients in treatment.

"Certified treatment program" means a legally operated entity certified by the department to provide problem and pathological gambling treatment services. The components of a treatment program are:

- (1) Legal entity/owner;
- (2) Facility; and
- (3) Staff and services.

"Change in ownership" means one of the following conditions:

(1) When the ownership of a certified problem and pathological gambling treatment program changes from one distinct legal owner to another distinct legal owner;

(2) When the type of business changes from one type to another such as, from a sole proprietorship to a corporation; or

(3) When the current ownership takes on a new owner of five percent or more of the organizational assets.

"Client" means an individual receiving problem or pathological gambling treatment services from a certified program.

"Clinical staff member" means an individual credentialed by the department of health in a counseling profession per chapter 18.19 RCW, chapter 18.83 RCW, or chapter 18.225 RCW.

"Criminal background check" means a search by the Washington state patrol for any record of convictions or civil adjudication related to crimes against children or other persons, including developmentally disabled and vulnerable adults, per RCW 43.43.830 through 43.43.842 relating to the Washington state patrol.

"Critical incident" includes:

- (1) Death of a client;
- (2) Serious injury;
- (3) Sexual assault of clients, staff members, or public citizens on the facility premises;
- (4) Abuse or neglect of an adolescent or vulnerable adult client by another client or program staff member on facility premises;
- (5) A natural disaster presenting a threat to facility operation or client safety;
- (6) A bomb threat; a break in or theft of client identifying information;
- (7) Suicide attempt at the facility.

"Department" means the Washington state department of social and health services.

"Disability, a person with" means a person whom:

- (1) Has a physical or mental impairment that substantially limits one or more major life activities of the person;
- (2) Has a record of such an impairment; or
- (3) Is regarded as having such an impairment.

"DSM-IV TR" means diagnostic and statistical manual of mental disorders, fourth edition text revision, published by the American psychiatric association.

"Essential requirement" means a critical element of problem and pathological gambling treatment services that must be present in order to provide effective treatment.

"Financial evaluation" means the total of a client's monthly financial obligations including gambling debts.

"Governing body" means the officers, board of directors or trustees of a corporation or limited liability company

who make up the body for the purpose of administering the problem or pathological gambling program.

**"Outcomes evaluation"** means a system for determining the effectiveness of results achieved by clients during or following service delivery, and client satisfaction with those results for the purpose of program improvement.

**"Pathological gambling"** means a mental disorder characterized by loss of control over gambling, progression in and preoccupation with gambling and in obtaining money to gamble and continuation of gambling despite adverse consequences.

**"Problem gambling"** means an earlier stage of pathological gambling which compromises, disrupts, or damages family or personal relationships or vocational pursuits.

**"Progress notes"** are a permanent record of ongoing assessments of a client's participation in and response to treatment, and progress in recovery.

**"Qualified personnel"** means trained, qualified staff who meet appropriate legal, licensing, certification, and registration requirements.

**"Relocation"** means change in location from one office space to a new office space, or moving from one office building to another.

**"Remodeling"** means expansion of existing office space to additional office space at the same address, or remodeling of interior walls and space within existing office space.

**"Summary suspension"** means an immediate suspension of certification, per RCW 34.05.422(4), by the department pending administrative proceedings for suspension, revocation, or other actions deemed necessary by the department.

**"Suspend"** means termination of the department's certification of a program's treatment services for a specified period or until specific conditions have been met and the department notifies the program of reinstatement.

**"Treatment plan review"** means a review of active problems on the client's individualized treatment plan, the need to address new problems, and client placement.

**"Vulnerable adult"** means a person who lacks the functional, mental, or physical ability to care for oneself.

## SECTION II—APPLICATION FOR CERTIFICATION

### NEW SECTION

**WAC 388-816-0010 What problem and pathological gambling treatment programs are certified by the department?** The department certifies problem and pathological gambling treatment programs which includes diagnostic screening and assessment, individual, group, couples and family counseling and case management.

### NEW SECTION

**WAC 388-816-0015 How do I apply for certification as a new problem and pathological gambling treatment program?** (1) A potential new problem and pathological gambling treatment program, referred to as applicant, seeking certification as described under WAC 388-816-0010, must request from the department an application packet of infor-

mation on how to become a certified problem and pathological gambling treatment program.

(2) The applicant must submit a completed application to the department that includes:

(a) If the applicant is a sole proprietor: The name and address of the applicant, and a statement of sole proprietorship;

(b) If the applicant is a partnership: The name and address of every partner, and a copy of the written partnership agreement;

(c) If the applicant is a limited liability corporation: The name and addresses of its officers and any owner of five percent or more of the organizational assets, and a copy of the certificate of formation issued by the state of Washington, secretary of state;

(d) If the applicant is a corporation: The names and addresses of its officers, board of directors and trustees, and any owner of five percent or more of the organizational assets, and a copy of the corporate articles of incorporation and bylaws;

(e) A copy of the master business license authorizing the organization to do business in Washington state;

(f) The social security number or Federal Employer Identification Number for the governing organization or person;

(g) The name and job description of the individual administrator appointed by the governing body under whose management or supervision the services will be provided;

(h) A copy of the report of findings from a criminal background check of any owner of five percent or more of the organizational assets and the administrator;

(i) Additional disclosure statements or background inquiries if the department has reason to believe that offenses specified under RCW 43.43.830, have occurred since completion of the original application;

(j) The physical location of the facility where services will be provided including, in the case of a location known only by postal route and box numbers, and the street address;

(k) Program facility requirements as set forth in WAC 388-816-0025;

(l) Policy and procedure manuals specific to the program at the proposed site, and meet the manual requirements described later in this regulation, including the:

(i) Administrative manual;

(ii) Personnel manual; and

(iii) Clinical manual.

(m) Sample client records for the treatment service applied for; and

(n) Evidence of sufficient qualified staff to deliver services.

(3) The program owner or legal representative must:

(a) Sign the completed application form and submit the original to the department; and

(b) Report any changes occurring during the certification process.

### NEW SECTION

**WAC 388-816-0020 How do currently certified or licensed agencies apply for added service?** Programs certi-

fied or licensed by the department through either chapter 388-805 WAC or chapter 388-865 WAC must apply for an added certified service by:

- (1) Submitting an abbreviated application, including:
  - (a) The name of the individual administrator providing management or supervision of the program;
  - (b) A written declaration that a current copy of the agency policy and procedure manual will be maintained for the added service and that the manual has been revised to accommodate the differences in business and clinical practices at that site;
  - (c) An organization chart, showing the relationship of the added service to the main organization, job titles, and lines of authority;
  - (d) Evidence of sufficient qualified staff to deliver services for the added service; and
  - (e) Evidence of meeting the requirements of:
    - (i) WAC 388-816-0015 (2)(h) through (l), (n) and (3);
    - (ii) WAC 388-816-0145;
    - (iii) WAC 388-816-0150;
    - (iv) WAC 388-816-0160;
    - (v) WAC 388-816-0170; and
    - (vi) WAC 388-816-0175.

#### NEW SECTION

**WAC 388-816-0025 What are the requirements for program facilities?** (1) The applicant must include a floor plan showing the dimensions and intended use of each room that includes the location of:

- (a) Floor to ceiling walls;
  - (b) Windows and doors;
  - (c) Restrooms;
  - (d) Areas serving as confidential counseling rooms;
  - (e) Confidential client records storage; and
  - (f) Other therapy and recreation areas and rooms.
- (2) A completed facility accessibility self-evaluation form.
- (3) The administrator must ensure the treatment site:
- (a) Is accessible to a person with a disability;
  - (b) Has a reception area separate from therapy areas;
  - (c) Has adequate private space for personal consultation with a client, staff charting, and therapeutic and social activities, as appropriate;
  - (d) Has secure storage of active and closed confidential client records;
  - (e) Has current fire inspection approval;
  - (f) Has facilities and furnishings that are kept clean and in good repair;
  - (g) Has adequate lighting, heating, and ventilation; and
  - (h) Has separate and secure storage of toxic substances, which are used only by staff or supervised persons.

#### NEW SECTION

**WAC 388-816-0030 How does the department conduct an examination of facilities?** The department must conduct an on-site examination of each new applicant's facility. The department must determine if the applicant's facility is:

- (1) Substantially as described.

- (2) Suitable for the purposes intended.
- (3) Not a personal residence.
- (4) Approved as meeting all building and safety requirements.

#### NEW SECTION

**WAC 388-816-0035 How does the department determine disqualification or denial of an application?** The department must consider the ability of each person named in the application to operate in accordance with this chapter before the department grants or renews certification of problem and pathological gambling service.

(1) The department must deny an applicant's certification when any of the following conditions occurred and was not satisfactorily resolved, or when any owner or administrator:

- (a) Had a license or certification for a health care agency denied, revoked, or suspended;
- (b) Was convicted of child abuse or adjudicated as a perpetrator of substantiated child abuse;
- (c) Obtained or attempted to obtain a health provider license, certification, or registration by fraudulent means or misrepresentation;
- (d) Committed, permitted, aided, or abetted the commission of an illegal act or unprofessional conduct as defined under RCW 18.130.180;

(e) Demonstrated cruelty, abuse, negligence, misconduct, or indifference to the welfare of a client or displayed acts of discrimination;

(f) Misappropriated client property or resources;

(g) Failed to meet financial obligations or contracted service commitments that affect client care;

(h) Has a history of noncompliance with state or federal regulations in an agency with which the applicant has been affiliated;

(i) Knowingly, or with reason to know, made a false statement of fact or failed to submit necessary information in:

- (i) The application or materials attached; and
- (ii) Any matter under department investigation.

(j) Refused to allow the department access to records, files, books, or portions of the premises relating to operation of the problem and pathological gambling program service;

(k) Willfully interfered with the preservation of material information or attempted to impede the work of an authorized department representative;

(l) Is in violation of any provision of RCW 43.20A.890;

or

(m) Does not meet criminal background check requirements.

(2) The department may deny certification when an applicant:

- (a) Fails to provide satisfactory application materials; or
- (b) Advertises itself as certified when certification has not been granted, or has been revoked or canceled.

(3) The applicant may appeal department decisions in accord with chapter 34.05 RCW, the Washington Administrative Procedure Act and chapter 388-02 WAC.



NEW SECTION

**WAC 388-816-0040 What happens after I make application for certification?** (1) The department may grant an applicant initial certification after a review of application materials and an on-site visit confirms the applicant has the capacity to operate in compliance with this chapter.

(2) A program's failure to meet and maintain conditions of the initial certification may result in suspension of certification.

(3) An initial certificate of approval may be issued for up to one year.

(4) The program must post the certificate in a conspicuous place on the premises.

NEW SECTION

**WAC 388-816-0045 How do I apply for an exemption?** (1) The department may grant an exemption from compliance with specific requirements in this WAC chapter if the exemption does not violate:

- (a) An existing federal or state law; or
- (b) An existing tribal law.

(2) Programs must submit a signed letter requesting the exemption to the Supervisor, Certification Section, Division of Behavioral Health and Recovery, P.O. Box 45330, Olympia, WA 98504-5330. The program must assure the exemption request does not:

- (a) Jeopardize the safety, health, or treatment of clients; and
  - (b) Impede fair competition of another program.
- (3) The department must approve or deny all exemption requests in writing.
- (4) The department and the program must maintain a copy of the decision.

**SECTION III—MAINTAINING CERTIFICATION**NEW SECTION

**WAC 388-816-0070 What do I need to do to maintain program certification?** Certificates are effective for one year from the date of issuance. A service program's continued certification and renewal is contingent upon:

- (1) Completion of an annual declaration of certification;
- (2) Providing the essential requirements for problem and pathological gambling treatment, including the following elements:
  - (a) Treatment process:
    - (i) Assessments, as described in WAC 388-816-0145;
    - (ii) Treatment planning, as described in WAC 388-816-0150 (2)(a) and 388-816-0160(8);
    - (iii) Documenting client progress, as described in WAC 388-816-0150 (1)(b); 388-816-0160(10);
    - (iv) Treatment plan reviews and updates, as described in WAC 388-816-0160(11); WAC 388-816-0175 (1)(d)(i) and (ii);
    - (v) Continuing care, and discharge planning, as described in WAC 388-816-0150 (2)(d); 388-816-0150 (6) and (7); and 388-816-0160(14);

(vi) Conducting individual and group counseling, as described in WAC 388-816-0150 (2)(b) and 388-816-0160 (10).

(b) Staffing: Provide sufficient qualified personnel for the care of clients as described in WAC 388-816-0130.

(c) Facility: Provide sufficient facilities, equipment, and supplies for the care and safety of clients as described in WAC 388-816-0105 (5) and (6).

(3) Findings during periodic on-site surveys and complaint investigations to determine the program's compliance with this chapter. During on-site surveys and complaint investigations, program representatives must cooperate with department representatives to:

(a) Examine any part of the facility at reasonable times and as needed;

(b) Review and evaluate records, including client clinical records, personnel files, policies, procedures, fiscal records, data, and other documents as the department requires to determine compliance; and

(c) Conduct individual interviews with clients and staff members.

(4) The program must post the notice of a scheduled department on-site survey in a conspicuous place accessible to clients and staff.

(5) The program must correct compliance deficiencies found at such surveys immediately or as agreed by a plan of correction approved by the department.

NEW SECTION

**WAC 388-816-0075 What do I need to do for a change in ownership?** (1) When a certified problem and pathological gambling treatment program plans a change in ownership, the current service program must submit a change in ownership application form sixty or more days before the proposed effective date of ownership change.

(2) The current program must include the following information with the application:

(a) Name and address of each new prospective owner of five percent or more of the organizational assets as required by WAC 388-816-0015 (2)(a) through (d);

(b) Current and proposed name (if applicable) of the service provider;

(c) Date of the proposed transaction;

(d) A copy of the transfer agreement between the outgoing and incoming owner(s);

(e) If a corporation, the names and addresses of the proposed responsible officers or partners;

(f) A statement regarding the disposition and management of client records, as described under 45 CFR, Part 160 through 164, and WAC 388-816-0155; and

(g) A copy of the report of findings from a criminal background check of any new owner of five percent or more of the organizational assets and new administrator when applicable.

