

**WSR 11-04-068**  
**EMERGENCY RULES**  
**DEPARTMENT OF REVENUE**

[Filed January 28, 2011, 1:26 p.m., effective January 28, 2011, 1:26 p.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 (Rule 19401) Minimum nexus thresholds for apportionable activities.
- WAC 458-20-19402 (Rule 19402) Single factor receipts apportionment—Generally.
- WAC 458-20-19403 (Rule 19403) Single factor receipts apportionment—Royalties.
- WAC 458-20-19404 (Rule 19404) Financial institutions—Income apportionment.

Changes from the previous emergency rules filed October 1, 2010, under WSR 10-20-104 were made in the following subsections:

- Rule 19401 - No changes.
- Rule 19402 - Subsection (5) Attribution of income.
- Rule 19403 - Subsection (5) How are royalty receipts attributed to Washington.
- Rule 19404 - No changes.

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.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 4, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 4, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.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: January 28, 2011.

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 unemployment 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 sub-

stantial 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) If a taxpayer can reasonably determine the amount of apportionable receipts related to the benefit of the services received in a state, that amount of apportionable receipts is attributable to that state. This may be shown by application of a reasonable method of proportionally assigning the benefit among states. The result determines the receipts attributed to each state. 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.

(C) 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. If Debt Collector can reasonably determine the proportion of the benefit received by ABC in each state, then that proportion of the fixed amount is the benefit received in each state. Depending on the circumstances, reasonable means to determine the proportion received in each state could be amounts recovered.

(b) If a taxpayer is unable to separately determine the benefit of the services in specific states under (a), and as a result the customer received the benefit of the service in multiple states, the apportionable receipts of the business is attributed to the state in which the benefit of the service was primarily received. Primarily means in this case more than 50%.

(i) Example 7. The same facts as Example 6, except Debt Collector cannot reasonably determine the portion of the benefit received in each state, 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.**

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	
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 reconciliation	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.

(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.

<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.

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

**NEW SECTION**

**WAC 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. In the case of sole proprietorships and pass-through entities, 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 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. If a taxpayer can reasonably determine the amount of royalty receipts related to the use in a state, that amount of royalty receipts is attributable to that state. This may be shown by application of a reasonable method of proportionally assigning the use of the intangible property among states.

(b) If a taxpayer is unable to separately determine the use of the intangible property in specific states under (a), and as a result the customer used the intangible property in multiple

states, the royalty receipts are attributed to the state in which the intangible property was primarily used. Primarily means in this case more than 50%.

(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 ter-

ritory 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; non-interest 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 terri-

tory 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 agree-

ments 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 11-05-001**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 11-15—Filed February 2, 2011, 1:24 p.m., effective February 2, 2011, 1:24 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order:  
Amending WAC 220-56-235.

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 conform to federal action taken by the Pacific Fishery Management Council. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 2, 2011.

Philip Anderson  
Director

NEW SECTION

**WAC 220-56-23500W Possession limits—Bottomfish.** Notwithstanding the provisions of WAC 220-56-235, effective immediately until further notice, it is unlawful for any person to take in any day more than the following quantities of bottomfish in waters of Marine Areas 1, 2, 3 and Marine Area 4 west of the Bonilla-Tatoosh line:

(1) 12 bottomfish species per day. The 12 fish in the aggregate limit of all species and species groups of bottomfish may include no more than 2 cabezon per person per day in addition to current daily sub limits for rockfish (10) and lingcod (2).

**WSR 11-05-002**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 11-16—Filed February 2, 2011, 1:26 p.m., effective March 12, 2011]

Effective Date of Rule: March 12, 2011.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order:  
Amending WAC 220-56-250.

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 conform to federal action taken by the Pacific Fishery Management Council. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 2, 2011.

Philip Anderson  
Director

#### NEW SECTION

**WAC 220-56-25000L Lingcod—Areas and seasons.** Notwithstanding the provisions of WAC 220-56-250, effective 12:01 a.m. March 12, 2011, until further notice, a person may fish for and possess lingcod for personal use in Marine Areas 1, 2, and 3.

**WSR 11-05-011**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 11-18—Filed February 3, 2011, 3:38 p.m., effective February 3, 2011, 3:38 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-07100F; and amending WAC 220-52-071.

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: Harvestable amounts of sea cucumbers are available in the sea cucumber districts listed. The harvest industry has requested an expanded harvest schedule in order to account for inclement weather days and maximize market opportunities. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 3, 2011.

Lori Preuss  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 220-52-07100G Sea cucumbers.** Notwithstanding the provisions of WAC 220-52-071, effective immediately until further notice, it is unlawful to take or possess sea cucumbers taken for commercial purposes except as provided for in this section:

(1) Sea cucumber harvest using shellfish diver gear is allowed in Sea Cucumber Districts 1 and 5 seven days per week.

(2) Sea cucumber harvest using shellfish diver gear is allowed in Sea Cucumber District 3 from Monday through Friday of each week.

#### REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-52-07100F Sea cucumbers. (10-268)

**WSR 11-05-017**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 11-17—Filed February 4, 2011, 1:26 p.m., effective February 5, 2011]

Effective Date of Rule: February 5, 2011.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

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

Reasons for this Finding: The fishery will reduce the number of excess hatchery-origin steelhead and consequently increase the proportion of natural-origin steelhead on the spawning grounds. Higher proportions of naturally produced spawners are expected to improve genetic integrity and stock recruitment of upper Columbia River steelhead through perpetuation of steelhead stocks with the greatest natural-origin lineage. Sections of the Okanogan River around the mouths of Omak and Tonasket creeks are closed to protect natural origin steelhead staging prior to spawning in those tributaries. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 4, 2011.

Philip Anderson  
Director

## NEW SECTION

**WAC 232-28-61900V Exceptions to statewide rules Columbia, Entiat, Methow, Okanogan and Similkameen rivers.** Notwithstanding the provisions of WAC 232-28-619, effective February 5, 2011, through March 31, 2011, 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, a person may retain hatchery-origin adipose fin-clipped steelhead with circular (hole) punches in the caudal (tail) fin just like they can in areas of the Columbia River and tributaries that remain open to steelhead fishing. Current salmon and all other game fish rules do not apply during steelhead season.

(2) 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 is allowed. Night closure in effect. 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) 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 con-

tain up to four adipose fin-clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

(4) 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) A person may fish for steelhead in waters of the Okanogan River from the mouth upstream to the Hwy 97 Bridge in Oroville. Night closure and selective gear rules apply. EXCEPTION: CLOSED WATERS, effective March 15, 2011, from the first powerline crossing downstream of the Hwy 155 Bridge in Omak (Coulee Dam Credit Union Building) to the mouth of Omak Creek; and from the Tonasket Bridge (4th Street) downstream to the Tonasket Lagoons Park boat launch.

(6) 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.

### **WSR 11-05-027**

#### **EMERGENCY RULES**

#### **DEPARTMENT OF**

#### **SOCIAL AND HEALTH SERVICES**

(Economic Services Administration)

[Filed February 7, 2011, 3:18 p.m., effective February 7, 2011, 3:18 p.m.]

