WSR 16-05-032
PERMANENT RULES
UTILITIES AND TRANSPORTATION COMMISSION

[Docket TR-151079, General Order R-584—Filed February 9, 2016, 11:03 a.m., effective March 11, 2016]

In the matter of amending and adopting rules in chapter 480-62 WAC, relating to rail safety.

1 **STATUTORY OR OTHER AUTHORITY:** The Washington utilities and transportation commission (commission) takes this action under Notice No. WSR 15-22-105, filed with the code reviser on November 4, 2015. The commission has authority to take this action pursuant to RCW 80.01.040, 80.04.160, 81.24.010, 81.53.010, 81.53.240, and chapter 81.44 RCW.

2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

3 **DATE OF ADOPTION:** The commission adopts this rule on the date this order is entered.

4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW 34.05.325(6) requires the commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the commission's reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the commission's responses to the comments reflecting the commission's consideration of them.

5 To avoid unnecessary duplication in the record of this docket, the commission designates the discussion in this order, including appendices, as its concise explanatory statement. This order provides a complete but concise explanation of the agency's actions and its reasons for taking those actions.

6 **REFERENCE TO AFFECTED RULES**: This order amends and adopts the following sections of the Washington Administrative Code: Amending WAC 480-62-130 Application of this chapter and 480-62-300 Annual reports—Regulatory fees; and adopting WAC 480-62-260 First-class cities opt-in and 480-62-270 Safety standards at private crossings.

7 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:** The commission filed a preproposal statement of inquiry (CR-101) on May 20, 2015, at WSR 15-11-092. The statement advised interested persons that the commission was considering a rule making to implement provisions of ESHB 1449, passed and signed into law in the 2015 legislative session, including a provision that adopts a requirement that railroads hauling crude oil must report information about their financial responsibility in the annual reports they submit to the commission. The commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the commission's list of persons requesting such information pursuant to RCW 34.05.320(3), and by sending notice to all railroad companies operating in the state and the commission's list of transportation attorneys. The commission posted the relevant rule-making information on its web site at www.utc.wa.gov/151079. Pursuant to the notice, the commission received written comments on June 22, 2015, and convened a workshop for interested stakeholders on July 8, 2015.

8 On August 21, 2015, the commission issued a notice soliciting written comments from stakeholders on draft rules by September 21, 2015, and notice of second workshop on October 1, 2015.

9 On September 28, 2015, the commission issued a notice cancelling the October 1, 2015, workshop.

10 **NOTICE OF PROPOSED RULE MAKING:** The commission filed a notice of proposed rule making (CR-102) on November 4, 2016, at WSR 15-22-105. The commission scheduled this matter for oral comment and adoption under that notice at 1:30 p.m., Wednesday, January 6, 2016, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 South Evergreen Park Drive S.W., Olympia, WA. The notice provided interested persons the opportunity to submit written comments to the commission by December 7, 2015.

11 **CONTINUED NOTICE OF PROPOSED RULE MAKING**: The commission filed a continuance of the notice of proposed rule making (CR-102) on December 29, 2015, at WSR 16-02-020. The commission rescheduled this matter for oral comment and adoption under Notice No. WSR 15-22-105 at 2:00 p.m., Thursday, January 7, 2016, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 South Evergreen Park Drive S.W., Olympia, WA.

12 **WRITTEN COMMENTS:** The commission received written comments in response to the WSR 15-22-105 notice from Jean M. Avery, Washington Department of Ecology (ecology), Columbia Riverkeeper, Friends of the Columbia Gorge, ForestEthics, Sierra Club Washington Chapter, The Lands Council, Washington Environmental Council, and Washington Physicians for Social Responsibility, BNSF Railway Company (BNSF), Union Pacific Railroad Company (UPRR), Fred Millar, and Senator Christine Rolfes. Summaries of all written comments and commission's responses are contained in Appendix A, shown below, and made part of this order.

13 **RULE-MAKING HEARING:** The commission considered the proposed rules for adoption at a rule-making hearing on January 7, 2016, before Chairman David W. Danner, Commissioner Philip B. Jones, and Commissioner Ann E. Rendahl. The commission heard comments at the hearing from Pat Dickason, Daniel McCabe, Robert Mack, Janet Lind, Sally Jacky, Matt Petryni, Alex Ramel, Matt Krogh, Don Steinke, Laura Ackerman and Hector Gruncaum.