(3) The department must determine which, if any, WAC 388-816-0015 or 388-816-0020 requirements apply to the potential new program, depending on the extent of ownership and operational changes.

(4) The department may grant certification to the new owner when the new owner:

- (a) Successfully completes the application process; and
- (b) Ensures continuation of compliance with rules of this chapter and implementation of plans of correction for deficiencies relating to this chapter, when applicable.

NEW SECTION

**WAC 388-816-0080 What do I do to relocate or remodel a facility?** (1) When a certified problem or pathological gambling treatment program plans to relocate or change the physical structure of a facility in a manner that affects client care, the program must:

- (a) Submit a completed program relocation approval request form, or a request for approval in writing if remodeling, sixty or more days before the proposed date of relocation or change.
- (b) Submit a sample floor plan that includes information identified in WAC 388-816-0025.
- (c) Submit a completed facility accessibility self-evaluation form.
- (d) Provide for department examination of the premises before approval, as described under WAC 388-816-0030.

NEW SECTION

**WAC 388-816-0085 How does the department assess penalties?** When the department determines that a program fails to comply with requirements of this chapter, the department may cease referrals of new clients who are recipients of state or federal funds.

NEW SECTION

**WAC 388-816-0090 How does the department cancel certification?** The department may cancel certification if the program:

- (1) Stops providing the certified service.
- (2) Voluntarily cancels certification.
- (3) Changes ownership without prior notification and approval.
- (4) Relocates without prior notification and approval.

NEW SECTION

**WAC 388-816-0095 How does the department suspend or revoke certification?** (1) The department must suspend or revoke a program's certification when a disqualifying situation described under WAC 388-816-0035 applies to a current program.

(2) The department may suspend or revoke a program's certification when any of the following deficiencies or circumstances occur:

- (a) A program fails to provide the essential requirements of problem or pathological gambling treatment as described in WAC 388-816-0070(2), and one or more of the following conditions occur:
  - (i) Violation of a rule threatens or results in harm to a client;
  - (ii) A reasonably prudent program should have been aware of a condition resulting in significant violation of a law or rule;

(iii) A program failed to investigate or take corrective or preventive action to deal with a suspected or identified client care problem;

(iv) Noncompliance occurs repeatedly in the same or similar areas; or

(v) There is an inability to attain compliance with laws or rules within a reasonable period of time.

(b) The program fails to submit an acceptable and timely plan of correction for cited deficiencies; or

(c) The program fails to correct cited deficiencies.

(3) The department may suspend certification upon receipt of a written request from the program. Programs requesting voluntary suspension must submit a written request for reinstatement of certification within one year from the effective date of the suspension. The department will review the request for reinstatement, determine if the program is able to operate in compliance with certification requirements, and notify the program of the results of the review for reinstatement.

NEW SECTION

**WAC 388-816-0100 What is the prehearing, hearing and appeal process?** (1) In case of involuntary certification cancellation, suspension, or revocation of the certification, or a penalty for noncompliance, the department must:

(a) Notify the program of any action to be taken; and

(b) Inform the program of prehearing and dispute conferencing, hearing, and appeal rights under chapter 388-02 WAC.

(2) The department may order a summary suspension of the program's certification pending completion of the appeal process when the preservation of public health, safety, or welfare requires emergency action.

**SECTION IV—ORGANIZATIONAL STANDARDS**NEW SECTION

**WAC 388-816-0105 What are the requirements for the governing body of the program?** In treatment programs not certified or licensed under chapter 388-805 WAC or chapter 388-865 WAC, a governing body, legally responsible for the conduct and quality of services provided, must:

(1) Appoint an administrator responsible for the day-to-day operation of the program.

(2) Maintain a current job description for the administrator including the administrator's authority and duties.

(3) Notify the department within thirty days, of changes of the program administrator.

(4) Provide personnel, facilities, equipment, and supplies necessary for the safety and care of clients.

(5) Programs must ensure:

(a) Safety of clients and staff; and

(b) Maintenance and operation of the facility.

(6) Ensure the administration and operation of the program is in compliance with:

(a) Chapter 388-816 WAC requirements;

(b) Applicable federal, state, tribal, and local laws and rules; and

(c) Applicable federal, state, tribal, and local licenses, permits, and approvals.

NEW SECTION

**WAC 388-816-0110 What are the key responsibilities required of a program administrator?** In treatment programs not certified or licensed under chapter 388-805 WAC or chapter 388-865 WAC, the administrator must:

- (1) Be responsible for the day-to-day operation of the certified treatment service, including:
  - (a) All administrative matters;
  - (b) Client care services; and
  - (c) Meeting all applicable rules and ethical standards.
- (2) Delegate the authority and responsibility to act in the administrator's behalf when the administrator is not on duty or on call.
- (3) Ensure administrative, personnel, and clinical policy and procedure manuals:
  - (a) Are developed and adhered to; and
  - (b) Are reviewed and revised as necessary, and at least annually.
- (4) Employ sufficient qualified personnel to provide adequate problem and pathological gambling treatment, facility security, client safety and other special needs of clients.
- (5) Ensure all persons providing counseling services are credentialed by the department of health.
- (6) Assign the responsibility of TB infection control manager to a program individual in order to assess the program's annual tuberculosis risk according to the center for disease control guidelines.

NEW SECTION

**WAC 388-816-0115 What must be included in a program administrative manual?** Treatment programs not certified or licensed under chapter 388-805 WAC or chapter 388-865 WAC must have and adhere to an administrative manual, which contains policies and procedures including:

- (1) Services will be made sensitive to the needs of each client, including assurance that:
  - (a) Certified interpreters or other acceptable alternatives are available for persons with limited English-speaking proficiency and persons having a sensory impairment; and
  - (b) Assistance will be provided to persons with disabilities in case of an emergency.
- (2) An organization chart specifying:
  - (a) The governing body;
  - (b) Each staff position by job title, including volunteers, students, and persons on contract; and
  - (c) The number of full or part-time persons for each position.
- (3) A delegation of authority policy.
- (4) A copy of current fee schedules.
- (5) Implementing state and federal regulations on client confidentiality, including provision of a summary of 45 CFR Part 160 and 164 to each client.
- (6) Reporting suspected child abuse and neglect.
- (7) Reporting the death of a client to the department within one business day when a client dies on the premises.
- (8) A client grievance policy and procedures.
- (9) Reporting of critical incidents and actions taken to the department within two business days when an unexpected event occurs.

(10) An evacuation plan for use in the event of a disaster or emergency, addressing:

- (a) Communication methods for clients, staff, and visitors including persons with a visual or hearing impairment or limitation;
  - (b) Evacuation of mobility-impaired persons;
  - (c) Evacuation of children if child care is offered;
  - (d) Different types of disasters or emergencies;
  - (e) Placement of posters showing routes of exit; and
  - (f) The need to mention evacuation routes at public meetings.
- (11) A smoking policy consistent with the Washington clean indoor air act, chapter 70.160 RCW.

**SECTION V—HUMAN RESOURCE MANAGEMENT**NEW SECTION

**WAC 388-816-0120 What must be included in a program personnel manual?** Treatment programs not certified or licensed under chapter 388-805 WAC or chapter 388-865 WAC must have and adhere to a personnel manual, which contains policies and procedures including:

- (1) How the program conducts criminal background checks on its employees in order to comply with the rules specified in RCW 43.43.830 through 43.43.842.
- (2) How the program provides staff orientation prior to assigning unsupervised duties, including orientation to:
  - (a) The administrative, personnel and clinical manuals;
  - (b) Staff ethical standards and conduct, including reporting of unprofessional conduct to appropriate authorities;
  - (c) Staff and client grievance procedures; and
  - (d) The facility evacuation plan.
- (3) Provides for a drug free work place which includes:
  - (a) A philosophy of nontolerance of illegal drug-related activity;
  - (b) Program standards of prohibited conduct; and
  - (c) Actions to be taken in the event a staff member misuses alcohol or other drugs.

NEW SECTION

**WAC 388-816-0125 What are program personnel file requirements?** In treatment programs not certified or licensed under chapter 388-805 WAC or chapter 388-865 WAC the administrator must:

- (1) Ensure that there is a current personnel file for each employee, trainee, student, and volunteer, and for each contract staff person who provides or supervises client care.
- (2) Designate a person to be responsible for management of personnel files.
- (3) Each person's file must contain:
  - (a) Evidence a criminal background check was completed per WAC 388-816-0120(1);
  - (b) A copy of the results of an initial tuberculin skin test or evidence the person has completed a course of treatment approved by a physician or local health officer if the results are positive and subsequent annual tuberculosis screening and risk assessment based on the program annual TB risk assessment; and

(c) A record of an orientation to the program as described in WAC 388-816-0120(2).

(4) In addition, each clinical staff member providing client care must contain:

(a) Verification of qualifications for each person engaged in the treatment of problem or pathological gambling, including counselors, physicians, nurses, and other certified, or licensed health care professionals, evidence they comply with the credentialing requirements of their respective professions;

(b) A copy of a current job description, signed and dated by the employee and supervisor which includes:

- (i) Job title;
- (ii) Minimum qualifications for the position; and
- (iii) Summary of duties and responsibilities.

(c) A written performance evaluation for each year of employment:

- (i) Conducted by the immediate supervisor of each staff member; and
- (ii) Signed and dated by the employee and supervisor.

#### NEW SECTION

**WAC 388-816-0130 What are the minimum qualifications for clinical staff members providing problem and pathological gambling treatment?** (1) All clinical staff members and approved clinical supervisors providing problem and pathological gambling treatment must have a credential issued by the department of health in a counseling profession per chapter 18.19 RCW, chapter 18.83 RCW, or chapter 18.225 RCW.

(2) Each clinical staff member credentialed per chapter 18.19 RCW providing treatment services to a client must provide documentation of at least fifteen hundred hours of professionally supervised post-certification or post-registration experience providing mental health or chemical dependency treatment services.

(3) Each clinical staff member providing treatment services must have at least a bachelor's degree from an accredited college-level institution.

(a) The department will review requests for an exemption to this requirement on a case-by-case basis.

(b) In order to qualify for an exemption, the employee must possess year-for-year professional level experience equivalent to a bachelor's degree. The department determines this equivalency at the discretion of the department program manager responsible for monitoring problem gambling treatment programs.

(4) Each clinical staff member providing treatment services under supervision must:

(a) Complete a minimum of thirty hours of unduplicated gambling specific training including the sixteen-hour basic training, approved by a state, national, or international organization including but not limited to:

- (i) Washington state gambling counselor certification committee;
- (ii) National gambling counselor certification board;
- (iii) International gambling counselor certification board; or

(iv) The department, division of behavioral health and recovery.

(b) Provide documentation of a minimum of one hundred hours of supervised experience working with problem and pathological gamblers and their significant others; and

(c) Receive a passing score on the national gambling counselor examination before providing unsupervised treatment services to program clients.

(5) Each clinical staff member credentialed per chapter 18.19 RCW providing unsupervised treatment services to program clients must:

(a) Be certified as a Washington state certified gambling counselor; or

(b) Be certified as a national certified gambling counselor.

(6) Approved clinical supervisors must:

(a) Hold a valid international gambling counselor certification board approved clinical consultant credential; or

(b) Hold a valid national certified gambling counselor II or Washington state certified gambling counselor II certification credential; and

(c) Complete six hours of training on gambling specific clinical supervision approved by recognized organizations listed in WAC 388-816-0130 (4)(a)(i) through (iv).

#### **SECTION VI—PROFESSIONAL PRACTICES**

##### NEW SECTION

**WAC 388-816-0135 What must be included in the program clinical manual?** Treatment programs not certified or licensed under chapter 388-805 WAC or chapter 388-865 WAC must have and adhere to a personnel manual, which contains policies and procedures including:

(1) How the program meets WAC 388-816-0135 through 388-816-0180 requirements.

(2) Identification of resources and referral options so staff can make referrals required by law and as indicated by client needs.

(3) Client admission, continued service, and discharge criteria.

(4) How the program implements the following requirements:

(a) The administrator must not admit or retain a person unless the person's treatment needs can be met.

(b) Clinical staff members must assess and refer each client to the appropriate treatment service.

(5) Tuberculosis screening for prevention and control of TB in all outpatient programs, including:

(a) Obtaining a history of preventive or curative therapy;

(b) Screening and related procedures for coordinating with the local health department; and

(c) Implementing TB control as provided by the department of health TB control program.

(6) Limitation of group counseling sessions to twelve or fewer clients.

(7) Use of self-help groups.

(8) Client rules and responsibilities.

(9) How the program manages:

(a) Medical emergencies; and

(b) Suicidal, chemically dependent and mentally ill clients.

#### NEW SECTION

**WAC 388-816-0140 What are clients' rights requirements in certified programs?** Each treatment program must ensure a client:

(1) Is admitted to treatment without regard to race, color, creed, national origin, religion, sex, sexual orientation, age, or disability, except for bona fide program criteria;

(2) Is reasonably accommodated in case of sensory or physical disability, limited ability to communicate, limited English proficiency, and cultural differences;

(3) Is treated in a manner sensitive to individual needs and which promotes dignity and self-respect;

(4) Is protected from invasion of privacy except that staff may conduct reasonable searches to detect and prevent possession or use of contraband on the premises;

(5) Has all clinical and personal information treated in accord with state and federal confidentiality regulations;

(6) Has the opportunity to review their own treatment records in the presence of the administrator or designee;

(7) Has the opportunity to have clinical contact with a same gender counselor, if requested and determined appropriate by the supervisor, either at the program or by referral;

(8) Is fully informed regarding fees charged, including fees for copying records to verify treatment and methods of payment available;

(9) Is protected from abuse by staff at all times, or from other clients who are on program premises, including:

- (a) Sexual abuse or harassment;
- (b) Sexual or financial exploitation;
- (c) Racism or racial harassment; and
- (d) Physical abuse or punishment.