Effective Date of Rule: Immediately.

Purpose: The department is proposing to amend by emergency adoption WAC 388-400-0025 in order to permit disability lifeline (DL) benefits for persons who are pregnant and in need, as required by RCW 74.04.005. The department is concurrently pursuing permanent adoption of these rules.

Citation of Existing Rules Affected by this Order: Amending WAC 388-400-0025.

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

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

Reasons for this Finding: RCW 74.04.005 directs the department to provide DL benefits to persons who are pregnant and in need, based upon current income and resource requirements of the federal temporary assistance for needy families program, who are not eligible to receive federal aid assistance other than basic food and medical assistance.

It is essential to have DL pregnancy eligibility in place in order to comply with the requirements of RCW 74.04.005.

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

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

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

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

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

Date Adopted: February 7, 2011.

Katherine I. Vasquez  
Rules Coordinator

**AMENDATORY SECTION** (Amending WSR 10-16-096, filed 7/30/10, effective 9/1/10)

**WAC 388-400-0025 Who is eligible for disability lifeline benefits?** (1) Effective March 29, 2010, the "general assistance" program was replaced by "disability lifeline." Any reference in Washington Administrative Code (WAC) to general assistance also applies to disability lifeline.

(2) You are eligible for disability lifeline (DL) benefits if you:

(a) Are pregnant as verified by a medical statement or incapacitated as required under WAC 388-448-0001 through 388-448-0120;

(b) Are at least eighteen years old or, if under eighteen, a member of a married couple;

(c) Are in financial need according to DL income and resource rules in chapters 388-450, 388-470 and 388-488 WAC. We determine who is in your assistance unit according to WAC 388-408-0010;

(d) Meet the disability lifeline citizenship/alien status requirements under WAC 388-424-0015(2);

(e) Provide a Social Security number as required under WAC 388-476-0005;

(f) Reside in the state of Washington as required under WAC 388-468-0005;

(g) Undergo referrals for assessment, treatment, or to other agencies as provided under WAC 388-448-0130 through 388-448-0150;

(h) Sign an interim assistance reimbursement authorization to agree to repay the monetary value of general assistance or disability lifeline benefits subsequently duplicated by Supplemental Security Income benefits as described under WAC 388-448-0200, 388-448-0210 and 388-474-0020;

(i) Report changes of circumstances as required under WAC 388-418-0005; and

(j) Complete a mid-certification review and provide proof of any changes as required under WAC 388-418-0011.

(3) You aren't eligible for disability lifeline benefits if you:

(a) Have received general assistance or disability lifeline benefits for more than the maximum number of months as defined in WAC 388-448-0250.

(b) Are eligible for temporary assistance for needy families (TANF) benefits.

(c) Are eligible for state family assistance (SFA) benefits.

(d) Refuse or fail to meet a TANF or SFA eligibility rule.

(e) Refuse or fail to participate in drug or alcohol treatment as required in WAC 388-448-0220.

(f) Are eligible for Supplemental Security Income (SSI) benefits.

(g) Are an ineligible spouse of an SSI recipient.

(h) Failed to follow a Social Security Administration (SSA) program rule or application requirement and SSA denied or terminated your benefits.

(4) If you reside in a public institution and meet all other requirements, your eligibility for DL depends on the type of institution. A "public institution" is an institution that is supported by public funds, and a governmental unit either is responsible for it or exercises administrative control over it.

(a) You may be eligible for disability lifeline if you are:

(i) A patient in a public medical institution; or

(ii) A patient in a public mental institution and:

(A) Sixty-five years of age or older; or

(B) Twenty years of age or younger.

(b) You aren't eligible for DL when you are in the custody of or confined in a public institution such as a state penitentiary or county jail including placement:

(i) In a work release program; or

(ii) Outside of the institution including home detention.

#### WSR 11-05-038

#### EMERGENCY RULES

#### DEPARTMENT OF

#### FISH AND WILDLIFE

[Order 11-20—Filed February 8, 2011, 4:34 p.m., effective February 8, 2011, 4:34 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-61900V; 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 fishery will reduce the number of excess hatchery-origin steelhead and consequently increase the proportion of natural-origin steelhead on the spawning grounds. Higher proportions of naturally produced spawners are expected to improve genetic integrity and stock recruitment of upper Columbia River steelhead through per-



petuation of steelhead stocks with the greatest natural-origin lineage. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 8, 2011.

Philip Anderson  
Director

#### NEW SECTION

**WAC 232-28-61900W Exceptions to statewide rules—Columbia, Entiat, Methow, Okanogan, Similkameen, Wenatchee and Icicle rivers.** 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:

(1) In the river sections modified below, mandatory retention of adipose fin-clipped hatchery origin steelhead. A person may retain hatchery-origin adipose fin-clipped steelhead with circular (hole) punches in the caudal (tail) fin. Current salmon and all other game fish rules do not apply during steelhead season.

(2) 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 is allowed. Night closure in effect. 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) 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) 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) A person may fish for steelhead in waters of the Okanogan River from the mouth upstream to the Hwy 97 Bridge in Oroville. Daily limit may contain up to four adi-

pose fin-clipped steelhead; minimum size 20 inches. Night closure and selective gear rules apply.

EXCEPTION: CLOSED WATERS, effective beginning March 15, 2011, from the first powerline crossing downstream of the Hwy 155 Bridge in Omak (Coulee Dam Credit Union Building) to the mouth of Omak Creek; and from the Tonasket Bridge (4th Street) downstream to the Tonasket Lagoons Park boat launch.

(6) 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) 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.

(8) A person may fish for steelhead in waters of the Icicle River from the mouth to 500 feet downstream of the Leavenworth National Fish Hatchery Barrier Dam. 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 232-28-61900V	Exceptions to statewide rules—Columbia, Entiat, Methow, Okanogan and Similkameen rivers. (11-17)
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#### **WSR 11-05-043**

#### **EMERGENCY RULES**

#### **DEPARTMENT OF**

#### **SOCIAL AND HEALTH SERVICES**

(Aging and Disability Services Administration)

[Filed February 9, 2011, 2:04 p.m., effective February 9, 2011, 2:04 p.m.]

Effective Date of Rule: Immediately.

Purpose: The division of developmental disabilities is proposing to amend WAC 388-827-0115 which governs eligibility for the state supplementary program (SSP). This amendment will expand the number of clients eligible for SSP. By amending this rule, state money will be preserved that is currently used to fund the individual and family services program. SSP is a federally mandated program which requires the division to spend monies to meet a maintenance of effort in order to continue to receive SSP. Currently the division has a surplus in SSP dollars and by converting clients from the individual and family services program, more clients can be served that previously received services from the individual and family services program. The changes to this rule will manage budget shortfalls, and maintain fund solvency.

Citation of Existing Rules Affected by this Order: Amending WAC 388-827-0115.

Statutory Authority for Adoption: RCW 71A.12.030, 71A.12.040.

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: By amending this rule, state money will be preserved that is currently used to fund the individual and family services program. SSP is a federally mandated program which requires the division to spend monies to meet a maintenance of effort in order to continue to receive SSP. Currently the division has a surplus in SSP dollars and by converting clients from the individual and family services program, more clients can be served that previously received services from the individual and family services program. The changes to this rule will manage budget shortfalls, and maintain fund solvency.