14 **SUGGESTIONS FOR CHANGE THAT ARE REJECTED/ ACCEPTED:** The commission proposed rules to cover three areas: (1) Establish minimum safety signage requirements at private crossings along oil train routes and commission inspection of those crossings; (2) permit first-class cities to opt into the commission's grade crossing inspection program should they choose to do so; and (3) require railroad companies to submit information to the commission concerning a company's ability to pay to cleanup a reasonable worst case spill resulting from the railroad's transportation of crude oil in Washington.

15 Written and oral comments suggested changes to the proposed rules. The commission received comments from Ms. Avery, UPRR, and the City of Tacoma concerning WAC 480-62-270, the proposed rule establishing safety standards at public crossings. The remaining comments concerned the language in the proposed rule establishing the reporting requirements for railroad company financial responsibility. The suggested changes and the commission's reason for rejecting the suggested changes are included in Appendix A. The commission also provides the following additional explanation for adopting the proposed rule that implements the statutory requirement that railroad companies report on their ability to pay the clean-up costs of a reasonable worst case spill.

16 The commission "possesses only those powers granted by statute."[1] The legislature has directed the commission to require railroad companies to include in the annual reports they file with the commission "a statement of whether the railroad has the ability to pay for damages resulting from a reasonable worst case spill of oil, as calculated by multiplying the reasonable per barrel cleanup and damage cost of spilled oil times the reasonable worst case spill volume as measured in barrels."[2] This is strictly a reporting requirement. The statute expressly prohibits the commission from using the information in this statement as a basis for penalizing the company,[3] assigning liability to the company, or establishing liquidated damages for a spill or accident.[4]

[1] *E.g., In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

[2] RCW 81.04.560(1).

[3] RCW 81.04.560(3).

[4] RCW 81.04.560(4).

17 Our charge, then, is to determine and give effect to the legislature's intent.[5] The rules of statutory construction require that we discern the plain meaning of the statute by looking to "the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole."[6] The statute obligates railroad companies to report their ability to pay the "cleanup and damage cost of spilled oil" resulting from a "reasonable worst case spill." The legislature, however, did not define those terms.

[5] *E.g.*, *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

[6] *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.2d 1283 (2010) (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)).

18 The commission received many comments on the meaning of "reasonable worst case spill" and "cleanup and damage cost of spilled oil." Railroad companies contend that the rule the commission has proposed is flawed and that the legislature's reporting requirement is preempted by federal law.[7] Other commenters maintain that the proposed rule underestimates both the potential for the amount of oil that will be spilled as a result of rail accidents and the damages associated with such spills.[8] Given the lack of consensus on the plain meaning of "reasonable worst case spill" and "clean up and damage cost of spilled oil," we apply the rules of statutory construction to determine and give effect to the legislature's intent when it used those terms.

[7] *See* Comments of Melissa B. Hagen, UPRR ("These requirements are preempted by federal law, compromise the integrity of Union Pacific's confidential business records and are blatantly discriminatory on their face.")

[8] Comments of Columbia Riverkeeper, *et al.* ("Assuming that a worst case scenario event were to be a result of a 100% spill of a typical 3,000,000 gallon oil train, that $6.3 billion comes to $2100 per gallon.")

Reasonable Worst Case Spill

19 We find it helpful to begin our analysis with some context. The genesis of the financial responsibility obligation in the statute and the legislature's use of the term "reasonable worst case spill" is the oil transportation study (study) led by ecology at the direction of the 2014 legislature.[9] The governor tasked ecology with analyzing oil transportation by ship and rail and developing recommendations to enhance safety and environmental stewardship.[10] The study recommendations include extending ecology's certification of financial responsibility program[11] to railroads, requiring railroads to demonstrate a financial ability to pay for costs and damages of an oil spill into Washington waters. The governor incorporated this recommendation into the original draft of HB 1449, the legislation he requested based on the findings and recommendations in the study. The legislature amended this provision to require only that railroads submit this information as part of their annual reports to the commission. The legislature also required that railroad companies report only on their ability to pay for a "reasonable worst case spill."

[9] https://fortress.wa.gov/ecy/publications/SummaryPages/1508010.html.

[10] http://www.governor.wa.gov/sites/default/files/directive/dir_14-06.pdf.

[11] RCW 88.40.020.