(10) Is fully informed and receives a copy of counselor disclosure requirements established under RCW 18.19.060;

(11) Receives a copy of client grievance procedures upon request; and

(12) In the event of a program closure or treatment service cancellation, each client must be:

- (a) Given thirty days notice;
- (b) Assisted with relocation;
- (c) Given refunds to which the person is entitled; and
- (d) Advised how to access records to which the person is entitled.

(13) A disclosure authorization to a health care provider or health care facility as required by RCW 70.02.030 shall:

- (a) Be in writing, dated, and signed by the client;
- (b) Identify the nature of the information to be disclosed;
- (c) Identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed;

(d) Identify the program or person who is to make the disclosure;

- (e) Identify the client; and
- (f) Contain an expiration date or an expiration event that relates to the client or the purpose of the use or disclosure.

(14) A treatment program must notify clients that outside persons or organizations which provide services to the pro-

gram are required by written agreement to protect client confidentially.

(15) The administrator must ensure a copy of clients' rights is given at admission to each client receiving services.

(16) The administrator must post a copy of clients' rights in a conspicuous place in the facility accessible to clients and staff.

#### NEW SECTION

**WAC 388-816-0145 What are the requirements for problem and pathological gambling assessments?** Programs must require all clinical staff members to obtain, review, evaluate and document a face-to-face diagnostic assessment of each client's involvement with problem and pathological gambling. The assessment must include, if not already documented in a chemical dependency or mental health assessment, the following information:

(1) Legal history describing any involvement with the criminal justice system.

(2) Medical and health history including all prescribed medications.

(3) Mental health history and current mental health status.

(4) Suicidal/homicidal assessment including past suicide attempts, methods, suicide plan, family history of suicide attempts, and suicide intent.

(5) Substance abuse history and screening describing current use, past use including amounts and duration and treatment history.

(6) Family history describing family composition and dynamics.

(7) If client is other than the problem or pathological gambler, a family assessment must be completed.

(8) Education status and history.

(9) Vocational or employment status and history describing skills or trades learned, jobs held, duration of employment, and reasons for leaving.

(10) Peers and friends, indicating interpersonal relationships and interaction with people and groups outside the home.

(11) A financial evaluation and information, including current financial status, gambling debts, any previous bankruptcy or repayment plans, and insurance coverage.

(12) Problem gambling screens.

(13) Documentation of the information collected, including:

(a) A diagnostic assessment statement including sufficient data to determine a client diagnosis supported by DSM IV TR criteria or subsequent editions.

(b) A written summary of the data gathered in subsections (1) through (12) of this section that supports the treatment recommendation.

(14) Evidence the client:

(a) Was notified of the assessment results; and

(b) Documentation of treatment options provided, and the client's choice; or

(c) If the client was not notified of the results and advised of referral options, the reason must be documented.

NEW SECTION**WAC 388-816-0150 What are the requirements for treatment, continuing care, transfer, and discharge plans?** Programs must:

- (1) Require clinical staff members be responsible for the overall treatment plan for each client, including:
  - (a) Client involvement in treatment planning;
  - (b) Documentation of progress toward client attainment of goals; and
  - (c) Completeness of client records.
- (2) The clinical staff member must:
  - (a) Develop the individualized treatment plan based upon the assessment and update the treatment plan based upon achievement of goals, or when new problems are identified;
  - (b) Conduct individual or group counseling;
  - (c) Develop the continuing care plan; and
  - (d) Complete the discharge summary.
- (3) A clinical staff member must follow up when a client misses an appointment to:
  - (a) Try to motivate the client to stay in treatment; and
  - (b) Report a noncompliant client to the committing authority as appropriate.
- (4) A clinical staff member must involve each client's family or other support persons, when the client gives written consent:
  - (a) In the treatment program; and
  - (b) In self-help or support groups.
- (5) A clinical staff member must meet with each client at the time of discharge from any treatment program to:
  - (a) Finalize a continuing care plan to assist in determining appropriate recommendation for care;
  - (b) Refer the client in making contact with necessary agencies or services; and
  - (c) Provide the client a copy of the plan.
- (6) When transferring a client to another treatment program, the current program must forward copies of the following information to the receiving program when a release of confidential information is signed by the client:
  - (a) Client's demographic information;
  - (b) Diagnostic assessment statement and other assessment information, including:
    - (i) TB screen or test result;
    - (ii) The reason for the transfer; and
    - (iii) Court mandated status or program recommended follow-up treatment.
  - (c) Discharge summary; and
  - (d) The plan for continuing care or treatment.
- (7) A clinical staff member must complete a discharge summary, within seven days of each client's discharge from the program, which includes:
  - (a) The date of discharge; and
  - (b) A summary of the client's progress toward each treatment goal.

NEW SECTION

**WAC 388-816-0155 What are the requirements for a client record system?** Programs not certified or licensed by either chapter 388-805 WAC or chapter 388-865 WAC must

have a comprehensive client record system maintained in accord with recognized principles of health record management. The program must ensure:

- (1) A designated individual is responsible for the record system;
- (2) A secure storage system which:
  - (a) Promotes confidentiality of and limits access to both active and inactive records; and
  - (b) Protects active and inactive files from damage during storage.
- (3) Client record policies and procedures on:
  - (a) Who has access to records;
  - (b) Content of active and inactive client records;
  - (c) A systematic method of identifying and filing individual client records so each can be readily retrieved;
  - (d) Assurance that each client record is complete and authenticated by the person providing the observation, evaluation, or service;
  - (e) Retention of client records for a minimum of six years after the discharge or transfer of the client; and
  - (f) Destruction of client records.
- (4) In addition to subsection (1) through (3) of this section, programs maintaining electronic client records must:
  - (a) Make records available in paper form upon request:
    - (i) For review by the department; and
    - (ii) By clients requesting record review as authorized by WAC 388-816-0140(6).
  - (b) Provide secure, limited access through means that prevent modification or deletion after initial preparation;
  - (c) Provide for back up of records in the event of equipment, media or human error;
  - (d) Provide for protection from unauthorized access, including network and internet access.
- (5) In case of a program closure, the closing treatment program must arrange for the continued management of all client records. The closing program must notify the department in writing of the mailing and street address where records will be stored and specify the person managing the records. The closing program may:
  - (a) Continue to manage the records and give assurance they will respond to authorized requests for copies of client records within a reasonable period of time;
  - (b) Transfer records of clients who have given written consent to another certified program;
  - (c) Enter into a business associate agreement with a certified program to store and manage records, when the outgoing program will no longer be a problem and pathological gambling treatment program; or
  - (d) In the event none of the arrangements listed in (a) through (c) of this subsection can be made, the closing program must arrange for transfer of client records to the department.

NEW SECTION

**WAC 388-816-0160 What are the requirements for client record content?** Programs must ensure client record content includes:

- (1) Demographic information;
- (2) A problem and pathological gambling assessment;

(3) Documentation the client was informed of the diagnostic assessment and options for referral or the reason not informed;

(4) Documentation the client was informed of federal confidentiality requirements and received a copy of the client notice required under 45 CFR, Part 160 through 164;

(5) Documentation the client was informed of treatment service rules, translated when needed, signed and dated by the client before beginning treatment;

(6) Voluntary consent to treatment signed and dated by the client;

(7) Documentation the client received counselor disclosure information, acknowledged by the program and client by signature and date;

(8) Initial and updated individual treatment plans, including results of the initial assessment and periodic reviews, addressing:

(a) Client biopsychosocial problems;

(b) Treatment goals;

(c) Estimated dates or conditions for completion of each treatment goal;

(d) Approaches to resolve the problems;

(e) Identification of persons responsible for implementing the approaches;

(f) Medical orders, if appropriate.

(9) Documentation of referrals made for specialized care or services;

(10) Progress notes as events occur, which include:

(a) Date, duration, and content of counseling and other treatment sessions;

(b) Ongoing assessments of each client's participation in and response to treatment and other activities.

(11) Treatment plan reviews as required by WAC 388-816-0175 (1)(d)(i) and (ii);

(12) Properly completed authorizations for release of information;

(13) Copies of all correspondence related to the client, including any court orders and reports of noncompliance; and

(14) A continuing care plan and discharge summary.

#### NEW SECTION

**WAC 388-816-0165 What are the requirements for reporting client noncompliance?** The following standards define client noncompliance behaviors and sets minimum time lines for reporting these behaviors to the appropriate court or court designated authority.

(1) Reporting client noncompliance is contingent upon obtaining a properly completed authorization to release confidential information form.

(2) For emergent noncompliance: The following noncompliance is considered emergent noncompliance and must be reported to the appropriate court within three working days from obtaining the information:

(a) Client failure to follow requirements in court order;

(b) Client reports a subsequent gambling related arrest; and

(c) Client leaves program against program advice or is discharged for rule violation.

(3) For nonemergent noncompliance: The following noncompliance is considered nonemergent noncompliance and must be reported to the appropriate court as required by subsection (4) and (5) of this section and needs to include the program's recommendations for engaging the client:

(a) Client has unexcused absences or failure to report. Programs must report all client unexcused absences.

(b) Client fails to provide program with documentation of attendance at self-help or support groups if required by the treatment plan.

(c) Client failure to make acceptable progress in any part of the treatment plan.

(4) If a court accepts monthly progress reports, nonemergent noncompliance may be reported in monthly progress reports, which must be mailed to the court within ten working days from the end of each reporting period.

(5) If a court does not wish to receive monthly reports and only requests notification of noncompliance or other significant changes in client status, the reports should be transmitted as soon as possible, but in no event longer than ten working days from the date of the noncompliance.

### SECTION VII—OUTCOMES EVALUATION

#### NEW SECTION

**WAC 388-816-0170 What are the requirements for outcomes evaluation?** Each program must develop and implement policies and procedures for outcomes evaluation, to monitor and evaluate program effectiveness and client satisfaction for the purpose of program improvement.

### SECTION VIII—PROGRAM SERVICE STANDARDS

#### NEW SECTION

**WAC 388-816-0175 What are the requirements for outpatient services?** All programs certified by this chapter must meet the following requirements:

(1) A clinical staff member, must:

(a) Complete an assessment prior to admission unless participation in this outpatient treatment service is part of the same program's continuum of care.

(b) Complete an initial individualized treatment plan prior to the client's participation in treatment.

(c) Conduct group, individual or conjoint problem or pathological gambling counseling sessions for each client, each month, according to an individual treatment plan.

(d) Conduct and document a treatment plan review for each client:

(i) Once a month for the first three months; and

(ii) Quarterly thereafter or sooner if required by other laws.

#### NEW SECTION

**WAC 388-816-0180 What are the requirements for providing off-site problem and pathological gambling treatment services?** (1) If a certified program wishes to offer treatment services, for which the program is certified, at a site

where patients are located primarily for purposes other than problem and pathological gambling, the administrator must:

- (a) Ensure off-site treatment services will be provided:
  - (i) In a private, confidential setting that is discrete from other services provided within the off-site location; and
  - (ii) By a clinical staff member.
- (b) Revise program policy and procedures manuals to include a description of how confidentiality will be maintained at each off-site location, including how confidential information and patient records will be transported between the certified facility and the off-site location.

### WSR 10-21-003

#### EMERGENCY RULES

#### DEPARTMENT OF PERSONNEL

[Filed October 7, 2010, 9:30 a.m., effective October 7, 2010, 9:30 a.m.]

Effective Date of Rule: Immediately.

Purpose: These changes are a result of the passage of ESSB 6503. This bill requires immediate action to reduce expenditures during the 2009-2011 fiscal biennium. It is the intent of this bill that state agencies of the legislative branch, judicial branch, and executive branch including institutions of higher education, shall achieve a reduction in government operating expenses as provided in the bill. For some state employers this means implementing temporary layoffs. There are provisions in the bill which require us to make changes to the current temporary layoff rules in order to implement temporary layoffs as described in the bill.

Citation of Existing Rules Affected by this Order: Amending WAC 357-01-174, 357-31-390, 357-31-435, 357-31-190, 357-46-067, 357-46-066, 357-58-553, 357-58-554, 357-31-010, 357-31-020, 357-31-120, 357-31-125, 357-31-180, and 357-31-175.

Statutory Authority for Adoption: Chapter 41.06 RCW.

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: State agencies and/or institutions would not be able to implement temporary layoffs as described in ESSB 6503 without adoption of these 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 3, Amended 14, 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 3, Amended 14, Repealed 0.

Date Adopted: October 7, 2010.

Eva N. Santos  
Director

AMENDATORY SECTION (Amending WSR 05-12-093, filed 5/27/05, effective 7/1/05)

**WAC 357-01-174 Full-time employee.** An employee who is scheduled to work:

- Forty hours in one workweek;
- For hospital personnel assigned to a fourteen-day schedule, eighty hours over a fourteen-day period; or
- For law enforcement positions, one hundred sixty hours in the twenty-eight-day work period.

For the purpose of this definition, time spent on temporary layoff will count towards the hourly requirement.

AMENDATORY SECTION (Amending WSR 09-03-013, filed 1/9/09, effective 2/13/09)

**WAC 357-31-010 Which employees qualify for holiday compensation?** (1) Full-time general government employees who work full monthly schedules qualify for holiday compensation if they are employed before the holiday and are in pay status:

- (a) For at least eighty nonovertime hours during the month of the holiday; or
- (b) For the entire work shift preceding the holiday.

(c) Time spent on temporary layoff as provided in WAC 357-46-063 is considered time in pay status for the purpose of this subsection.

(2) Full-time higher education employees and cyclic year position employees who work full monthly schedules qualify for holiday compensation if they are in pay status for the entire work shift preceding the holiday.

(3) Cyclic year position employees scheduled to work less than full monthly schedules throughout their work year qualify for holiday compensation if they work or are in pay status on their last regularly scheduled working day before the holiday(s) in that month.