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

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

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

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

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

Date Adopted: February 8, 2011.

Katherine I. Vasquez  
Rules Coordinator

**AMENDATORY SECTION** (Amending WSR 09-19-107, filed 9/21/09, effective 10/1/09)

**WAC 388-827-0115 What are the programmatic eligibility requirements for DDD/SSP?** Following are the programmatic eligibility requirements to receive DDD/SSP:

(1) You received one or more of the following services from DDD with state-only funding between March 1, 2001 and June 30, 2003 and continue to demonstrate a need for and meet the DDD program eligibility requirements for these services. Additionally, you must have been eligible for or received SSI prior to July 1, 2006; or you received Social Security Title II benefits as a disabled adult child prior to July 1, 2006 and would have been eligible for SSI if you did not receive these benefits.

(a) Certain voluntary placement program services, which include:

- (i) Foster care basic maintenance,
- (ii) Foster care specialized support,

- (iii) Agency specialized support,
- (iv) Staffed residential home,
- (v) Out-of-home respite care,
- (vi) Agency in-home specialized support,
- (vii) Group care basic maintenance,
- (viii) Group care specialized support,
- (ix) Transportation,
- (x) Agency attendant care,
- (xi) Child care,
- (xii) Professional services,
- (xiii) Nursing services,
- (xiv) Interpreter services,
- (b) Family support;
- (c) One or more of the following residential services:
  - (i) Adult family home,
  - (ii) Adult residential care facility,
  - (iii) Alternative living,
  - (iv) Group home,
  - (v) Supported living,
  - (vi) Agency attendant care,
  - (vii) Supported living or other residential service allowance,
  - (viii) Intensive individual supported living support (companion homes).

(2) For individuals with community protection issues as defined in WAC 388-820-020, the department will determine eligibility for SSP on a case-by-case basis.

(3) For new authorizations of family support opportunity:

(a) You were on the family support opportunity waiting list prior to January 1, 2003; and

(b) You are on the home and community based services (HCBS) waiver administered by DDD; and

(c) You continue to meet the eligibility requirements for the family support opportunity program contained in WAC 388-825-200 through 388-825-242; and

(d) You must have been eligible for or received SSI prior to July 1, 2003; or you received Social Security Title II benefits as a disabled adult child prior to July 1, 2003 and would have been eligible for SSI if you did not receive these benefits.

(4) For individuals on one of the HCBS waivers administered by DDD (Basic, Basic Plus, Core or community protection):

(a) You must have been eligible for or received SSI prior to April 1, 2004; and

(b) You were determined eligible for SSP prior to April 1, 2004.

(5) You received medicaid personal care (MPC) between September 2003 and August 2004; and

(a) You are under age eighteen at the time of your initial comprehensive assessment and reporting evaluation (CARE) assessment;

(b) You received or were eligible to receive SSI at the time of your initial CARE assessment;

(c) You are not on a home and community based services waiver administered by DDD; and

(d) You live with your family, as defined in WAC 388-825-020.

(6) If you meet all of the requirements listed in (5) above, your SSP will continue.

(7) You received one or more of the following state-only funded residential services between July 1, 2003 and June 30, 2006 and continue to demonstrate a need for and meet the DDD program eligibility requirements for these services:

- (a) Adult residential care facility;
- (b) Alternative living;
- (c) Group home;
- (d) Supported living;
- (e) Agency attendant care;
- (f) Supported living or other residential allowance.

(8) You received one or more of the following residential services between July 1, 2003 and June 30, ~~((2009))~~ 2013 and demonstrate an ongoing need for a residential allowance request on a periodic, or routine basis of at least once a quarter. You must also receive SSI or would receive SSI if it were not for the receipt of DAC as well as continue to meet the program eligibility requirements for these services:

- (a) Alternative living;
- (b) Supported living; or
- (c) Companion homes.

(9) As of December 31, 2010, you met the eligibility requirements listed in WAC 388-832-0015 for the individual and family services program (IFS), you had an IFS service level of three or four, and your individual service plan included IFS services. Additionally, you must have been eligible for or received SSI prior to January 1, 2011, or you received Social Security Title II benefits as a disabled adult child prior to January 1, 2011 and would have been eligible for SSI if you did not receive these benefits.

#### NEW SECTION

**WAC 388-827-0133 What is the impact on medicaid eligibility on the receipt of state supplemental payments (SSP)?** The impact on medicaid eligibility on the receipt of state supplemental payments is that it does not in and of itself qualify an individual for medicaid.

**WSR 11-05-044  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 11-19—Filed February 9, 2011, 4:23 p.m., effective February 17, 2011, 12:01 p.m.]

Effective Date of Rule: February 17, 2011, 12:01 p.m.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

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

Reasons for this Finding: Survey results show that adequate clams are available for harvest in Razor Clam Areas 1, 2 and those portions of Razor Clam Area 3 open for harvest. Washington department of health has certified clams from these beaches to be safe for human consumption. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 9, 2011.

Lori Preuss  
for Philip Anderson  
Director

#### NEW SECTION

**WAC 220-56-36000P Razor clams—Areas and seasons.** Notwithstanding the provisions of WAC 220-56-360, it is unlawful to dig for or possess razor clams taken for personal use from any beach in Razor Clam Areas 1, 2, or 3, except as provided for in this section:

1. Effective 12:01 p.m. February 18 through 11:59 p.m. February 19, 2011, razor clam digging is allowed in Razor Clam Area 1. Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

2. Effective 12:01 p.m. February 17 through 11:59 p.m. February 19, 2011, razor clam digging is allowed in Razor Clam Area 2. Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

3. Effective 12:01 p.m. February 18 through 11:59 p.m. February 19, 2011, razor clam digging is allowed in that portion of Razor Clam Area 3 that is between the Grays Harbor North Jetty and the southern boundary of the Quinault Indian Nation (Grays Harbor County), and that portion of Razor Clam Area 3 that is the between Olympic National Park South Beach Campground access road (Kalaloch area, Jefferson County) and Browns Point (Kalaloch area, Jefferson County). Digging is allowed from 12:01 p.m. to 11:59 p.m. each day only.

4. It is unlawful to dig for razor clams at any time in Long Beach, Twin Harbors Beach or Copalis Beach Clam sanctuaries defined in WAC 220-56-372.

**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 12:01 a.m. February 20, 2011:

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

**WSR 11-05-053**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 11-14—Filed February 10, 2011, 1:19 p.m., effective February 10, 2011, 1:19 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend recreational and commercial fishing rules.

Citation of Existing Rules Affected by this Order: Amending WAC 220-16-490.

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 description of the Bonilla-Tatoosh line is essential to differentiating between adjacent management areas located on the northwest coast at Cape Flattery. The current rule does not include latitude and longitude coordinates for each reference point and is not consistent with the description in the federal regulation. The changes simplify the description of the line and will make it easier for recreational fishers and enforcement to identify where the line is drawn. This rule conforms to federal action taken by the Pacific Fisheries Management Council. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 10, 2011.