20 In this context we examine the language of the phrase "reasonable worst case spill." Merriam-Webster defines a "worst case" as one "involving, projecting, or providing for the worst possible circumstances or outcome of a given situation."[12] The legislature has defined "worst case spill" in the context of vessel oil spill prevention and response as "the largest foreseeable spill in adverse weather conditions."[13] The statute at issue here, however, adds the word "reasonable" to modify "worst case spill." "Reasonable" is a common term in the law and is generally defined as "fair, proper, just, moderate, suitable under the circumstances" and "[n]ot immoderate or excessive."[14] Similarly, Merriam-Webster defines "reasonable" as "not extreme or excessive."[15] The term "reasonable worst case spill" thus is ambiguous because of the inherent conflict that arises from modifying an extreme - worst case - with an adjective that means "not extreme."

[12] http://www.merriam-webster.com/dictionary/worst%E2%80%93case.

[13] RCW 88.46.010(30). In implementing this definition, ecology requires an Aframax tanker holding thirty-three million gallons of oil to have a certificate of financial responsibility of $1 billion. An articulated tug barge holding nine million gallons of oil has the same requirement. http://www.oilspilltaskforce.org/docs/project_reports/CofrMatrix2.pdf. Under the rule we adopt today, a unit train holding approximately three million gallons of oil at a speed greater than forty mph would need to report a financial responsibility of approximately $650 million.

[14] Black's Law Dictionary 1138 (5th Ed. 1979).

[15] http://www.merriam-webster.com/dictionary/reasonable.

21 We nevertheless must give effect to all of the language in the statute.[16] We resolve the inherent conflict between "reasonable" and "worst" by interpreting "reasonable worst case spill" to mean a foreseeable oil spill that, while not as devastating as the worst possible incident, is nevertheless of high consequence and would have a significant impact on the citizens of this state.

[16] *Lake*, 169 Wn.2d at 526.

22 To give practical meaning to that definition, we look to the federal agencies charged with regulating railroads, the Pipeline Hazardous Materials Safety Administration (PHMSA) and the Federal Railroad Administration (FRA). Those agencies engaged in a rule making to establish enhanced tank car safety standards. That proceeding resulted in the most complete and exhaustive regulatory analysis available to examine all factors associated with the enhanced tank car rule.[17] PHMSA and the FRA developed the rule by calculating the results of "high consequence events," which "would cause greater environmental damages than a typical derailment."[18] PHMSA then applied data from the incident in Lac Mégantic, Quebec, the most catastrophic crude oil car derailment in North America,[19] which PHMSA scaled down to approximate the results of a high consequence event.

[17] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082 (HM-251), Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains.

[18] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 52.

[19] *See* Railway Investigation Report R13D0054 ("As a result of the derailment and the ensuing fires and explosions, forty-seven people died, and about two thousand people were evacuated. Forty buildings and fifty-three vehicles were destroyed. The derailed tank cars contained about 6.7 million litres of petroleum crude oil, about six million litres of which were released, contaminating approximately thirty-one hectares of land. An estimated one hundred thousand litres of crude oil ended up in Mégantic Lake and the Chaudière River.")

23 We find that PHMSA's approach to determining "high consequence events" is reasonable. The commission, therefore, has quantified a "reasonable worst case spill" based on PHMSA's scaled down approach.[20] As part of that approach, PHMSA calculated that the likelihood of high consequence events varies directly with the square of the train's speed - the faster a train is traveling, the higher the percentage of tank cars that are likely to derail and spill the oil they are carrying.[21] That determination is based on the assumption that all loaded unit trains are of equal mass and that the kinetic energy (*i.e.*, energy associated with motion) generated by a unit train in motion will be a key factor in predicting the number of cars in a possible derailment,[22] as well as the potential release of oil[23] and extent of the damage[24] from oil to those cars and surrounding area. Accordingly, our rule requires each railroad company to calculate the amount of oil involved in a reasonable worst case spill through a formula that takes a percentage of the unit train, based on the highest operating speed of the train when moving oil, and multiplies that percentage by the company's largest train load of crude oil, measured in barrels, moved in the previous calendar year.[25]

[20] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 101.

[21] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 52.

[22] FRA Emergency Order No. 30, Notice No. 1.