(4) Part-time general government employees who are in pay status during the month of the holiday qualify for holiday pay on a pro rata basis in accordance with WAC 357-31-020, except that part-time employees hired during the month of the holiday will not receive compensation for holidays that occur prior to their hire date.

(5) Part-time higher education employees who satisfy the requirements of subsection (1) of this section are entitled to the number of paid hours on a holiday that their monthly schedule bears to a full-time schedule.

AMENDATORY SECTION (Amending WSR 05-08-136, filed 4/6/05, effective 7/1/05)

**WAC 357-31-020 For general government part-time employees, how is holiday compensation ((pro-rated) prorated)?** Compensation for holidays (including personal holiday) for part-time general government employees will be proportionate to the number of hours in pay status in the month to that required for full-time employment, excluding



all holiday hours. Time spent on temporary layoff as provided in WAC 357-46-063 is considered time in pay status for the purpose of this section.

AMENDATORY SECTION (Amending WSR 05-08-136, filed 4/6/05, effective 7/1/05)

**WAC 357-31-120 Do employees accrue sick leave if they have taken leave without pay during the month?** (1) Full-time general government employees who are in pay status for less than eighty nonovertime hours in a month do not earn a monthly accrual of sick leave. Time spent on temporary layoff as provided in WAC 357-46-063 is considered time in pay status for the purpose of this subsection.

(2) Full-time and part-time higher education employees who have more than ten working days of leave without pay in a month do not earn a monthly accrual of sick leave.

AMENDATORY SECTION (Amending WSR 05-08-136, filed 4/6/05, effective 7/1/05)

**WAC 357-31-125 For general government part-time employees, how is leave accrual pro rated?** Vacation and sick leave accruals for part-time general government employees will be proportionate to the number of hours in pay status in the month to that required for full-time employment. Time spent on temporary layoff as provided in WAC 357-46-063 is considered time in pay status for the purpose of this section.

AMENDATORY SECTION (Amending WSR 05-08-137, filed 4/6/05, effective 7/1/05)

**WAC 357-31-180 When an employee has taken leave without pay during the month is the employee's rate of accrual adjusted for the leave without pay?** Leave without pay taken for military leave of absence without pay, for temporary layoff as provided in WAC 357-46-063, or for scheduled mandatory periods of leave without pay for employees in cyclic year positions do not affect the rate at which employees accrue vacation leave. For all other periods of leave without pay, the following applies:

(1) When a general government employee takes leave without pay which exceeds fifteen consecutive calendar days, the employee's anniversary date and unbroken service date are adjusted in accordance with WAC 357-31-345. These adjustments affect the rate at which an employee accrues vacation leave.

(2) When a higher education employee takes more than ten working days of leave without pay, that month does not qualify as a month of employment under WAC 357-31-165.

AMENDATORY SECTION (Amending WSR 05-08-137, filed 4/6/05, effective 7/1/05)

**WAC 357-31-175 Do employees accrue vacation leave if they have taken leave without pay during the month?** (1) Full-time general government employees who are in pay status for less than eighty nonovertime hours in a month do not earn a monthly accrual of vacation leave. Time spent on temporary layoff as provided in WAC 357-46-063 is

considered time in pay status for the purpose of this subsection.

(2) Full-time and part-time higher education employees who have more than ten working days of leave without pay in a month do not earn a monthly accrual of vacation leave.

AMENDATORY SECTION (Amending WSR 05-08-137, filed 4/6/05, effective 7/1/05)

**WAC 357-31-190 When can an employee start to use accrued vacation leave?** An employee (part-time or full-time) must complete six months of continuous state employment before ~~(he/she)~~ they can use vacation leave. The only exception to the six-month requirement is that during the 2009-2011 fiscal biennium if an employee's monthly full-time equivalent base salary is two thousand five hundred dollars or less and the employee's office or institution enacts a temporary layoff as described in chapter 32, Laws of 2010, the employee can use accrued vacation leave.

AMENDATORY SECTION (Amending WSR 08-15-043, filed 7/11/08, effective 10/1/08)

**WAC 357-31-390 What criteria does an employee have to meet to be eligible to receive shared leave?** An employee may be eligible to receive shared leave if the agency head or higher education institution president has determined the employee meets the following criteria:

(1) The employee:

(a) Suffers from, or has a relative or household member suffering from, an illness, injury, impairment, or physical or mental condition which is of an extraordinary or severe nature;

(b) The employee has been called to service in the uniformed services;

(c) A state of emergency has been declared anywhere within the United States by the federal or any state government and the employee has the needed skills to assist in responding to the emergency or its aftermath and volunteers ~~(his/her)~~ their services to either a governmental agency or to a nonprofit organization engaged in humanitarian relief in the devastated area, and the governmental agency or nonprofit organization accepts the employee's offer of volunteer services; or

(d) The employee is a victim of domestic violence, sexual assault, or stalking as defined in RCW 41.04.655.

(e) During the 2009-2011 fiscal biennium only, an employee whose monthly full-time equivalent base salary is two thousand five hundred dollars or less is eligible to use shared leave in lieu of temporary layoff as described in chapter 32, Laws of 2010.

(2) The illness, injury, impairment, condition, call to service, or emergency volunteer service, or consequence of domestic violence, sexual assault, or stalking has caused, or is likely to cause, the employee to:

(a) Go on leave without pay status; or

(b) Terminate state employment.

(3) The employee's absence and the use of shared leave are justified.

(4) The employee has depleted or will shortly deplete ~~(his or her)~~ their:

(a) Compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, accrued vacation leave, and accrued sick leave if the employee qualifies under subsection (1)(a) of this section; or

(b) Compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, accrued vacation leave, and paid military leave allowed under RCW 38.40.060 if the employee qualifies under subsection (1)(b) of this section; or

(c) Compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, and accrued vacation leave if the employee qualifies under (1)(c) or (d) of this section.

(d) Compensatory time, recognition leave as described in WAC 357-31-565, and accrued vacation leave if the employee qualifies under subsection (1)(e) of this section.

(5) The employee has abided by employer rules regarding:

(a) Sick leave use if the employee qualifies under subsection (1)(a) of this section; or

(b) Military leave if the employee qualifies under subsection (1)(b) of this section.

(6) If the illness or injury is work-related and the employee has diligently pursued and been found to be ineligible for benefits under chapter 51.32 RCW if the employee qualifies under subsection (1)(a) of this section.

AMENDATORY SECTION (Amending WSR 08-15-043, filed 7/11/08, effective 10/1/08)

**WAC 357-31-435 Must employees use their own leave before using shared leave?** Employees who qualify for shared leave under WAC 357-31-390 (1)(a) must first use all compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, sick leave, and vacation leave that they have accrued before using shared leave. Employees who qualify under WAC 357-31-390 (1)(b) must first use all of their compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, accrued vacation leave, and paid military leave allowed under RCW 38.40.060 before using shared leave. Employees who qualify under WAC 357-31-390 (1)(c) and (d) must first use all compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, and vacation leave that they have accrued before using shared leave. Employees who qualify for shared leave under WAC 357-31-390 (1)(e) must first use all compensatory time, recognition leave as described in WAC 357-31-565, and vacation leave that they have accrued before using shared leave.

AMENDATORY SECTION (Amending WSR 05-12-074, filed 5/27/05, effective 7/1/05)

**WAC 357-46-066 What is the notice requirement to temporarily layoff an employee?** An employer must provide the employee seven calendar days' notice of temporary layoff. The temporary layoff notice must inform the employee of ~~((his/her))~~ their status during temporary layoff and the expected duration of the temporary layoff. Notice of temporary layoff may be provided by using alternative methods as described in WAC 357-04-105.

AMENDATORY SECTION (Amending WSR 09-11-063, filed 5/14/09, effective 6/16/09)

**WAC 357-46-067 What is an employee's status during temporary layoff?** (1) The following applies during a temporary layoff:

(a) An employee's anniversary ~~((date))~~, seniority, ~~((or))~~ and unbroken service dates ~~((is))~~ are not adjusted for periods of time spent on temporary layoff;

~~(b) ((An employee continues to accrue vacation and sick leave in accordance with chapter 357-31-WAC))~~ An employee's vacation and sick leave accruals will not be impacted by periods of time spent on temporary layoff; ~~((and))~~

(c) An employee's holiday compensation will not be impacted by periods of time spent on temporary layoff; and

(d) The duration of an employee's probationary period or trial service period shall not be extended for periods of time spent on temporary layoff.

(2) An employee who is temporarily laid off is not entitled to:

(a) Layoff rights, including the ability to bump any other position or be placed on the employer's internal or statewide layoff list;

(b) Payment for ~~((his/her))~~ their vacation leave balance; and

(c) Use of ~~((his/her))~~ their accrued vacation leave for hours the employee is not scheduled to work if the temporary layoff was due to lack of funds.

(3) If the temporary layoff was not due to lack of funds, an employer may allow an employee to use accrued vacation leave in lieu of temporary layoff.

#### NEW SECTION

**WAC 357-46-069 How is an employee's temporary layoff day determined when an employee works a night shift schedule which begins one calendar day and ends on the next?** For employees working a shift which begins on one calendar day and ends on the next, the twenty-four hour period during which the temporary layoff occurs must be determined by the employer to start either at the start of the shift that begins on the day of temporary layoff, or the start of the shift that precedes the day of temporary layoff. For example:

The employer has determined that July 12th will be a temporary layoff day. The employee's regular work schedule is 6:00 p.m. to 3:00 a.m. Sunday through Thursday. The employer must determine if the employee's temporary layoff will occur for the shift which begins at 6:00 p.m. on July 11th or the shift that begins at 6:00 p.m. on July 12th.

#### NEW SECTION

**WAC 357-58-556 How is a WMS employee's temporary layoff day determined when an employee works a night shift schedule which begins one calendar day and ends on the next?** For WMS employees working a shift which begins on one calendar day and ends on the next, the twenty-four hour period during which the temporary layoff occurs must be determined by the employer to start either at

the start of the shift that begins on the day of temporary lay-off, or the start of the shift that precedes the day of temporary layoff. For example:

The employer has determined that July 12th will be a temporary layoff day. The employee's regular work schedule is 6:00 p.m. to 3:00 a.m. Sunday through Thursday. The employer must determine if the employee's temporary layoff will occur for the shift which begins at 6:00 p.m. on July 11th or the shift that begins at 6:00 p.m. on July 12th.

#### NEW SECTION

**WAC 357-52-012 Does an employee who has been temporarily laid off under chapter 32, Laws of 2010 have the right to appeal the temporary layoff?** An employee who has been temporarily laid off under chapter 32, Laws of 2010 does not have the right to appeal the temporary layoff.

AMENDATORY SECTION (Amending WSR 06-07-048, filed 3/9/06, effective 4/10/06)

**WAC 357-58-553 What is the notice requirement to temporarily layoff a WMS employee?** An employer must provide the WMS employee seven calendar days' notice of temporary layoff. The temporary layoff notice must inform the WMS employee of ~~((his/her))~~ their status during temporary layoff and the expected duration of the temporary layoff. Notice of temporary layoff may be provided by using alternative methods as described in WAC 357-04-105.

AMENDATORY SECTION (Amending WSR 09-17-060, filed 8/13/09, effective 9/16/09)

**WAC 357-58-554 What is a WMS employee's status during temporary layoff?** (1) The following applies during a temporary layoff:

(a) ~~((A WMS))~~ An employee's anniversary date, seniority, or unbroken service date is not adjusted for periods of time spent on temporary layoff;

(b) ~~((A WMS employee continues to accrue vacation and sick leave in accordance with chapter 357-31 WAC))~~ An employee's vacation and sick leave accruals will not be impacted by periods of time spent on temporary layoff; ~~((and))~~

(c) An employee's holiday compensation will not be impacted by periods of time spent on temporary layoff; and

(d) The duration of an employee's review period shall not be extended for periods of time spent on temporary layoff.

(2) A WMS employee who is temporarily laid off is not entitled to:

(a) Layoff rights, including the ability to bump any other position or be placed on the employer's internal or statewide layoff list;

(b) Payment for ~~((his/her))~~ their vacation leave balance; and

(c) Use of ~~((his/her))~~ their accrued vacation leave for hours the employee is not scheduled to work if the temporary layoff was due to lack of funds.

(3) If the temporary layoff was not due to lack of funds, an employer may allow a WMS employee to use accrued vacation leave in lieu of temporary layoff.

**WSR 10-21-017**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-271—Filed October 7, 2010, 2:54 p.m., effective October 7, 2010, 2:54 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order:  
Amending WAC 220-47-311, 220-47-401, and 220-47-411.

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: Pursuant to the Pacific Salmon Treaty (January 2009), Chapter 6, paragraph 6(a) and paragraph 10(a), Fraser River chum levels of less than 1 million are defined as critical. Paragraph 6(c) states that when run sizes are expected to be below the critical threshold, Canada is required to notify the United States. Paragraph 6(c) also states that Canada will conduct only assessment fisheries and noncommercial fisheries when this occurs, and that commercial fisheries targeting Fraser River chum salmon will be suspended. Canada has determined that the current run size of inside chum in Johnstone Strait is one million or less, which indicates a critical level. Canadian commercial fisheries are suspended, effective on midnight, October 8, 2010, until further notice. 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 3, Amended 0, Repealed 0.

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

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

Date Adopted: October 7, 2010.

Philip Anderson  
Director

#### NEW SECTION

**WAC 220-47-31100F Purse seines—Open periods.** Notwithstanding the provisions of WAC 220-47-311, effective immediately until further notice, it is unlawful to fish for or possess salmon taken for commercial purposes with purse

seine gear in waters of Puget Sound Salmon Management and Catch Reporting Areas 7 and 7A.

#### NEW SECTION

**WAC 220-47-40100E Reef nets—Open periods.** Notwithstanding the provisions of WAC 220-47-401, effective immediately until further notice, it is unlawful to fish for or possess salmon taken for commercial purposes with reef net gear in waters of Puget Sound Salmon Management and Catch Reporting Areas 7 and 7A.