Philip Anderson  
Director

NEW SECTION

**WAC 220-16-49000B Bonilla-Tatoosh line.** Effective immediately until further notice, the Bonilla-Tatoosh Line is defined as a line projected from the most westerly point on Cape Flattery (48° 22.863' N. lat., 124° 43.907' W. long.) to the light on Tatoosh Island, WA (48° 23.493' N. lat., 124° 44.207' W. long.), then to the light on Bonilla Point on Vancouver Island, British Columbia (at 48°35.73' N. lat., 124°43.00' W. long.).

**WSR 11-05-054**  
**EMERGENCY RULES**  
**DEPARTMENT OF**  
**FISH AND WILDLIFE**

[Order 11-23—Filed February 10, 2011, 1:19 p.m., effective February 10, 2011, 1:19 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: 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 the 2011 winter and spring select area commercial seasons. The seasons are based on a strong forecasted return of 13,200 select area spring chinook. Impacts to nonlocal stocks are expected to be minimal. The fishery is consistent with the *U.S. v. Oregon Management Agreement* and the associated biological opinion. Conforms Washington state rules with Oregon state rules. Regulation is consistent with compact action of February 8, 2011. There is insufficient time to promulgate 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 0; Federal Rules or Standards: New 1, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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

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

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

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

Date Adopted: February 10, 2011.

Philip Anderson  
Director

## NEW SECTION

**WAC 220-33-0100S Columbia River seasons below Bonneville.** Notwithstanding the provisions of WAC 220-33-010, WAC 220-33-020, and WAC 220-33-030, it is unlawful for a person to take or possess salmon, sturgeon, and shad for commercial purposes from Columbia River Salmon Management and Catch Reporting Areas 1A, 1B, 1C, 1D, 1E and Select Areas, except during the times and conditions listed below:

### **1. Deep River Select Area**

a) Area: From the markers at USCG navigation marker #16, upstream to the Highway 4 Bridge. Reduced area extends from the Oneida Road boat ramp upstream to the Highway 4 Bridge.

b) Dates: Winter Season: Open hours are:

(i) 7:00 p.m. Sundays to 7:00 a.m. Mondays, and 7:00 p.m. Wednesdays to 7:00 a.m. Thursdays, from February 13 through March 21, 2011; and

(ii) 7:00 p.m. Sundays to 7:00 a.m. Mondays from March 27 through April 4, 2011, in reduced fishing area.

Spring Season: Open hours are: 7:00 p.m. Sundays to 7:00 a.m. Mondays, and 7:00 p.m. Wednesdays to 7:00 a.m. Thursdays, from April 17 through June 9, 2011.

c) Gear: Gillnets. Winter season: 7-inch minimum mesh. Spring season: 9 3/4-inch maximum mesh. Nets are restricted to 100 fathoms in length with no weight restriction on leadline. Use of additional weights or anchors attached directly to the leadline is allowed. Nets cannot be tied off to stationary structures. Nets may not fully cross navigation channel. It is unlawful to operate in any river, stream or channel any gillnet longer than three-fourths the width of the stream (WAC 220-20-015(1)). It shall be unlawful in any area to use, operate, or carry aboard a commercial fishing vessel a licensed net or combination of such nets, whether fished singly or separately, in excess of the maximum lawful size or length prescribed for a single net in that area, except as otherwise provided for in the rules and regulations of the department (WAC 220-20-010(17)). Nets (or parts of 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 that are fished at any time between official sunset and official sunrise must have lighted buoys on both ends of the net unless the net is attached to the boat. If the net is attached to the boat, then one lighted buoy on the opposite end of the net from the boat is required.

d) Allowable sale: salmon, shad, and white sturgeon. A maximum of two white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open.

e) Miscellaneous: Transportation or possession of fish outside the fishing area (except to the sampling station) is unlawful until department staff has biologically sampled individual catches. After sampling, fishers will be issued a transportation permit by agency staff. During the winter season, fishers are required to call 360-795-0319 for information on the place and time of sampling. In the spring season, a sampling station will be established approximately 2 miles downstream of the Highway 4 Bridge near Stephan's dock.

f) 24-hour quick reporting in effect for Washington buyers.

### **2. Tongue Point**

a) Area: Tongue Point fishing area includes all waters bounded by a line extended from the upstream (southern most) pier (#1) at the Tongue Point Job Corps facility, through navigation marker #6 to Mott Island, (new spring lower deadline); a line from a marker at the southeast end of

Mott Island, northeasterly to a marker on the northwest tip of Lois Island; and a line from a marker on the southwest end of Lois Island, westerly to a marker on the Oregon shore.

The South Channel area includes all waters bounded by a line from a marker on John Day Point through the green USCG buoy #7 to a marker on the southwest end of Lois Island, upstream to an upper boundary line from a marker on Settler Point, northwesterly to the flashing red USCG marker #10, and northwesterly to a marker on Burnside Island defining the upstream terminus of South Channel.

b) Dates: Open hours are 7:00 p.m. Mondays to 7:00 a.m. Tuesdays, and 7:00 p.m. Thursdays to 7:00 a.m. Fridays, from April 25 through June 10, 2011.

c) Gear: Gillnets. In the Tongue Point fishing area, gear restricted to 9 3/4-inch maximum mesh size, maximum net length of 250 fathoms, and weight not to exceed two pounds on any one fathom. In the South Channel fishing area, gear restricted to 9 3/4-inch maximum mesh size, maximum net length of 100 fathoms, no weight restriction on leadline, and use of additional weights or anchors attached directly to the leadline is allowed. Nets that are fished at any time between official sunset and official sunrise must have lighted buoys on both ends of the net unless the net is attached to the boat. If the net is attached to the boat, then one lighted buoy on the opposite end of the net from the boat is required.

d) Allowable sale: salmon, shad, and white sturgeon. A maximum of two white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open.

e) Miscellaneous: During April 25 through May 20, 2011, transportation or possession of fish outside the fishing area is unlawful (except while in transit to ODFW sampling stations) until ODFW staff has biologically sampled individual catches. A sampling station will be established near the Tongue Point area. After sampling, fishers will be issued a transportation permit by agency staff. Beginning May 23, fishers are required to call 503-428-0518 and leave a message including name, catch, and where and when fish will be sold.

f) 24-hour quick reporting in effect for Washington buyers.

### 3. Blind Slough Select Area

a) Area: Only the Blind Slough area is open during winter season, and both Blind Slough and Knappa Slough areas are open during spring season. From May 2 through June 10, 2011, the lower boundary of the Knappa Slough fishing area is extended downstream to boundary lines defined by markers on the west end of Minaker Island to markers on Karlson Island and the Oregon Shore (Fall season boundary).

b) Dates: Winter Season: Open hours are:

(i) 7:00 p.m. Sundays to 7:00 a.m. Mondays, and 7:00 p.m. Thursdays to 7:00 a.m. Fridays, from February 13 through March 14, 2011;

(ii) 7:00 p.m. Wednesday March 16, through 7:00 a.m. Thursday, March 17, 2011;

(iii) 7:00 p.m. Sundays to 7:00 a.m. Mondays from March 20 through April 4, 2011.