[23] Xiang Liu, Mohd Rapik Saat, Christopher P. L. Barkan, Probability analysis of multiple-tank-car release incidents in railway hazardous materials transportation, Journal of Hazardous Materials 276 (2014) ("Train speed has a two-fold effect on the number of tank cars releasing. First, on average, lower speed derailments result in fewer cars derailed. Second, as already discussed, lower derailment speed results in a lower release probability of a derailed tank car compares the distribution of tank car releases by derailment speed.")

[24] DOE/DOT Tight Crude Oil Flammability and Transportation Spill Safety Project, at 14 (March 2015).

[25] For example, a railroad company that transports oil would have to report both the company's largest load of crude oil by tank car and its maximum operating speed. The calculation of potential oil spilled would result from (a) dividing the maximum operating speed by sixty-five mph (the speed of the train in the Lac Mégantic accident); (b) squaring the results of the maximum operating speed divided by sixty-five; and (c) multiplying the squared amount by the number of tank cars in the largest unit train moved by the railroad in the previous year. The result of this calculation will determine the likely amount of oil spilled in a "reasonable worst case" spill involving rail transporters.

24 Railroad industry commenters in this rule making contend that PHMSA's approach is overstated and inapplicable. They propose that the commission determine a reasonable worst case spill based on the most probable number of tank cars derailed or on an historical analysis of the average number of tank cars that have derailed. We reject that proposal. Had the legislature intended that the commission determine "the most probable" or "historic average" oil spill, the statute would have used those terms. Instead, the legislature used the term "reasonable worst case spill" - a term not limited to historical averages or upon probability derivatives based upon this history. The commission must give meaning to the statutory language, and we reject the railroads' proposal as being inconsistent with that language. PHMSA's approach, although developed in a different context, provides an appropriate methodology for defining a "reasonable worst case spill."

25 Other commenters urge the commission to recognize that far worse oil spills are more likely than the "high consequence events" that PHMSA has calculated. They recommend that we use the events in Lac Mégantic as the basis for calculating a reasonable worst case spill. Again, we decline that recommendation. We certainly are aware that Lac Mégantic was the worst oil by rail spill in North America, and that even more disastrous spills are conceivable. The legislature, however, did not authorize the commission to gather information on railroad companies' ability to pay the costs of a worst case spill. Rather, we may only determine what constitutes a *reasonable* worst case spill, and the PHMSA approach comports with that legislative direction.

Cleanup and Damage Cost of Spilled Oil

26 Just as the legislature limited the commission to assessing what constitutes a "reasonable worst case spill," we must determine the "cleanup and damage cost of spilled oil." The plain meaning of this phrase is that the commission must consider costs associated with cleaning up the spilled oil and compensating for the damage caused by that oil. The damage,

however, must result from "spilled oil." As we explain below, we do not interpret that term to include personal injury, property damage, and other liabilities resulting from a fire or explosion, rather than from the spill itself.

27 As part of the commission's analysis, we looked at numerous sources to determine the reasonable cost of cleaning up spilled oil and the range of compensation for damages caused by such a spill. These sources included, but were not limited to, ecology's contingency plan rule making,[26] California Contingency Plan Rulemaking,[27] and railroad derailment data and clean-up costs.[28] The commission also reviewed and considered stakeholder comments, and we ultimately concluded that the data compiled by the federal government as part of its enhanced tank car rule making was the most reliable and therefore reasonable.

[26] Final Cost-Benefit Analysis for Oil Spill Contingency Planning, Oil Spill Contingency Plan Rules, Pub. No. 06-08-020.

[27] 14 CCR § 817.04 § 817.04. Inland Facilities.

[28] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 87.

28 The literature on the subjects of clean-up costs and damage assessments identified in the PHMSA and FRA proceeding was both comprehensive and well-analyzed. It found that the weighted average of the cost estimates per gallon of spilled crude oil, including marine, pipeline, and rail spills, is $407 to $415.[29] PHMSA's final regulatory impact analysis for the federal enhanced tank car rule estimated that costs for crude oil cleanup for rail carriers was $200 per gallon, but "the review found that damages could be as high as twice that amount for crude oil spills."[30] In addition, a 1999 study estimated a cost of $326 per gallon for cleanup alone,[31] and a 2012 study showed a clean-up cost of $378.34 for crude oil by rail.[32] PHMSA recognized that it is unlikely that any of these estimates capture the comprehensive societal damages that result from these incidents.[33]

[29] *Id*. at 115.