#### NEW SECTION

**WAC 220-47-41100N Gill nets—Open periods.** Notwithstanding the provisions of WAC 220-47-411, effective immediately until further notice, it is unlawful to fish for or possess salmon taken for commercial purposes with gill net gear in waters of Puget Sound Salmon Management and Catch Reporting Areas 7 and 7A.

**WSR 10-21-021  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-272—Filed October 8, 2010, 2:26 p.m., effective October 8, 2010, 2:26 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: The previous emergency rule inadvertently omitted salmon angling at night in the area from Priest Rapids Dam to Rock Island Dam. 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 Mak-

ing: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: October 8, 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, it is unlawful to violate the following provisions, provided that unless otherwise amended, all permanent rules remain in effect:

(1) In the river sections modified below mandatory retention of adipose fin-clipped hatchery origin steelhead. Release any steelhead with one or more round holes punched in the caudal (tail) fin. Current salmon and all other game fish gear rules do not apply during steelhead season.

(2) Effective immediately until further notice, a person may fish for steelhead in the Columbia River from Priest Rapids Dam to 400 feet below Chief Joseph Dam. Selective gear rules, except bait allowed. Night closure in effect, except angling is allowed at night for salmon from Priest Rapids Dam to Rock Island Dam. Daily limit may contain up to four adipose fin clipped steelhead; minimum size 20 inches.

(a) A person may fish for and possess floy tagged rainbow trout. No daily or minimum size limits.

(3) Effective immediately, until further notice, a person may fish for steelhead in the Entiat River upstream from the Alternate Highway 97 Bridge near the mouth of the Entiat River to 800 feet downstream of the Entiat National Fish Hatchery outfall. Daily limit may contain up to four adipose fin clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

(4) Effective immediately until further notice, a person may fish for steelhead in waters of the Methow River from the mouth to the confluence with the Chewuch River in Winthrop. Fishing from a floating device is prohibited from the second powerline crossing to the first Highway 153 bridge. Daily limit may contain up to four adipose fin clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

(5) Effective immediately until further notice, a person may fish for steelhead in the Okanogan River from the mouth to the Highway 97 Bridge in Oroville. Daily limit may contain up to four adipose fin clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

(6) Effective November 1, 2010, until further notice, a person may fish for steelhead in waters of the Similkameen River from the mouth to 400 feet below Enloe Dam. Daily limit may contain up to four adipose fin clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

(7) Effective immediately until further notice, a person may fish for steelhead in waters of the Wenatchee River from the mouth to the Icicle River Road Bridge. Daily limit may

contain up to four adipose fin clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

### REPEALER

The following section of the Washington Administrative code is repealed

WAC 232-28-61900Y Exceptions to statewide rules—Columbia, Entiat, Methow, Okanogan, Similkameen, and Wenatchee rivers. (10-222)

**WSR 10-21-022**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-273—Filed October 8, 2010, 2:27 p.m., effective October 11, 2010, 6:00 a.m.]

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

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

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

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

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

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

Reasons for this Finding: Sets the sixth weekly commercial fishing period for fall season treaty gillnet fisheries. Continues to allow sales of fish caught prior to 6 p.m. on October 17, 2010, in areas above and below Bonneville Dam with platform hook and line gear. Continues to allow sales of fish from Yakama Nation tributary fisheries, except all fish caught after 6 p.m. on October 17, 2010, and sold outside the fishing area must be accompanied by a transport permit, and steelhead caught in Yakama Nation tributary fisheries after 6 p.m. on October 17, 2010, may not be sold and may only be retained for subsistence purposes.

Based on current forecasts, adult fall chinook and steelhead remain available for treaty Indian harvest. Impact limits

to ESA-listed salmonids remain available for treaty Indian fisheries. Harvest is expected to remain within the allocation and guidelines of the 2008-2017 management agreement. Rule is consistent with action of the Columbia River compact on June 10 and October 8, 2010. Conforms state rules with tribal rules.

Regulations include fisheries that are described in the memorandum of agreement between Washington state and the Yakama Nation. Regulations also include fisheries that are described in individual memorandums of understanding between Washington state and the Umatilla and Warm Springs tribes. The Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the congressionally ratified Columbia River compact. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

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

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

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

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

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

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

Date Adopted: October 8, 2010.

Joe Stohr  
for Philip Anderson  
Director

### NEW SECTION

**WAC 220-32-05100R 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, walleye, carp, yellow perch, catfish or bass for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas (SMCRA) 1E, 1F, 1G, and 1H, and in the White Salmon River, Klickitat River, and Drano Lake, except as provided in the following subsections, and except that individuals possessing treaty fishing rights under the Yakama, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, walleye, shad, yellow perch, catfish, bass carp, or sturgeon under the following provisions, pursuant to lawfully enacted tribal rules and MOUs:

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

a) SEASON: 6:00 a.m. October 11 to 6:00 p.m. October 13, 2010.

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

c) SANCTUARIES: No Spring Creek sanctuary in effect.

d) GEAR: Gillnets. 8-inch minimum mesh restriction.

e) ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, catfish, bass and carp may be sold or retained for subsistence. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools and between 38-54 inches in fork length in the Bonneville Pool may be retained for subsistence.

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

a) SEASON: Immediately until 6:00 p.m. October 17, 2010.

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

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

d) ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, catfish, bass and carp may be sold or retained for subsistence. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools and between 38-54 inches in fork length in the Bonneville Pool may be retained for subsistence.

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

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

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

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

d) ALLOWABLE SALES: For Salmon, walleye, shad, yellow perch, catfish, bass and carp caught after 6:00 p.m. October 17, the Yakama Nation will provide fishers participating in these fisheries with transport permits that will be required in order to sell fish outside the fishing areas. **Steelhead caught in YN tributary fisheries after 6:00 p.m. October 17 may not be sold, and may only be kept for subsistence.** Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools (SMCRA 1G, 1H) may be retained for subsistence. Sturgeon between 38-54 inches in fork length in the Bonneville pool (SMCRA 1F) may also be retained for subsistence.

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

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

b) SEASON: Immediately until 6:00 p.m. October 17, 2010, except closed Thursdays through Saturdays for the CTUIR and the CTWS when non-tribal salmon fishing is open in the MOU area.

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

1. Between the markers located 150 feet upstream and 450 feet downstream from the mouth of Tanner Creek, out to the center of the Columbia river, immediately until further notice.

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

3. From Bradford Island below Bonneville Dam from the south shore between the dam and a line perpendicular to the shore marker at the west end of riprap.

4. From the north shore between the fishway entrance and a line perpendicular to the shoreline marker 850 feet downstream. From Robins Island below Bonneville Dam downstream to a line perpendicular to the shoreline marker on the mooring cell.

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

e) ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, bass and carp. Sturgeon caught below Bonneville Dam may NOT be retained, and may NOT be sold. Fish may not be sold on USACE Property below Bonneville Dam, but may be caught and transported off USACE Property for sale.

**5. ADDITIONAL REGULATIONS:** For all commercial sales, 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240.

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

REPEALER

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

WAC 220-32-05100Q Columbia River salmon seasons above Bonneville Dam. (10-260)

**WSR 10-21-031**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**EARLY LEARNING**

[Filed October 12, 2010, 9:55 a.m., effective October 12, 2010, 9:55 a.m.]

Effective Date of Rule: Immediately.

Purpose: Increasing annual licensing fees for child care centers and school age centers in accordance with section 614(14), of ESSB 6444, the 2010-2011 supplemental operating budget (chapter 37, Laws of 2010 1st sp. sess.). The act authorizes department of early learning (DEL) to increase these fees effective in fiscal year 2011 starting July 1, 2010. This filing continues and extends the emergency rules filed on June 14, 2010, as filing number WSR 10-13-072.

Citation of Existing Rules Affected by this Order: Amending WAC 170-151-070 and 170-295-060.

Statutory Authority for Adoption: RCW 43.215.255; and chapter 37, Laws of 2010 1st sp. sess. (ESSB 6444).

Other Authority: Chapter 43.215 RCW.

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: Section 614(14) of the 2010-2011 Supplemental Operating Budget Act (ESSB 6444) directs DEL to increase licensing fees for child care centers by \$52 for the first twelve children, plus and [an] additional \$4 per additional child up to the center's maximum licensed capacity. The 2010 state legislature authorized this fee increase as part of several revenue-generating measures to close a projected \$2.8 billion budget shortfall during the 2011 fiscal year, and for predicted shortfalls in future fiscal years. The rule is needed to implement the requirements or reductions in appropriations enacted in the budget for fiscal year 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 of the state. Revenues generated by this fee increase will be deposited to the state general fund and are not retained by DEL. DEL has filed proposed rules (WSR 10-18-065), and public hearings were held on October 7 and 9, 2010. DEL must extend the emergency rules filed on June 14, 2010, while the department completes the permanent rule adoption.

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

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 2, Repealed 0.

Date Adopted: October 12, 2010.

Elizabeth M. Hyde  
Director

AMENDATORY SECTION (Amending WSR 08-10-041, filed 4/30/08, effective 5/31/08)

**WAC 170-151-070 How do I apply or reapply for a license?** (1) You must comply with the department's application procedures and submit to the department:

(a) A completed department-supplied application for school-age child care center license, including attachments, ninety or more days before the:

- (i) Expiration of your current license;
- (ii) Opening date of your center;
- (iii) Relocation of your center; or
- (iv) Change of the licensee.

(b) A completed background check form for each staff person or volunteer having unsupervised or regular access to the child in care; and

(c) The annual licensing fee(~~(-The fee)~~) is:

(i) For new licenses issued by the department before July 1, 2010, or for licensees whose annual licensing fees are due before July 1, 2010, forty-eight dollars per year for the first twelve children plus four dollars for each additional child over the licensed capacity of twelve children; or

(ii) For new licenses issued after June 30, 2010, or for licensees whose annual licensing fees are due after June 30, 2010, one hundred dollars per year for the first twelve children plus eight dollars for each additional child over the licensed capacity of twelve children.

(2) In addition to the required application materials specified under subsection (1) of this section, you must submit to the department:

(a) An employment and education resume of the person responsible for the active management of the center and of the site coordinator;

(b) Copies of diplomas or education transcripts of the director and site coordinator; and

(c) Three professional references each for you, the director, and the site coordinator.

(3) You, as the applicant for a license under this chapter must be twenty-one years of age or older.

(4) You must conform to rules and regulations approved or adopted by the:

(a) State department of health and relating to the health care of children at school-age child care centers;

(b) State fire marshal's office, establishing standards for fire prevention and protection of life and property from fire, under chapter 212-12 WAC.

(5) The department must not issue a license to you until the state fire marshal's office has certified or inspected and approved the center.

(6) The department may exempt a school site possessing a fire safety certification signed by the local fire official within six months prior to licensure from the requirement to receive an additional fire safety inspection by the state fire marshal's office.

(7) You must submit a completed plan of deficiency correction, when required, to the department of health and the department licensor before the department will issue you a license.

(8) You, your director and site coordinator must attend department-provided orientation training.

**AMENDATORY SECTION** (Amending WSR 08-10-041, filed 4/30/08, effective 5/31/08)

**WAC 170-295-0060 What are the requirements for applying for a license to operate a child care center?** (1)

To apply or reapply for a license to operate a child care center you must:

(a) Be twenty-one years of age or older;

(b) The applicant, director and program supervisor must attend the orientation programs that we provide, arrange or approve;

(c) Submit to us a completed and signed application for a child care center license or certification using our forms (with required attachments).

(2) The application package must include the following attachments:

(a) The annual licensing fee. The fee is based on your licensed capacity, and is:

(i) For new licenses issued by the department before July 1, 2010, or for licensees whose annual licensing fees are due before July 1, 2010, forty-eight dollars for the first twelve children plus four dollars for each additional child over the licensed capacity of twelve children; or

(ii) For new licenses issued after June 30, 2010, or for licenses whose annual license fees are due after June 30, 2010, one hundred dollars per year for the first twelve children plus eight dollars for each additional child over the licensed capacity of twelve children;

(b) If the center is solely owned by you, a copy of your:

(i) Photo identification issued by a government entity; and

(ii) Social Security card that is valid for employment or verification of your employer identification number.

(c) If the center is owned by a corporation, verification of the corporation's employer identification number;

(d) An employment and education resume for:

(i) The person responsible for the active management of the center; and

(ii) The program supervisor.

(e) Diploma or education transcript copies of the program supervisor;

(f) Three professional references each, for yourself, the director, and the program supervisor;

(g) Articles of incorporation if you choose to be incorporated;

(h) List of staff (form is provided in the application);

(i) Written parent communication (child care handbook);

(j) Copy of transportation insurance policy (liability and medical);

(k) In-service training program (for facilities employing more than five persons);

(l) A floor plan of the facility drawn to scale;

(m) A copy of your health care plan reviewed and signed by an advisory physician, physician's assistant, or registered nurse;

(n) A copy of your policies and procedures that you give to parents; and

(o) A copy of your occupancy permit.

(3) You must submit to the department a completed background check form for all persons required to be authorized by DEL to care for or have unsupervised access to the children in care under chapter 170-06 WAC; and

(4) You must submit your application and reapplication ninety or more calendar days before the date:

(a) You expect to open your new center;

(b) Your current license is scheduled to expire;

(c) You expect to relocate your center;

(d) You expect to change licensee; or

(e) You expect a change in your license category.

### WSR 10-21-032

#### EMERGENCY RULES DEPARTMENT OF EARLY LEARNING

[Filed October 12, 2010, 10:08 a.m., effective October 12, 2010, 10:08 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" (OTC) 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 June 14, 2010, filing number WSR 10-13-104.

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-102 proposed rule notice was filed as WSR 10-16-090, and the department has received public comments. DEL plans to adopt permanent rules soon.