Spring Season: Open hours are 7:00 p.m. Mondays to 7:00 a.m. Tuesdays and 7:00 p.m. Thursdays to 7:00 a.m. Fridays, from April 18 through June 10, 2011.

b) Gear: Gillnets. Winter season: 7-inch minimum mesh. Spring Season: 9 3/4-inch maximum mesh. Nets are restricted to 100 fathoms in length, with no weight restriction on leadline. Use of additional weights or anchors attached directly to the leadline is allowed. Nets 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.

c) Allowable sales: salmon, shad, and white sturgeon. A maximum of two white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open.

d) 24-hour quick reporting in effect for Washington buyers. Permanent transportation rules in effect.

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

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

## WSR 11-05-055

### EMERGENCY RULES

### DEPARTMENT OF

### FISH AND WILDLIFE

[Order 11-24—Filed February 10, 2011, 1:19 p.m., effective February 10, 2011, 1:19 p.m.]

Effective Date of Rule: Immediately.

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

Citation of Existing Rules Affected by this Order: Repealing WAC 220-32-05100T; 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: Modifies the treaty Indian winter season by increasing the Bonneville Pool fishery to seven days per week. Continues to allow sales of fish caught with platform and hook and line gear. Fisheries are consistent with the 2008-2017 management agreement and the

associated biological opinion. Rule is consistent with action of the Columbia River compact on January 27, 2011, and February 8, 2011. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

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

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

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 0, Repealed 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: February 10, 2011.

Philip Anderson  
Director

## NEW SECTION

**WAC 220-32-05100U 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 fur-

ther notice, it is unlawful for a person to take or possess salmon, steelhead, sturgeon, shad, carp, catfish, walleye, bass, or yellow perch taken for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas 1F, 1G, and 1H. However, those individuals possessing treaty fishing rights under the Yakima, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, sturgeon, shad, carp, catfish, walleye, bass, or yellow perch under the following provisions:

1. Open Area: SMCRA 1F, 1G, 1H (Zone 6):

a. Season: Immediately through 6:00 p.m. Monday, March 21, 2011.

b. Gear: Gillnets, hoop nets, dip bag nets, and rod and reel with hook and line. No mesh restriction on gillnets.

c. Allowable sale: Salmon, steelhead, white sturgeon, shad, carp, catfish, walleye, bass, and yellow perch. Sturgeon between 38-54 inches in fork length in the Bonneville Pool and sturgeon and between 43-54 inches in fork length in The Dalles and John Day pools may be sold or retained for subsistence purposes. Live release of all oversize and undersize sturgeon is required. Sale of platform or hook-and-line-caught fish is allowed during open commercial seasons.

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

2. Open 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.

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

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

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

a. Participants: Tribal members may participate under the conditions described in the 2007 Memorandum of Agreement (MOA) with the Yakama Nation (YN), in the 2010 Memorandum of Understanding (MOU) 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 through 6:00 p.m. Monday, March 21, 2011.

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

d. Allowable Sales: Salmon, steelhead, shad, carp, catfish, walleye, bass, and yellow perch. **Sturgeon retention is prohibited**, and sturgeon may not be sold or retained for ceremonial or subsistence purposes. Sale of platform or hook-and-line-caught fish is allowed. Sales may not occur on USACE property.

3. 24-hour quick reporting required for Washington wholesale dealers, WAC 220-69-240, for all areas.

**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:

WAC 220-32-05100T Columbia River salmon seasons above Bonneville Dam. (11-12)

**WSR 11-05-056  
EMERGENCY RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Order 11-26—Filed February 10, 2011, 4:39 p.m., effective February 10, 2011, 4:39 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

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

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

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

Reasons for this Finding: Mandatory meat pick-out rate allowance for coastal crab will be achieved by the opening dates contained herein. The special management areas are listed in accordance with state/tribal management agreements. The stepped opening periods/areas will also provide for fair start provisions. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 10, 2011.

Joe Stohr  
for Philip Anderson  
Director

### NEW SECTION

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

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

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

(3) Dungeness crab license holders, or any vessel or vessel operator designated on the license that participated in the coastal commercial Dungeness crab fishery in the waters from Point Arena, California, to Klipsan Beach, Washington (46°28.00), including Willapa Bay, before the area north of Klipsan Beach (46°28.00) opens, are prohibited from:

a. Fishing in the area between Oysterville (46°33.00) and the U.S./Canada border until 8:00 A.M., February 19, 2011.

(4) Klipsan Beach and the U.S./Canada Border, including Grays Harbor: Open.

(5) The Quinault primary special management area (PSMA) is closed to fishing for Dungeness crab until 8:00 A.M. March 22, 2011. The PSMA includes the area shoreward of a line approximating the 27-fathom depth curve between Raft River (47°28.00) and Copalis River (47°08.00) according to the following coordinates:

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

(6) The Quinault Secondary Special Management Area (SSMA) is closed to fishing for Dungeness crab starting at 8:00 A.M., March 22, 2011, from the area shoreward of a line approximating the 27-fathom depth curve between the mouth of the Copalis River (47°08.00) and Split Rock (47°24.50). This area will be closed until further notice. This SSMA is described by the following coordinates:



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

(7) It is unlawful for a vessel to use more than 200 pots in the area between Split Rock (47°24.50) and Raft River (47°28.00) shoreward of a line approximating the 27-fathom depth curve from 8:00 A.M. March 22, 2011 through 8:00 A.M. April 21, 2011. Fishers must pre-register with the Department of Fish and Wildlife 24 hours prior to deploying gear in this area by one of the three following methods:

- Fax transmission to Carol Henry at 360-249-1229;
- E-mail to Carol Henry at [Carol.Henry@dfw.wa.gov](mailto:Carol.Henry@dfw.wa.gov); or
- Telephone call to Carol Henry at 360-249-1296.

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

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

(9) The Makah special management area (SMA) is closed to fishing until 8:00 A.M. February 14, 2011. The SMA includes the waters between 48°02.15 N. Lat. and 48°19.50 N. Lat. east of a line connecting those points and approximating the 25-fathom depth curve according to the following coordinates:

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

(10) It is unlawful for a vessel to use more than 200 pots in the Makah SMA beginning 8:00 A.M. February 14, 2011, until 8:00 A.M. March 16, 2011. Fishers must pre-register with the Department of Fish and Wildlife 24 hours prior to deploying gear in this area by one of the three following methods:

- Fax transmission to Carol Henry at 360-249-1229;
- E-mail to Carol Henry at [Carol.Henry@dfw.wa.gov](mailto:Carol.Henry@dfw.wa.gov); or
- Telephone call to Carol Henry at 360-249-1296.

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

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

### REPEALER

The following sections of the Washington Administrative Code are repealed:

- |                   |   |
|-------------------|---|
| WAC 220-52-04000C | Commercial crab fishery. Lawful and unlawful gear, methods and other unlawful acts. (11-03) |
| WAC 220-52-04600F | Coastal crab seasons (11-03)  |

### **WSR 11-05-057 EMERGENCY RULES DEPARTMENT OF FISH AND WILDLIFE**

[Order 11-21—Filed February 10, 2011, 4:39 p.m., effective February 19, 2011, 12:01 a.m.]