[30] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 86.

[31] Etkin, D.S. "Estimating Clean-up Costs for Oil Spills," Proceedings, International Oil Spill Conference, 1999.

[32] Marruffo, Amanda, Hongkyu Yoon, David J. Schaeffer, Christopher P. L. Barkan, Mohd Rapik Saat, and Charles J. Werth. "NAPL Source Zone Depletion Model and Its Application to Railroad-Tank-Car Spills." Groundwater 50, no. 4 (2012): 627-32. This model is used to predict the relative impact of crude oil or ethanol released from railroad-tank car accidents on soil and groundwater contamination and cleanup times.

[33] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 115.

29 The commission finds that the weight of the available evidence supports a minimum estimate of "cleanup and damage cost of spilled oil" of $400 per gallon or $16,800 per barrel. Accordingly, the rule we adopt requires railroad companies to demonstrate their ability to pay the costs to cleanup a reasonable worst case spill of oil, calculated as $16,800 per barrel multiplied by the percentage of barrels in the largest train load of crude oil likely to be spilled.[34] While this assessment has been criticized by several stakeholders, none of them offered specific reasonable alternatives to the PHMSA analysis.[35]

[34] For more detailed discussion of this issue, see staff's January 7, 2016, memorandum concerning rail safety rule making related to ESHB 1449, Docket TR-151079 Oil train safety rule making, available on the commission's web site in this docket.

[35] *See, e.g.,* comments of BNSF ("The definition of reasonable worst case in the CR-101 and CR-102 are flawed. The formula focuses on one aspect of rail safety - speed. There are numerous other factors that may influence the potential of a rail car carrying crude oil to derail and spill."); comments of Columbia Riverkeeper, *et al*. ("Worst case planning should include all risk categories."); comments of Fred Millar ("The Commission's cleanup cost calculations are dubious. The commission process for calculating fees does not properly weight safety.").

30 Several commenters contend that these costs are far too low. They point to the billions of dollars in loss resulting from the Lac Mégantic incident and to the enormous devastation and resulting costs that would result from a spill in any of the state's waterways that trains carrying oil parallel or cross. As PHSMA observed, however, an event like Lac Mégantic "would not be representative of damages from a typical accident or even a high consequence accident."[36] We agree with PHMSA on this point. As discussed above, promulgating a rule based on the incident in Lac Mégantic would exceed the commission's authority under RCW 81.04.560. The legislature did not establish a specific benchmark for the commission to determine the magnitude of oil spills and scope of damages. Accordingly, we must employ our expertise and discretion to make those determinations, and we conclude that our rule reasonably does so based on the information available.

[36] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 87.

31 We recognize that even cleanup and damage costs of spilled oil likely would be much higher if a spill occurs in areas close to the Columbia River, Puget Sound, the Spokane River and tributaries, or any of the other environmentally sensitive areas in Washington. At the same time, however, we must have a sound and credible factual basis for any cost estimates we establish. If more evidence becomes available, especially from the relevant federal authorities such as PHMSA or FRA, we may revisit this issue in the future. For now, we believe the studies and data we cite above persuasively provide a solid foundation for the analysis and cost estimates underlying the rule we adopt today.

32 Finally, we emphasize that RCW 81.04.560 authorizes the commission only to obtain information, none of which may be used as the basis of enforcement action against the railroad companies providing it. We construe this authorization and limitation as reflecting the legislative purpose to obtain data on the hazards and financial consequences of oil train operations in Washington. We therefore seek to maximize the information the railroads make publicly available about those operations. The rule we adopt obligates the railroads to inform the commission of the largest amount of oil they transport on a train, the maximum speed of that train, and whether the company has the financial ability to pay to cleanup a reasonable worst case spill resulting from a derailment or other accident involving that train. Such information provides the commission and the public with a clearer picture of the possible perils presented by the transportation of oil by rail in Washington.

33 The recommendations the railroads and other commenters have made, on the other hand, would result in the railroads reporting less or no information about oil trains in Washington. Both sets of proposals rely on data from occurrences outside this state - an historic national average of oil train cars derailed (as proposed by the railroads) or the incident in Lac Mégantic (as others would have us use) - which would provide no real insights into what a reasonable worst case spill would look like in Washington.