The rule is needed to protect the health and safety of children in DEL-licensed child care. Although the federal Centers for Disease Control and Prevention (CDC) has lifted the United States public health emergency regarding the H1N1 "swine" flu, and World Health Organization has ended its worldwide pandemic alert, controlling the spread of flu viruses and bacteria remain a concern in licensed child care. Without these rules, licensed child care providers in Washington state would be prevented from using hand sanitizing gels with children in care even if requested by the child's parent.

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 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. For any OTC medication not listed, including OTC hand sanitizer gels, the licensee must obtain a physician's written authorization - specific to each child - before the child care provider may use them with children in care. The emergency rules would permit use of hand sanitizer gels with children over twelve months old with the child's parent or guardian written permission.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 3, Repealed 0.

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

Date Adopted: October 12, 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.

**WSR 10-21-034  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-274—Filed October 12, 2010, 11:46 a.m., effective October 12, 2010, 11:46 a.m.]

Effective Date of Rule: Immediately.

Purpose: Promote public safety by extending the deadline [deadline] for public safety cougar removal applications.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-12-24300G; and amending WAC 232-12-243.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: This emergency rule is needed to extend the public safety cougar removal application date from October 1, 2010, until October 29, 2010, in order to lengthen the reporting periods for public safety situations involving cougars. The current application deadline of October 1, 2010, would prevent information that could be gleaned from an extended reporting period from being used to plan and implement the cougar removal program as required. Cougar removal programs are critical to preventing cougar populations from growing beyond manageable numbers. There is insufficient time to adopt permanent rules prior to the current deadline.

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

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

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

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

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

Date Adopted: October 12, 2010.

Philip Anderson  
Director

#### NEW SECTION

**WAC 232-12-24300G Public safety cougar removals—Application date extension.** Notwithstanding the provisions of WAC 232-12-243, applications for the public safety cougar removal 2010-2011 season will be accepted if postmarked no later than October 29, 2010.

#### REPEALER

The following section of the Washington Administrative Code is repealed effective October 30, 2010:

WAC 232-12-24300G	Public safety cougar removals—Application date extension.
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**WSR 10-21-047  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-275—Filed October 13, 2010, 3:54 p.m., effective October 14, 2010, 6:00 a.m.]

Effective Date of Rule: October 14, 2010, 6:00 a.m.

Purpose: Commercial fishing rules.

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

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: Sets additional chinook and coho commercial fishing periods for non-Indian mainstem fisheries. Select area commercial fishing sites remain open for salmon sales; however, sturgeon sales are prohibited because the harvest guideline has been met for select areas. Clarifies WAC 220-20-015 for Deep River. The seasons are consistent with the 2008-2017 interim management agreement, the 2010 non-Indian salmon allocation agreement, and the 2010 sturgeon accord. The regulation is consistent with compact action of July 29 and October 13, 2010. There is insufficient time to adopt permanent rules.

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

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

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

considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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

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

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

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

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

Date Adopted: October 13, 2010.

Joe Stohr  
for Philip Anderson  
Director

#### NEW SECTION

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

##### **1. Mainstem Columbia River**

a. SEASON: 6:00 a.m. through 6:00 p.m. on October 14, 2010.

b. AREA: SMCRA 1A-1C (Zones 1-3).

c. GEAR: Drift gillnets only. 6-inch maximum mesh size; un-slackened floater gillnet.

##### **2. Mainstem Columbia River**

a. SEASON: 7:00 p.m. on October 14 through 7:00 a.m. on October 15, 2010.

7:00 p.m. on October 17 through 7:00 a.m. on October 18, 2010.

b. AREA: SMCRA 1D, 1E (Zones 4-5).

c. GEAR: Drift gillnets only. 8-inch minimum mesh size.

##### **3. Blind Slough/Knappa Slough Select Area.**

a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2010. Open hours are 6 PM to 8 AM.

b. AREA: Blind Slough and Knappa Slough. An area closure of an approximately 100-foot radius at the mouth of Big Creek is defined by markers. Concurrent jurisdiction waters include all areas in Knappa Slough and downstream of the Railroad Bridge in Blind Slough.

c. GEAR: Gillnet. Monofilament gear is allowed. 9 3/4-inch maximum mesh size. Maximum net length of 100 fathoms. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

##### **4. Tongue Point/South Channel Select Area.**

a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2010. Open hours are 4 PM to 8 AM

b. AREA: Tongue Point and South Channel. All waters in this fishing area are concurrent jurisdiction waters.

c. GEAR: Gillnet. Monofilament gear is allowed. 6-inch maximum mesh.

Tongue Point fishing area: Net length 250 fathoms, maximum. Weight not to exceed two pounds on any one fathom.

South Channel area: Net length 100 fathoms, maximum. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

##### **5. Deep River Select Area.**

a. SEASON: Monday, Tuesday, Wednesday and Thursday nights immediately through October 30, 2010. Open hours 4 PM to 9 AM.

b. AREA: The Deep River Select Area. Concurrent jurisdiction waters extend downstream of the Highway 4 Bridge.

c. GEAR: Gill net. Monofilament gear is allowed. 6-inch maximum mesh. Net length 100 fathoms, maximum. No weight restriction on the lead line. Use of additional weights or anchors attached directly to the lead line is allowed. Nets may not be tied off to stationary structures. In addition, according to WAC 220-20-015, (1) it is unlawful to operate in any river, stream or channel any gill net gear longer than three-fourths the width of the stream.

**6. ALLOWABLE SALES:** Salmon. Sturgeon sales allowed in mainstem fisheries only. A maximum of eight (8) white sturgeon may be possessed or sold by each vessel participating each calendar week (Sunday through Saturday) through October 15. A maximum of five (5) white sturgeon may be possessed or sold by each vessel participating each calendar week (Sunday through Saturday) through October 15. Sturgeon retention and sales are prohibited in all Select Area sites (Blind Slough/Knappa Slough, Tongue Point/South Channel, Deep River).

**7. Sanctuaries:** Elokomin-B, Cowlitz, Kalama-B, Lewis-B, Sandy and Washougal.

**8. Quick Report:** 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240. When quick reporting is required, Columbia River reports must be submitted within 24 hours of the closure of each fishing period. This quick-report requirement applies to all seasons described above (Columbia River and Select Areas).

**9. Additional Rules:** Nets not specifically authorized for use in these areas may be onboard a vessel if properly stored. A properly stored net is defined as a net on a drum that is fully covered by a tarp (canvas or plastic) and bound with a minimum of ten revolutions of rope with a diameter of 3/8 (0.375) inches or greater.

Nets fished any time between official sunset and official sunrise must have lighted buoys on both ends of the net. If the net is attached to the boat, then one lighted buoy on the end of the net opposite the boat is required.

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

REPEALER

The following section of the Washington Administrative Code is repealed effective 6:00 a.m. on October 14, 2010:

WAC 220-33-01000M Columbia River season below Bonneville. (10-270)

**WSR 10-21-050**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-276—Filed October 14, 2010, 10:02 a.m., effective October 15, 2010]

Effective Date of Rule: October 15, 2010.

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

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

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

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

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

Reasons for this Finding: Opens the area below the Lewis River to chinook retention. Retains the daily limit that includes two adult chinook. Harvestable numbers of upriver bright fall chinook remain within the ESA impact limit, based on the current in-season chinook run size. 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 2, Repealed 0.

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

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

Date Adopted: October 14, 2010.

Philip Anderson  
Director

NEW SECTION

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

**Columbia River**

1. From Buoy 10 upstream to Bonneville Dam: Effective October 15 through December 31, 2010: Release all salmon other than Chinook and hatchery coho. Salmon minimum size limit is 12 inches. Daily limit six fish. Up to two may be adult salmon or hatchery steelhead, or one of each.

2. From Beacon Rock to Bonneville Dam, closed to fishing for salmon November 1 through December 31, 2010.

REPEALER

The following section of the Washington Administrative Code is repealed effective October 15, 2010:

WAC 232-28-61900J Exceptions to statewide rules—Columbia River. (10-249)

The following section of the Washington Administrative Code is repealed effective January 1, 2011:

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

**WSR 10-21-053**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-277—Filed October 14, 2010, 12:32 p.m., effective October 14, 2010, 12:32 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 (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes, federal law governing Washington's relationship with Oregon, and Washington fish

and wildlife commission policy guidance for Columbia River fisheries.

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

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

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

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

Reasons for this Finding: Corrects a typo on the previous emergency rule. Sets additional chinook and coho commercial fishing periods for non-Indian mainstem fisheries. Select area commercial fishing sites remain open for salmon sales; however, sturgeon sales are prohibited because the harvest guideline has been met for select areas. Clarifies WAC 220-20-015 for Deep River. The seasons are consistent with the 2008-2017 interim management agreement, the 2010 non-Indian salmon allocation agreement, and the 2010 sturgeon accord. The regulation is consistent with compact action of July 29 and October 13, 2010. There is insufficient time to adopt permanent rules.

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

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

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington

(WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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

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

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

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

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

Date Adopted: October 14, 2010.

Joe Stohr  
for Philip Anderson  
Director

## NEW SECTION

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

### **1. Mainstem Columbia River**

a. SEASON: Immediately through 6:00 p.m. on October 14, 2010.

b. AREA: SMCRA 1A-1C (Zones 1-3).

c. GEAR: Drift gillnets only. 6-inch maximum mesh size; un-slackened floater gillnet.

### **2. Mainstem Columbia River**

a. SEASON: 7:00 p.m. October 14 through 7:00 a.m. on October 15, 2010

7:00 p.m. October 17 through 7:00 a.m. on October 18, 2010

b. AREA: SMCRA 1D, 1E (Zones 4-5).

c. GEAR: Drift gillnets only. 8-inch minimum mesh size.

### **3. Blind Slough/Knappa Slough Select Area.**

a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2010. Open hours are 6 PM to 8 AM.

b. AREA: Blind Slough and Knappa Slough. An area closure of an approximately 100-foot radius at the mouth of Big Creek is defined by markers. Concurrent jurisdiction waters include all areas in Knappa Slough and downstream of the Railroad Bridge in Blind Slough.

c. GEAR: Gillnet. Monofilament gear is allowed. 9 3/4-inch maximum mesh size. Maximum net length of 100 fathoms. No weight restriction on lead line. Use of additional

weights or anchors attached directly to the lead line is allowed.

#### 4. Tongue Point/South Channel Select Area.

a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2010. Open hours are 4 PM to 8 AM

b. AREA: Tongue Point and South Channel. All waters in this fishing area are concurrent jurisdiction waters.

c. GEAR: Gillnet. Monofilament gear is allowed. 6-inch maximum mesh.

Tongue Point fishing area: Net length 250 fathoms, maximum. Weight not to exceed two pounds on any one fathom.

South Channel area: Net length 100 fathoms, maximum. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

#### 5. Deep River Select Area.

a. SEASON: Monday, Tuesday, Wednesday and Thursday nights immediately through October 30, 2010. Open hours 4 PM to 9 AM.

b. AREA: The Deep River Select Area. Concurrent jurisdiction waters extend downstream of the Highway 4 Bridge.

c. GEAR: Gill net. Monofilament gear is allowed. 6-inch maximum mesh. Net length 100 fathoms, maximum. No weight restriction on the lead line. Use of additional weights or anchors attached directly to the lead line is allowed. Nets may not be tied off to stationary structures. In addition, according to WAC 220-20-015, (1) it is unlawful to operate in any river, stream or channel any gill net gear longer than three-fourths the width of the stream.

**6. ALLOWABLE SALES:** Salmon. Sturgeon sales allowed in mainstem fisheries only. A maximum of eight (8) white sturgeon may be possessed or sold by each vessel participating each calendar week (Sunday through Saturday) through October 15. A maximum of five (5) white sturgeon may be possessed or sold by each vessel participating each calendar week (Sunday through Saturday) through October 18. Sturgeon retention and sales are prohibited in all Select Area sites (Blind Slough/Knappa Slough, Tongue Point/South Channel, Deep River).

**7. Sanctuaries:** Elokomin-B, Cowlitz, Kalama-B, Lewis-B, Sandy and Washougal.

**8. Quick Report:** 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240. When quick reporting is required, Columbia River reports must be submitted within 24 hours of the closure of each fishing period. This quick-report requirement applies to all seasons described above (Columbia River and Select Areas).

**9. Additional Rules:** Nets not specifically authorized for use in these areas may be onboard a vessel if properly stored. A properly stored net is defined as a net on a drum that is fully covered by a tarp (canvas or plastic) and bound with a minimum of ten revolutions of rope with a diameter of 3/8 (0.375) inches or greater.

Nets fished any time between official sunset and official sunrise must have lighted buoys on both ends of the net. If the net is attached to the boat, then one lighted buoy on the end of the net opposite the boat is required.

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

#### REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-33-01000N Columbia River season  
below Bonneville. (10-275)

#### WSR 10-21-064

#### EMERGENCY RULES

#### DEPARTMENT OF FISH AND WILDLIFE

[Order 10-279—Filed October 15, 2010, 3:33 p.m., effective October 16, 2010]

Effective Date of Rule: October 16, 2010.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900W; 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 number of late stock, hatchery coho salmon returning to the Grays River this year is larger than expected. This regulation will allow anglers additional opportunity to harvest hatchery coho, as well as hatchery winter steelhead. The fishery also will help remove hatchery origin fish, allowing a greater proportion of wild fish onto the spawning grounds. 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: October 15, 2010.

Joe Stohr  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 232-28-61900W Exceptions to statewide rules—Grays River.** Notwithstanding the provisions of WAC 232-28-619, effective October 16 through November 14, 2010, a person may fish for salmon and steelhead in waters of the Grays River from the mouth to the Highway 4 Bridge. Daily limit six salmon; minimum size 12 inches in length. Up to two may be adult Chinook. All Chinook must be adipose and/or ventral fin clipped to be retained. Release wild coho, Chinook not adipose and/or ventral fin clipped, and all chum. In addition, two hatchery steelhead may be retained. Release wild steelhead and all other game fish. Night closure, ant snagging rule, and stationary gear rules remain in effect.