Effective Date of Rule: February 19, 2011, 12:01 a.m.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: The closure date for retention of sturgeon was adopted because Washington and Oregon fish managers estimate that the harvest guideline of two thousand fish will be reached on February 18, 2011. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 10, 2011.

Joe Stohr  
for Philip Anderson  
Director

Emergency

NEW SECTION

**WAC 232-28-61900X Exceptions to statewide rules—Columbia River sturgeon.** Notwithstanding the provisions of WAC 232-28-619, effective 12:01 a.m. February 19, 2011, until further notice, it is unlawful to retain sturgeon caught in those waters of the Columbia River and tributaries from Bonneville Dam upstream to The Dalles Dam.

**WSR 11-05-071****EMERGENCY RULES****DEPARTMENT OF****SOCIAL AND HEALTH SERVICES**

(Medicaid Purchasing Administration)

[Filed February 14, 2011, 3:12 p.m., effective February 14, 2011, 3:12 p.m.]

Effective Date of Rule: Immediately.

Purpose: Upon order of the 61st legislature, 2010 2nd sp. sess., HB 3225, the medicaid purchasing administration must reduce cost-based encounter payments to federally qualified health centers and rural health clinics by reinstating the federal prospective payment system that was replaced by an alternative payment methodology in 2009.

Citation of Existing Rules Affected by this Order: Amending WAC 388-548-1400 and 388-549-1400.

Statutory Authority for Adoption: RCW 74.08.090.

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

Reasons for this Finding: 2011 supplemental omnibus operating budget, under HB 3225, passed by legislature on December 11, 2010, under a 2nd sp. sess., directed the department to reinstate the federal prospective payment system that was replaced by an alternative payment system in 2009. Delaying this adoption could jeopardize the state's ability to maintain the mandatory medicaid services for the majority of DSHS clients.

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 2, 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: February 14, 2011.

Katherine I. Vasquez  
Rules CoordinatorAMENDATORY SECTION (Amending WSR 10-09-002, filed 4/7/10, effective 5/8/10)

**WAC 388-548-1400 Federally qualified health centers—Reimbursement and limitations.** (1) ~~((Effective))~~ For services provided during the period beginning January 1, 2001, and ending December 31, 2008, the department's payment methodology for federally qualified health centers (FQHC) ((conforms to 42 U.S.C. 1396a(bb). As set forth in 42 U.S.C. 1396a (bb)(2) and (3), all FQHCs that provide services on January 1, 2001, and through December 31, 2008, are reimbursed on)) was a prospective payment system (PPS) as authorized by 42 U.S.C. 1396a (bb)(2) and (3).

(2) ~~((Effective))~~ For services provided during the period beginning January 1, 2009, and ending February 14, 2011, FQHCs ((have)) had the choice to continue being reimbursed under the PPS or to be reimbursed under an alternative payment methodology (APM), as authorized by 42 U.S.C. 1396a (bb)(6). As required by 42 U.S.C. 1396a (bb)(6), payments made under the APM ~~((must be))~~ were at least as much as payments that would have been made under the PPS.

(3) For services provided on and after February 15, 2011, the department reimburses FQHCs only under the PPS as authorized by 42 U.S.C. 1396 (bb)(2) and (3) and as directed by the legislature. The APM will not be available for any services provided on and after February 15, 2011.

(4) The department calculates the FQHC's PPS encounter rate as follows:

(a) Until the FQHC's first audited cost report is available, the department pays an average encounter rate of other similar FQHCs within the state, otherwise known as an interim rate;

(b) Upon availability of the FQHC's first audited medicaid cost report, the department sets the clinic's encounter rate at one hundred percent of its total reasonable costs as defined in the cost report. The FQHC receives this rate for the remainder of the calendar year during which the audited cost report became available. Thereafter, the encounter rate is then inflated each January 1 by the medicare economic index (MEI) for primary care services.

~~((4))~~ (5) For FQHCs in existence during calendar years 1999 and 2000, the department sets the payment prospectively using a weighted average of one hundred percent of the center's total reasonable costs for calendar years 1999 and 2000 and adjusted for any increase or decrease in the scope of services furnished during the calendar year 2001 to establish a base encounter rate.

(a) The department adjusts a PPS base encounter rate to account for an increase or decrease in the scope of services

provided during calendar year 2001 in accordance with WAC 388-548-1500.

(b) The PPS base encounter rates are determined using audited cost reports and each year's rate is weighted by the

total reported encounters. The department does not apply a capped amount to these base encounter rates. The formula used to calculate the base encounter rate is as follows:

$\text{Specific FQHC Base Encounter Rate} = \frac{(\text{1999 Rate} \times \text{1999 Encounters}) + (\text{2000 Rate} \times \text{2000 Encounters})}{(\text{1999 Encounters} + \text{2000 Encounters}) \text{ for each FQHC}}$
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(c) Beginning in calendar year 2002 and any year thereafter, the encounter rate is increased by the MEI for primary care services, and adjusted for any increase or decrease within the center's scope of services.

~~((5))~~ (6) The department calculates the FQHC's APM encounter rate as follows:

(a) ~~((Beginning January 1, 2009, the))~~ APM utilizes the FQHC base encounter rates, as described in WAC 388-548-1400 ~~((4)(b))~~ (5)(b).

(i) The base rates are adjusted to reflect any valid changes in scope of service between years 2002 and 2009.

(ii) The adjusted base rates are then inflated by each annual percentage, from years 2002 through 2009, of the APM index. The result is the year 2009 APM rate for each FQHC that chooses to be reimbursed under the APM.

(b) The department will ensure that the APM pays an amount that is at least equal to the PPS, the annual inflator used to increase the APM rates is the greater of the APM index or the MEI.

(c) The department will periodically rebase the APM rates. The department will not rebase rates determined under the PPS.

~~((6))~~ (7) The department limits encounters to one per client, per day except in the following circumstances:

(a) The visits occur with different healthcare professionals with different specialties; or

(b) There are separate visits with unrelated diagnoses.

~~((7))~~ (8) FQHC services and supplies incidental to the provider's services are included in the encounter rate payment.

~~((8))~~ (9) Payments for nonFQHC services provided in an FQHC are made on a fee-for-service basis using the department's published fee schedules. NonFQHC services are subject to the coverage guidelines and limitations listed in chapters 388-500 through 557 WAC.

~~((9))~~ (10) For clients enrolled with a managed care organization, covered FQHC services are paid for by that plan.

~~((10))~~ (11) Only clients enrolled in Title XIX (medicaid) or Title XXI (CHIP) are eligible for encounter or enhancement payments. The department does not pay the encounter rate or the enhancement rate for clients in state-only medical programs. Services provided to clients in state-only medical programs are considered fee-for-service regardless of the type of service performed.

~~((11))~~ (12) For clients enrolled with a managed care organization (MCO), the department pays each FQHC a supplemental payment in addition to the amounts paid by the MCO. The supplemental payments, called enhancements, are paid in amounts necessary to ensure compliance with 42 U.S.C. 1396a (bb)(5)(A).

(a) The FQHCs receive an enhancement payment each month for each managed care client assigned to them by an MCO.

(b) To ensure that the appropriate amounts are paid to each FQHC, the department performs an annual reconciliation of the enhancement payments. For each FQHC, the department will compare the amount actually paid to the amount determined by the following formula: (Managed care encounters times encounter rate) less FFS equivalent of MCO services. If the center has been overpaid, the department will recoup the appropriate amount. If the center has been underpaid, the department will pay the difference.

AMENDATORY SECTION (Amending WSR 10-09-030, filed 4/13/10, effective 5/14/10)

**WAC 388-549-1400 Rural health clinics—Reimbursement and limitations.** (1) ~~((Effective))~~ For services provided during the period beginning January 1, 2001, and ending December 31, 2008, the department's payment methodology for rural health clinics (RHC) ((conforms to)) was a prospective payment system (PPS) as authorized by 42 USC 1396a (bb)(2) and (3). ((RHCs that provide services on January 1, 2001 through December 31, 2008 are reimbursed on a prospective payment system (PPS)-))

~~((Effective))~~ (2) For services provided during the period beginning January 1, 2009, and ending February 14, 2011, RHCs ((have)) had the choice to continue being reimbursed under the PPS or be reimbursed under an alternative payment methodology (APM), as authorized by 42 USC 1396a (bb)(6). As required by 42((U.S.C.)) USC 1396a (bb)(6), payments made under the APM ((must be)) were at least as much as payments that would have been made under the PPS.

(3) For services provided on and after February 15, 2011, the department reimburses RHCs only under the PPS as authorized by 42 USC 1396a (bb)(2) and (3) and as directed by the legislature. The APM will not be available for any services provided on and after February 15, 2011.

~~((2))~~ (4) The department calculates the RHC's PPS encounter rate for RHC core services as follows:

(a) Until the RHC's first audited medicare cost report is available, the department pays an average encounter rate of other similar RHCs (whether the RHC is classified as hospital-based or free-standing) within the state, otherwise known as an interim rate.

(b) Upon availability of the RHC's audited medicare cost report, the department sets the clinic's encounter rate at one hundred percent of its costs as defined in the cost report divided by the total number of encounters the clinic has provided during the time period covered in the audited cost report. The RHC will receive this rate for the remainder of the calendar year during which the audited cost report became available. The encounter rate is then inflated each January 1

by the medicare economic index (MEI) for primary care services.

~~((3))~~ (5) For RHCs in existence during calendar years 1999 and 2000, the department sets the payment prospectively using a weighted average of one hundred percent of the clinic's total reasonable costs for calendar years 1999 and 2000 and adjusted for any increase or decrease in the scope of services furnished during the calendar year 2001 to establish a base encounter rate.

$$\text{Specific RHC Base Encounter Rate} = \frac{(\text{1999 Rate} \times \text{1999 Encounters}) + (\text{2000 Rate} \times \text{2000 Encounters})}{(\text{1999 Encounters} + \text{2000 Encounters}) \text{ for each RHC}}$$

(c) Beginning in calendar year 2002 and any year thereafter, the encounter rate is increased by the MEI and adjusted for any increase or decrease in the clinic's scope of services.

~~((4))~~ (6) The department calculates the RHC's APM encounter rate as follows:

(a) ~~(Beginning January 1, 2009, the)~~ APM utilizes RHC base encounter rates as described in WAC 388-549-1400 ~~((3)(b))~~ (5)(b). The base rates are inflated by each annual percentage, from years 2002 through 2009, of the APM index. The result is the year 2009 APM rate for each RHC that chooses to be reimbursed under the APM.

(b) To ensure that the APM pays an amount that is at least equal to the PPS in accordance with 42 USC 1396a (bb)(6), the annual inflator used to increase the APM rates is the greater of the APM index or the MEI.

(c) The department periodically rebases the APM rates. The department does not rebase rates determined under the PPS.

(d) When rebasing the APM encounter rates, the department applies a productivity standard to the number of visits performed by each practitioner group (physicians and mid-levels) to determine the number of encounters to be used in each RHC's rate calculation. The productivity standards are determined by reviewing all available RHC cost reports for the rebasing period and setting the standards at the levels necessary to allow ninety-five percent of the RHCs to meet the standards. The encounter rates of the clinics that meet the standards are calculated using each clinic's actual number of encounters. The encounter rates of the other five percent of clinics are calculated using the productivity standards. This process is applied at each rebasing, so the actual productivity standards may change each time encounter rates are rebased.

~~((5))~~ (7) The department pays for one encounter, per client, per day except in the following circumstances:

(a) The visits occur with different healthcare professionals with different specialties; or

(b) There are separate visits with unrelated diagnoses.

~~((6))~~ (8) RHC services and supplies incidental to the provider's services are included in the encounter rate payment.

~~((7))~~ (9) Payments for non-RHC services provided in an RHC are made on a fee-for-service basis using the department's published fee schedules. Non-RHC services are subject to the coverage guidelines and limitations listed in chapters 388-500 through 388-557 WAC.

~~((8))~~ (10) For clients enrolled with a managed care organization, covered RHC services are paid for by that plan.

(a) The department adjusts a PPS base encounter rate to account for an increase or decrease in the scope of services provided during calendar year 2001 in accordance with WAC 388-549-1500.

(b) The PPS base encounter rates are determined using medicare's audited cost reports and each year's rate is weighted by the total reported encounters. The department does not apply a capped amount to these base encounter rates. The formula used to calculate the base encounter rate is as follows:

~~((9))~~ (11) The department does not pay the encounter rate or the enhancements for clients in state-only programs. Services provided to clients in state-only programs are considered fee-for-service, regardless of the type of service performed.

~~((10))~~ (12) For clients enrolled with a managed care organization (MCO), the department pays each RHC a supplemental payment in addition to the amounts paid by the MCO. The supplemental payments, called enhancements, are paid in amounts necessary to ensure compliance with 42 USC 1396a (bb)(5)(A).

(a) The RHCs receive an enhancement payment each month for each managed care client assigned to them by an MCO.

(b) To ensure that the appropriate amounts are paid to each RHC, the department performs an annual reconciliation of the enhancement payments. For each RHC, the department will compare the amount actually paid to the amount determined by the following formula: (managed care encounters times encounter rate) less fee-for-service equivalent of MCO services. If the clinic has been overpaid, the department will recoup the appropriate amount. If the clinic has been underpaid, the department will pay the difference.

**WSR 11-05-081**

**EMERGENCY RULES**

**DEPARTMENT OF**

**FISH AND WILDLIFE**

[Order 11-22—Filed February 15, 2011, 11:10 a.m., effective March 1, 2011]

Effective Date of Rule: March 1, 2011.

Purpose: Amend personal use fishing rules.

Citation of Existing Rules Affected by this Order: Amending WAC 220-56-350 and 220-56-380.