#### REPEALER

The following section of the Washington Administrative Code is repealed effective November 15, 2010:

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

**WSR 10-21-065  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-280—Filed October 15, 2010, 4:07 p.m., effective October 15, 2010, 4:07 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-47-31100F, 220-47-40100E, and 220-47-41100N.

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: Pursuant to the Pacific Salmon Southern Panel communications, Canada has determined that the current run size of Fraser chum is above a critical level of 900,000. Comanager agreement was reached to reopen fisheries per preseason schedules. There is insufficient time to adopt permanent rules.

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

Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 3.

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

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

Date Adopted: October 15, 2010.

Joe Stohr  
for Philip Anderson  
Director

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 220-47-31100F	Purse seines—Open periods. (10-271)
WAC 220-47-40100E	Reed nets—Open periods. (10-271)
WAC 220-47-41100N	Gill nets—Open periods. (10-271)

**WSR 10-21-066  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 10-278—Filed October 15, 2010, 4:10 p.m., effective October 15, 2010, 4:10 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Readopting WAC 220-47-311 and 220-47-411.

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 department of fish and wildlife (WDFW) originally adopted 2010 Puget Sound commercial salmon fishing regulations on July 7, 2010. Included within the filing were amendments to WAC 220-47-311 and 220-47-411, which, respectively, set open periods for commercial purse seine and gillnet salmon fishing in Puget Sound, including Management Areas 10 and 11. These rules



became effective on August 7, 2010, thirty-one days after filing.

On September 28, 2010, the Washington Court of Appeals published its opinion in *Puget Sound Harvesters Association v. WDFW*, No. 39435-9-II. That case involved a challenge by Puget Sound Harvesters Association to WDFW's 2008 commercial salmon fishing regulations for Areas 10 and 11 (codified in the 2008 version of WAC 220-47-311 and 220-47-411). The Court of Appeals ruled that the 2008 regulations for Areas 10 and 11 were arbitrary and capricious because WDFW did not sufficiently consider the likely catch share outcome of the regulations, or the implications with respect to two of the department's management objectives to "[m]aintain the economic well-being and stability of the fishing industry," and to "[f]airly allocate harvest opportunity between gear groups."

WDFW has reevaluated its 2010 regulations for Areas 10 and 11 in light of the Court of Appeals' decision. In conducting this reevaluation, the department considered it [its] entire official rule-making file for the 2010 regulations. Based on this additional analysis, WDFW has concluded that the substance of the regulations adopted on July 7, 2010, comply with WDFW's management objectives and are otherwise consistent with the Court of Appeals' guidance in its recent decision. Consequently, WDFW is readopting via emergency regulation WAC 220-47-311 and 220-47-411 without change. The basis for WDFW's decision is documented in the agency's rule-making file.

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

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

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

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

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

Date Adopted: October 15, 2010.

Joe Stohr  
for Philip Anderson  
Director

**READOPTED SECTION** (Readopting Order 10-137, filed 7/7/10, effective 8/7/10)

**WAC 220-47-311 Purse seine—Open periods.** It is unlawful to take, fish for, or possess salmon taken with purse seine gear for commercial purposes from Puget Sound, except in the following designated Puget Sound Salmon Management and Catch Reporting Areas and during the periods provided for in each respective Management and Catch Reporting Area:

AREA	TIME	DATE
7, 7A:	7AM - 6PM	- 10/10, 10/11, 10/14, 10/15, 10/18, 10/19, 10/20, 10/21, 10/22, 10/23, 10/24, 10/25, 10/26, 10/27, 10/28, 10/29, 10/30, 10/31, 11/1, 11/2, 11/3, 11/4, 11/5, 11/6
	7AM - 5PM	- 11/7, 11/8, 11/9, 11/10, 11/11, 11/12, 11/13

Note: In Areas 7 and 7A, it is unlawful to fail to brail when fishing with purse seine gear. Any time brailing is required, purse seine fishers must also use a recovery box in compliance with WAC 220-47-301 (7)(a) through (f).

7B, 7C:	6AM - 8PM	- 8/18, 8/25, 9/1
7B:	7AM - 8PM	- 9/8
	7AM - 7PM	- 9/13, 9/15, 9/17
	7AM 9/19	- 6PM 10/30
	7AM 11/1	- 4PM 11/5
	7AM 11/8	- 4PM 11/12
	7AM 11/15	- 4PM 11/19
	7AM 11/22	- 4PM 11/26
	8AM 11/29	- 4PM 12/3

Note: That portion of Area 7B east of a line from Post Point to the flashing red light at the west entrance to Squalicum Harbor is open to purse seines beginning at 12:01 a.m. on the last Monday in October and until 4:00 p.m. on the first Friday in December.

8A:	7AM - 7PM	- Limited participation - two boats (9/27, 10/4).
	7AM - 6PM	- 10/11
8D:	7AM - 7PM	- 9/20, 9/27, 10/4
	7AM - 6PM	- 10/11, 10/18, 10/25, 10/27, 11/3
	7AM - 5PM	- 11/9, 11/11, 11/17
	7AM - 4PM	- 11/22, 11/24
10, 11:	7AM - 6PM	- 10/18, 10/26, 10/28, 11/1
	7AM - 5PM	- 11/9, 11/11, 11/15
	7AM - 4PM	- 11/23
12, 12B:	7AM - 6PM	- 10/18, 10/26, 10/28, 11/1
	7AM - 5PM	- 11/9, 11/11, 11/15
12C:	7AM - 5PM	- 11/9, 11/11, 11/15
	7AM - 4PM	- 11/23

Note: In Areas 12, 12B, and 12C, it is unlawful to take or fish for salmon during any open period with purse seine gear unless purse seine fishers are using a recovery box in compliance with WAC 220-47-301 (7)(a) through (f).

It is unlawful to retain the following salmon species taken with purse seine gear within the following areas during the following periods:

Chinook salmon - at all times in Areas 7, 7A, 8, 8A, 8D, 10, 11, 12, 12B, and 12C, and after October 23 in Area 7B.

Coho salmon - at all times in Areas 7, 7A, 10, and 11, prior to September 5 in Area 7B, and wild coho in Areas 12, 12B, and 12C.

Chum salmon - prior to October 1 in Areas 7 and 7A.

All other saltwater and freshwater areas - closed.

READOPTED SECTION (Readopting Order 10-137, filed 7/7/10, effective 8/7/10)

**WAC 220-47-411 Gill net—Open periods.** It is unlawful to take, fish for, or possess salmon taken with gill net gear for commercial purposes from Puget Sound, except in the following designated Puget Sound Salmon Management and Catch Reporting Areas during the periods provided for in each respective fishing area:

AREA	TIME		DATE(S)	MINIMUM MESH
6D: Skiff gill net only, definition WAC 220-16-046 and lawful gear description WAC 220-47-302.	7AM	-	7PM 9/21, 9/22, 9/23, 9/24, 9/27, 9/28, 9/29, 9/30, 10/1, 10/4, 10/5, 10/6, 10/7, 10/8, 10/11, 10/12, 10/13, 10/14, 10/15, 10/18, 10/19, 10/20, 10/21, 10/22	5"

Note: In Area 6D, it is unlawful to use other than 5-inch minimum mesh in the skiff gill net fishery. It is unlawful to retain Chinook taken in Area 6D at any time, or any chum salmon taken in Area 6D prior to October 16. In Area 6D, any Chinook or chum salmon required to be released must be removed from the net by cutting the meshes ensnaring the fish.

7, 7A:	7AM	-	Midnight; use of recovery box required 10/10, 10/11, 10/14, 10/15	6 1/4"
	7AM	-	Midnight 10/18, 10/19, 10/20, 10/21, 10/22, 10/23, 10/24, 10/25, 10/26, 10/27, 10/28, 10/29, 10/30, 10/31, 11/1, 11/2, 11/3, 11/4, 11/5, 11/6, 11/7, 11/8, 11/9, 11/10, 11/11, 11/12, 11/13	6 1/4"

Note: In Areas 7 and 7A after September 26 but prior to October 17, coho and Chinook salmon must be released, and it is unlawful to use a net soak time of more than 45 minutes. Net soak time is defined as the time elapsed from when the first of the gill net web enters the water, until the gill net is fully retrieved from the water. Fishers must also use a recovery box in compliance with WAC 220-47-302 (5)(a) through (f).

7B, 7C:	7PM	-	8AM NIGHTLY 8/15, 8/17, 8/18, 8/22, 8/24, 8/25, 8/29, 8/31, 9/1	7"
7B:	7AM	-	7 AM the day following 9/6, 9/7, 9/8, 9/9, 9/12, 9/13, 9/14, 9/16	5"
	7AM 9/19	-	Midnight 10/23	5"
	12:01AM 10/24	-	Midnight 10/30	6 1/4"
	7AM 11/1	-	4PM 11/5	6 1/4"
	6AM 11/8	-	4PM 11/12	6 1/4"
	6AM 11/15	-	4PM 11/19	6 1/4"
	7AM 11/22	-	4PM 11/26	6 1/4"
	8AM 11/29	-	4PM 12/3	6 1/4"

Note: That portion of Area 7B east of a line from Post Point to the flashing red light at the west entrance to Squalicum Harbor is open to gill nets using 6 1/4-inch minimum mesh beginning 12:01 AM on the last day in October and until 4:00 PM on the first Friday in December.

8A:	6PM	-	8AM NIGHTLY 10/4	5"
	7AM	-	8PM 10/12, 10/13, 10/14	5"
8D:	6PM	-	8AM NIGHTLY 9/19, 9/20, 9/21, 9/22, 9/23, 9/26, 9/27, 9/28, 9/29, 9/30, 10/3, 10/4, 10/5, 10/6, 10/7	5"
	5PM	-	8AM 10/10, 10/11, 10/12, 10/13, 10/14	5"
	7AM	-	9PM 9/21, 9/22, 9/28, 9/29, 10/5, 10/6	5"
	7AM	-	8PM 10/12, 10/13, 10/21, 10/28, 11/4	5"
	7AM	-	4PM 10/22, 10/29, 11/5	5"
	6AM	-	6PM 11/10, 11/18	6 1/4"
	7AM	-	6PM 11/25	6 1/4"
	6AM	-	4PM 11/12, 11/19	6 1/4"
	7AM	-	4PM 11/26	6 1/4"
9A: Skiff gill net only, definition WAC 220-16-046 and lawful gear description WAC 220-47-302.	7AM	-	7PM 8/22 through 10/30 daily	5"

Note: It is unlawful to retain chum salmon taken in Area 9A prior to October 1, and it is unlawful to retain Chinook salmon at any time. Any salmon required to be released must be removed from the net by cutting the meshes ensnaring the fish.

10, 11:	5PM	-	9AM NIGHTLY 10/19, 10/24, 11/2	6 1/4"
	5PM	-	8AM NIGHTLY 10/27	6 1/4"

AREA	TIME		DATE(S)	MINIMUM MESH	
	4PM	-	8AM	NIGHTLY 11/7, 11/10, 11/16	6 1/4"
	3PM	-	8AM	NIGHTLY 11/21	6 1/4"
	4PM	-	Midnight	NIGHTLY 10/20, 11/3, 11/17, 11/24	6 1/4"
12A: Skiff gill net only, definition WAC 220-16-046 and lawful gear description WAC 220-47-302.	7AM	-	7PM	Dates determined per agreement with tribal comanagers in-season if Summer Chum Salmon Conservation Initiative goals are met allowing for openings of gill net gear.	5"
12, 12B:	7AM	-	8PM	10/19, 10/21, 10/25, 10/27, 11/2, 11/4	6 1/4"
	6AM	-	6PM	11/8, 11/10, 11/16, 11/18	6 1/4"
12C:	6AM	-	6PM	11/8, 11/10, 11/16, 11/18	6 1/4"
	7AM	-	6PM	11/22, 11/25	6 1/4"

All other saltwater and freshwater areas - closed.

Nightly openings refer to the start date.

Within an area or areas, a mesh size restriction remains in effect from the first date indicated until a mesh size change is shown, and the new mesh size restriction remains in effect until changed.

**WSR 10-21-073  
EMERGENCY RULES  
CENTER FOR CHILDHOOD  
DEAFNESS AND HEARING LOSS**

[Filed October 18, 2010, 10:03 a.m., effective October 18, 2010, 10:03 a.m.]

Effective Date of Rule: Immediately.

Purpose: To implement newly revised admission policy and procedure for the Washington State School for the Deaf. The school will be repealing chapter 148-171 WAC, which contain the rules for special education programs, including WAC 148-171-100 Initial assessment. New rules for the provision of special education which follow the requirements of the office of the superintendent of public instruction in chapters 28A.155 RCW and 392-172A WAC, will be included in new chapter 148-172 WAC. This rule describes the admission and retention process, explains how safety risk factors are addressed, and the purpose and scope of diagnostic placement which occurs as part of the admission process.

Citation of Existing Rules Affected by this Order: New section WAC 148-172-100; and repealing WAC 148-171-100.

Statutory Authority for Adoption: RCW 72.40.0191.

Other Authority: RCW 72.40.040.

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

Reasons for this Finding: In July 2009, management and supervision over the Washington State School for the Deaf was transferred to the Washington State Center for Childhood Deafness and Hearing Loss. The School for the Deaf is currently applying the revised admission policy and procedure, which includes a limited forty-five school day diagnostic placement for the purpose of evaluation, to admission applications. An interlocutory decision which ordered the

school as a stay-put placement following a diagnostic placement found that the school's process did not unequivocally inform the parent that an agreed diagnostic placement would not constitute a potential stay-put placement. The new rule informs parents and school districts that acceptance for evaluation purposes in a forty-five school day diagnostic placement will not constitute a change in educational placement or a potential stay-put placement before a student is enrolled at the School for the Deaf and an individual education program is developed.

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 1, Amended 0, Repealed 1.

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

Date Adopted: October 1, 2010.

Rick Hauan  
Director

NEW SECTION

**WAC 148-172-100 Admission and initial evaluation.**

(1) A parent, guardian, local education agency (LEA) or school district may refer a student for admission to the Washington state school for the deaf (WSD). Students who are eighteen years old or are deemed to have reached the age of majority, consistent with RCW 26.28.010 through 26.28.020,

and who are eligible for special education may self-refer for admission.

(2) An application packet for new students may be obtained by contacting the office of the superintendent at (360) 696-6525 x0401 V/TTY, or through the link on the school's web site at <http://www.wsd.wa.gov/about/admissions.aspx>. Applications for admission shall include the reason(s) for referral.

(3) WSD will assess the appropriateness of admission by first considering the student for evaluation in a diagnostic placement. A diagnostic placement allows school personnel to obtain necessary information about the student's needs and to evaluate how the student will fare in a placement at WSD. The diagnostic placement is limited to forty-five school days. A visit by the parent(s)/guardian(s) and student to WSD is required before a diagnostic placement is initiated.

(4) WSD will request the following records from the student's current school district. All requested records must be received before the admissions team will consider and make a decision on the application for a diagnostic placement:

(a) All completed forms and material in the application packet;

(b) Student's most recent individualized education program (IEP);

(c) Student's most recent triennial evaluation report;

(d) All psychological records;

(e) High school transcripts or academic records and report cards;

(f) Records of all behavioral information, including history of criminal or violent behavior; past, current or pending disciplinary history; and other behavior that indicates the student could be a threat to the safety of staff and students; and information that would be required under RCW 28A.225.-330. Any falsification of or withholding of information will result in the termination of the application process, the evaluation, or continued placement; and

(g) Needs Assessment Inventory Interview (NAII) and Safety Risk Matrix completed by the parent(s).

If access to necessary information requires parental or student consent for the exchange of information with a third party, all such written consents must be attached to the completed application.

(5) If a student is deemed to pose a safety risk after review of the records submitted during the admissions process, the admissions team and/or the superintendent may:

(a) Deny the application for diagnostic placement; or

(b) Develop a safety plan designed to mitigate perceived safety risk(s).

If the safety plan can be implemented within existing resources at WSD, the admissions team may accept the student for diagnostic placement. If all elements of the safety plan cannot be accomplished within existing resources at Washington school for the deaf, the application shall be denied unless additional resources which are needed to ensure the safety of the student, staff and other students can be provided through an interagency agreement with the LEA or other agency.

(6)(a) Upon approval of the application for diagnostic placement, the admissions team will establish the beginning date of the diagnostic placement.

(b) The LEA or school district is responsible for ensuring that the student's IEP and evaluations remain current and valid through the end of the diagnostic placement.

(c) The admissions team will review the student's current IEP from the LEA or school district to ascertain whether any modifications should be considered or made for the purposes of the diagnostic placement. All modifications must be approved by the parent. Modifications to a student's educational program for the purposes of a diagnostic placement shall not constitute a change in placement for purposes of the Individuals with Disabilities in Education Act or stay-put under WAC 392-172A-05125.

(d) The admissions team will provide prior written notification to the parent, LEA or school district that the diagnostic placement shall not exceed forty-five school days and shall not become the student's stay-put or current educational placement should the parent(s) or school district contest the decision on the student's educational placement at the conclusion of the diagnostic placement.

(7) Residential program services may be available to a student during a diagnostic placement: *PROVIDED That:*

(a) The student is accepted into the academic program for diagnostic purposes;

(b) The residential program has space available and can provide the needed services;

(c) A one-way commute by school bus is greater than sixty minutes; and

(d) The student is able to finger-feed, chew and swallow most foods, indicated need for help when self-soiled or wet, and assist in self-dressing and bathing.

(8) Prior to the end of the diagnostic placement timeline, the admissions team will meet to determine whether the student may be enrolled at WSD. If enrollment is recommended, one of the following options will occur:

(a) The student's evaluation and IEP from the school district is reviewed and adopted following Office of the Superintendent of Public Instruction (OSPI) transfer procedures;

(b) The student's evaluation from the school district is reviewed and accepted following OSPI transfer procedures, and a new IEP is developed; or

(c) WSD will conduct a reevaluation and develop a new IEP.

(9) Partnerships and interagency agreements with LEAs and school districts may be developed to support a student's educational placement at the school for the deaf when a lack of existing resources is a reason for denying enrollment. WSD does not constitute a potential stay-put placement for students who have been denied enrollment but may be receiving services at WSD pursuant to an inter-agency agreement.

(10) Pursuant to RCW 72.40.040, WSD shall not admit and may not retain any student who is an adjudicated sex offender, classified level III pursuant to RCW 13.40.217 or 72.09.354. It is the policy of the school to deny admission to any student who has sexually abused, assaulted or victimized any student who is currently enrolled at WSD.

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

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 148-171-100 Initial assessment.

**WSR 10-21-078**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-281—Filed October 18, 2010, 4:39 p.m., effective October 19, 2010, 6:00 a.m.]

Effective Date of Rule: October 19, 2010, 6:00 a.m.

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

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

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

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

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

Reasons for this Finding: Sets the seventh weekly commercial fishing period for fall season treaty gillnet fisheries. Allow sales of fish caught during open commercial gillnet seasons in areas above and below Bonneville Dam with platform hook-and-line gear. Continues to allow sales of fish from Yakama Nation tributary fisheries, except that steelhead can only be sold if caught during an open mainstem commercial season. All tributary caught fish sold outside the fishing area must be accompanied by a transport permit. Based on current forecasts, adult fall chinook and steelhead remain available for treaty Indian harvest. Impact limits to ESA-listed salmonids remain available for treaty Indian fisheries. Harvest is expected to remain within the allocation and guidelines of the 2008-2017 management agreement. Rule is consistent with action of the Columbia River compact on October 18, 2010. Conforms state rules with tribal rules.

Regulations include fisheries that are described in the memorandum of agreement (MOA) between Washington state and the Yakama Nation. Regulations also include fisheries that are described in individual memorandums of under-

standing (MOU) between Washington state and the Umatilla and Warm Springs tribes. The Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the congressionally ratified Columbia River compact. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The tribes and the states adopt parallel regulations for treaty Indian fisheries under the supervision of the federal courts. Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal ESA. Columbia River fisheries are monitored very closely to ensure consistency with court orders and ESA guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. As required by court order, the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and invite tribal participation when considering proposals for new emergency rules affecting treaty fishing rights. *Sohappy*, 302 F. Supp. at 912. WDFW and ODFW then adopt regulations reflecting agreements reached. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: October 18, 2010.

Philip Anderson  
Director

NEW SECTION

**WAC 220-32-05100S 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, walleye, carp, yellow perch, catfish or bass for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas (SMCRA) 1E, 1F, 1G, and 1H, and in the White Salmon River, Klickitat River, and Drano Lake, except as provided in the following subsections, and except that individuals possessing treaty fishing rights under the Yakama, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, walleye, shad, yellow perch, catfish, bass,

carp, or sturgeon under the following provisions, pursuant to lawfully enacted tribal rules and MOUs:

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

a) SEASON: 6:00 a.m. October 19 to 6:00 p.m. October 22, 2010.

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

c) SANCTUARIES: No Spring Creek sanctuary in effect.

d) GEAR: Gillnets. 8-inch minimum mesh restriction.

e) ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, catfish, bass and carp may be sold or retained for subsistence. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools and between 38-54 inches in fork length in the Bonneville Pool may be retained for subsistence.

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

a) SEASON: 6:00 a.m. October 19 to 6:00 p.m. October 22, 2010.

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

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

d) ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, catfish, bass and carp may be sold or retained for subsistence. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools and between 38-54 inches in fork length in the Bonneville Pool may be retained for subsistence.

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

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

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

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

d) ALLOWABLE SALES: Salmon, walleye, shad, yellow perch, catfish, bass and carp. Steelhead from tributary fisheries may only be sold when sales are allowed in the mainstem Columbia, but may be kept for subsistence purposes. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools (SMCRA 1G, 1H) may be retained for subsistence. Sturgeon between 38-54 inches in fork length in the Bonneville pool (SMCRA 1F) may also be retained for subsistence. The Yakama Nation will provide fishers with transport permits that will be required in order to sell fish outside the fishing areas.

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

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

b) SEASON: 6:00 a.m. October 19 to 6:00 p.m. October 22, 2010, except closed Thursdays through Saturdays for the CTUIR and the CTWS when non-tribal salmon fishing is open in the MOU area.

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

1. Between the markers located 150 feet upstream and 450 feet downstream from the mouth of Tanner Creek, out to the center of the Columbia river, immediately until further notice.

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

3. From Bradford Island below Bonneville Dam from the south shore between the dam and a line perpendicular to the shore marker at the west end of riprap.

4. From the north shore between the fishway entrance and a line perpendicular to the shoreline marker 850 feet downstream. From Robins Island below Bonneville Dam downstream to a line perpendicular to the shoreline marker on the mooring cell.

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

e) ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, bass and carp. Sturgeon caught below Bonneville Dam may NOT be retained, and may NOT be sold. Fish may not be sold on USACE Property below Bonneville Dam, but may be caught and transported off USACE Property for sale.

**5. ADDITIONAL REGULATIONS:** For all commercial sales, 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240.

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

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

**REPEALER**

The following section of the Washington Administrative code is repealed effective 6:00 a.m. October 19, 2010:

WAC 220-32-05100R Columbia River salmon seasons above Bonneville Dam. (10-273)

**WSR 10-21-079**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 10-282—Filed October 18, 2010, 4:43 p.m., effective October 18, 2010, 4:43 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 (ESA). This rule making implements federal court orders governing Washington's relationship with treaty Indian tribes, federal law governing Washington's relationship with Oregon, and Washington fish and wildlife commission policy guidance for Columbia River fisheries.

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

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

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

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

Reasons for this Finding: Sets additional chinook and coho commercial fishing periods for non-Indian mainstem fisheries. Select area commercial fishing sites remain open for salmon sales; however, sturgeon sales are prohibited because the harvest guideline has been met for select areas. The seasons are consistent with the 2008-2017 interim management agreement, the 2010 non-Indian salmon allocation agreement, and the 2010 sturgeon accord. The regulation is consistent with compact action of July 29 and October 18, 2010. There is insufficient time to adopt permanent rules.

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

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536

that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

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

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

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

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

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

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

Date Adopted: October 18, 2010.

Philip Anderson  
 Director

NEW SECTION

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

**1. Mainstem Columbia River**

a. SEASON: 6:00 a.m. through 6:00 p.m. on October 20, 2010.

b. AREA: SMCRA 1A-1C (Zones 1-3).

c. GEAR: Drift gillnets only. No minimum mesh size.

**2. Mainstem Columbia River**

a. SEASON: 7:00 p.m. October 19 through 7:00 a.m. on October 20, 2010.

7:00 p.m. October 21 through 7:00 a.m. on October 22, 2010.

b. AREA: SMCRA 1D and 1E (Zones 4-5).

c. GEAR: Drift gillnets only. 8-inch minimum mesh size.

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

a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2010. Open hours are 6 PM to 8 AM.

b. AREA: Blind Slough and Knappa Slough. An area closure of an approximately 100-foot radius at the mouth of Big Creek is defined by markers. Concurrent jurisdiction waters include all areas in Knappa Slough and downstream of the Railroad Bridge in Blind Slough.

c. GEAR: Gillnet. Monofilament gear is allowed. 9 3/4-inch maximum mesh size. Maximum net length of 100 fathoms. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

#### 4. Tongue Point/South Channel Select Area.

a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2010. Open hours are 4 PM to 8 AM

b. AREA: Tongue Point and South Channel. All waters in this fishing area are concurrent jurisdiction waters.

c. GEAR: Gillnet. Monofilament gear is allowed. 6-inch maximum mesh.

Tongue Point fishing area: Net length 250 fathoms, maximum. Weight not to exceed two pounds on any one fathom.

South Channel area: Net length 100 fathoms, maximum. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.

#### 5. Deep River Select Area.

a. SEASON: Monday, Tuesday, Wednesday and Thursday nights immediately through October 30, 2010. Open hours 4 PM to 9 AM.

b. AREA: The Deep River Select Area. Concurrent jurisdiction waters extend downstream of the Highway 4 Bridge.

c. GEAR: Gill net. Monofilament gear is allowed. 6-inch maximum mesh. Net length 100 fathoms, maximum. No weight restriction on the lead line. Use of additional weights or anchors attached directly to the lead line is allowed. Nets may not be tied off to stationary structures. In addition, according to WAC 220-20-015, (1) it is unlawful to operate in any river, stream or channel any gill net gear longer than three-fourths the width of the stream.

6. ALLOWABLE SALES: Salmon. Sturgeon sales allowed in mainstem fisheries only. A maximum of five (5) white sturgeon may be possessed or sold by each vessel participating each calendar week (Sunday through Saturday). Sturgeon retention and sales are prohibited in all Select Area sites (Blind Slough/Knappa Slough, Tongue Point/South Channel, Deep River).

7. SANCTUARIES: Grays Bay (up to the lower boundary of Deep River), Elokomin-B, Cowlitz, Kalama-B, Lewis-B, Sandy and Washougal.

8. Quick Report: 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240. When quick reporting is required, Columbia River reports must be submitted within 24 hours of the closure of each fishing period. This quick-report requirement applies to all seasons described above (Columbia River and Select Areas).

9. Additional Rules: Nets not specifically authorized for use in these areas may be onboard a vessel if properly

stored. A properly stored net is defined as a net on a drum that is fully covered by a tarp (canvas or plastic) and bound with a minimum of ten revolutions of rope with a diameter of 3/8 (0.375) inches or greater.

Nets fished any time between official sunset and official sunrise must have lighted buoys on both ends of the net. If the net is attached to the boat, then one lighted buoy on the end of the net opposite the boat is required.

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

#### REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-33-01000P	Columbia River season below Bonneville. (10-277)
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