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: Penrose Point State Park was closed in 2010 due to overharvest in 2009. Surveys indicate

that the clam population has increased, in part due to Washington department of fish and wildlife enhancement efforts, allowing a return to the former three-month season. Surveys at Point Whitney and Point Whitney Lagoon indicate that clam populations have declined, requiring a two-week delay in the season opener at Point Whitney, and an earlier opening of the season at Point Whitney Lagoon, when effort will be reduced and conflicts with the Hood Canal shrimp fishery will be avoided. Oyster season at this beach should coincide for enforcement purposes with the clam season, which is being reopened March 1. Sufficient oysters exist to provide a three-month season. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: February 15, 2011.

Philip Anderson  
Director

#### NEW SECTION

**WAC 220-56-35000L Clams other than razor clams—Areas and seasons.** Notwithstanding the provisions of WAC 220-56-350, effective immediately until further notice, it is unlawful to take, dig for and possess clams, cockles, and mussels taken for personal use from the following public tidelands except during the open periods specified herein:

- (1) Penrose Point State Park: Open March 1, 2011, until further notice.
- (2) Point Whitney (excluding Point Whitney Lagoon): Open March 15, 2011 through April 30, 2011.
- (3) Point Whitney Lagoon: Open March 1, 2011 through March 31, 2011.

#### NEW SECTION

**WAC 220-56-38000U Oysters—Areas and seasons.** Notwithstanding the provisions of WAC 220-56-380, effective immediately until further notice, it is unlawful to take and possess oysters for personal use from the following public tidelands except during the open periods specified herein:

- (1) Penrose Point State Park: Open March 1, 2011, until further notice.

**WSR 11-05-088  
EMERGENCY RULES  
DEPARTMENT OF  
EARLY LEARNING**

[Filed February 15, 2011, 4:06 p.m., effective March 1, 2011]

Effective Date of Rule: March 1, 2011.

Purpose: The department of early learning (DEL) is amending working connections child care (WCCC) and seasonal child care (SCC) program[s], WAC 170-290-0001 Purpose and intent. The amended rule establishes parameters of actions that DEL and the department of social and health services (DSHS) are authorized to take on an emergency basis to limit consumer entry into the WCCC program in order to reduce program expenditures and prevent exhausting available funds for the state's WorkFirst program prior to the end of the fiscal year on June 30, 2011. If WorkFirst funds are exhausted prior to June 30, the state faces a broad termination of child care benefits for families currently receiving WCCC subsidies, with serious disruptive impacts for children, parents, child care providers, and employers.

Agency actions may include one or more of the following: Limiting or closing enrollment into WCCC; establishing priority lists of new WCCC enrollees subject to applicable state and federal law; or creating and maintaining WCCC waiting lists.

Citation of Existing Rules Affected by this Order: Amending WAC 170-290-0001.

Statutory Authority for Adoption: RCW 43.215.060 and 43.215.070.

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; 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: DEL remains under directives from the governor to reduce child care subsidy expenditures to help close a projected \$82 million shortfall in the state fiscal year (SFY) 2011 budget for the state's WorkFirst program. WorkFirst is the state's various "welfare-to-work" programs, including WCCC subsidies for parents who are working or participating in certain education, training or other approved activities.

Approximately 35,800 families in Washington state are enrolled in WCCC and receive child care subsidy assistance currently, at a monthly cost of more than \$25.5 million. If WCCC enrollment continues at this rate, the department will not meet its spending reduction targets necessary to prevent a WorkFirst deficit in SFY 2011.

The department has filed a series of emergency rules in September and December 2010 and in January 2011 (WSR 10-20-032, 11-01-114, 11-03-046, and 11-04-078) intended

to reduce WCCC enrollment and expenditures. While these actions have reduced WCCC expenditures significantly, DEL and DSHS\* must prepare to take additional actions to limit entry into WCCC as necessary to prevent a WorkFirst deficit.

Failure to limit consumer entry into WCCC by emergency rule would result in the program becoming oversubscribed and over budget, because of insufficient revenues to pay program benefits and higher than anticipated WorkFirst caseloads. If that occurs, the state could be faced with terminating child care benefits to all families receiving WCCC benefits, with serious disruptive impacts to children, families, child care providers, employers and the public welfare.

Washington state's economic situation remains unstable into the foreseeable future. Current forecasts indicate that revenues will be insufficient to meet state general fund appropriations in the 2010-2011 Supplemental Operating Budget Act, ESSB 6444 (chapter 37, Laws of 2010 1st sp. sess.). The level of federal aid that the legislature had anticipated receiving to help balance the WorkFirst budget has not materialized.

As tax and federal revenues have declined sharply, WorkFirst case loads continue to climb. In the last two years the state's WorkFirst caseload has grown by more than thirty percent, from 51,106 cases in July 2008 to 66,634 cases in June 2010. Caseloads are expected to grow further.

On September 13, 2010, Governor Gregoire formally declared that a budget shortfall is imminent and directed state agencies to implement 6.3 percent across-the-board spending cuts to avoid an SFY 2011 deficit. See Executive Order 10-04 - Ordering Expenditure Reductions in Allotments of State General Fund Appropriations.

In December 2010, the legislature met in emergency special session to adopt \$282 million in SFY 2011 spending reductions (HB 3225). And in February 2011, the legislature enacted a supplemental operating budget bill (ESHB 1086) that cut an additional \$254 million in state spending through June 30, 2011.

The legislature's anticipated shortfall in the WorkFirst program, combined with the Governor's Executive Order 10-04 and the legislature's emergency spending reductions, demonstrate that an emergency rule is necessary to implement spending reductions, and observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary both to the public interest and to the state's fiscal needs and requirements.

DEL has determined that the rules meet office of financial management guidance 3.c regarding the Governor's Executive Order 10-06 suspending noncritical rule making, but allowing rules to proceed that are "... necessary to manage budget shortfalls, maintain fund solvency, or for revenue generating activities ...."

\*DEL and DSHS jointly operate the WCCC program. DEL adopts rules and other WCCC policy. DSHS accepts WCCC applications, determines consumer eligibility, and processes subsidy payments to child care providers.

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

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

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

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

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

Date Adopted: February 15, 2011.

Elizabeth M. Hyde  
Director

AMENDATORY SECTION (Amending WSR 09-22-043, filed 10/28/09, effective 12/1/09)

**WAC 170-290-0001 Purpose and intent.** (1) This chapter establishes the requirements for eligible families to receive subsidized child care through the working connections child care (WCCC) and seasonal child care (SCC) programs under applicable state and federal law, to the extent of available funds. As used in chapter 170-290 WAC, "to the extent of available funds" includes one or more of the following:

(a) Limiting or closing enrollment;

(b) Establishing a priority list for new enrollees subject to applicable state and federal law; or

(c) Creating and maintaining a waiting list.

(2) The purpose of WCCC, as provided in part II of this chapter, is to:

(a) Assist eligible families in obtaining child care subsidies for approvable activities that enable them to work, attend training, or enroll in educational programs; and

(b) Consider the health and safety of children while they are in care and receiving child care subsidies.

(3) The purpose of SCC, as provided in part III of this chapter, is to:

(a) Assist eligible families who are seasonally employed in agriculturally related work to pay for licensed child care; and

(b) Consider the health and safety of children while they are in care and receiving child care subsidies.

**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.