34 Indeed, imposing a reporting requirement based on an incident of the magnitude of that in Lac Mégantic - or an even worse spill - would be particularly problematic in this respect. The railroad involved in the Quebec incident was unable to pay for the damage and declared bankruptcy, forcing the provincial and Canadian federal governments to fund the cleanup and damage reparations.[37] Assuming a railroad company in Washington similarly did not have the financial resources to cover the billions of dollars in damages from such an incident, we expect that the company would report nothing more than a single statement to that effect. The commission would then be left with virtually no information about oil by rail operations in this state or the extent of the companies' ability to pay oil spill clean-up costs. We decline to take that path. Rather, we adopt a rule that gives full effect to the intent and purpose of RCW 81.04.560, and which will provide the commission and the public with more useful information.

[37] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 23.

35 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the commission finds and concludes that it should amend and adopt the rules as proposed in the CR-102 at WSR 15-22-105.

36 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** After reviewing the entire record, the commission determines that chapter 480-62 WAC should be amended and adopted to read as set forth in Appendix B, as rules of the Washington utilities and transportation commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the code reviser.

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 2, Amended 2, Repealed 0.

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

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

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

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

ORDER

37 **THE COMMISSION ORDERS:**

38 The commission amends WAC 480-62-130 and 480-62-300, and adopts WAC 480-62-260 and 480-62-270 to read as set forth in Appendix B, as rules of the Washington utilities and transportation commission, to take effect on the thirty-first day after the date of filing with the code reviser pursuant to RCW 34.05.380(2).

39 This order and the rule set out below, after being recorded in the order register of the Washington utilities and transportation commission, shall be forwarded to the code reviser for filing pursuant to chapters 80.01 and 34.05 RCW and 1-21 WAC.

DATED at Olympia, Washington, February 9, 2016.

Washington Utilities and Transportation Commission

David W. Danner, Chairman
Philip B. Jones, Commissioner
Ann E. Rendahl, Commissioner

Appendix A
(Comment Summary Matrix)

Synopsis: The oil train safety rule making before the commission is one part of a larger effort to enhance safety around crude oil trains and mitigate, to the extent possible, risks posed by the transportation of oil by rail in the state of Washington. The commission participated in the oil transportation study (study)[1], led by ecology at the direction of the 2014 legislature. The study was further tasked by the governor[2] with analyzing oil transportation in regards to marine and rail along with developing recommendations to enhance safety and environmental stewardship. As a result of the study, the governor requested legislation on oil movements by marine and rail. The recommendations that the commission and ecology submitted during the study were drafted into the governor's legislation (HB [ESHB] 1449). The passage of HB [ESHB] 1449 gave the commission regulatory authority over a few key areas (private shipper property, private crossings, first class city opt-in and financial responsibility reporting) along with increasing the regulatory fee paid by the railroad industry to provide more commission railroad inspectors.

[1] https://fortress.wa.gov/ecy/publications/SummaryPages/1508010.html.

[2] http://www.governor.wa.gov/sites/default/files/directive/dir_14-06.pdf.

This rule making is necessary to implement ESHB 1449, as signed into law on May 14, 2015.

Commission Provisions in ESHB 1449:

Private Shipper Property (not part of the rule making): Before the passage of ESHB 1449, commission employees needed an escort from FRA to enter private shipper property to conduct hazardous materials inspections. This requirement created delays in inspections and inefficient scheduling. After the passage of ESHB 1449, commission employees that are FRA-certified inspectors are able to go onto shippers property, with prior notice, to inspect any rail cars, review documents (generally located near the rail cars)

and observe any loading or unloading of hazardous materials. The inspector then forwards notice of any defects to FRA for enforcement. Since 2010 there have been approximately one hundred thirty-four safety defects discovered during these inspections.

Private Crossings Along Oil Routes: Before the passage of EHB [ESHB] 1449, neither the state nor federal government had authority over private crossings. This provision allows the commission to adopt minimum safety language at private crossings along oil routes and gives the commission authority to inspect the crossings. There are approximately three thousand private crossings in the state of Washington, with three hundred fifty along the oil routes.

Increase in Regulatory Fee: The commission rail program is funded by fees paid for by the railroad industry. The current fee on railroads is 1.5 percent of the gross annual intrastate operating revenues. Existing fees do not apply to oil, since oil is considered an interstate activity. ESHB 1449 allows for an increase in the regulatory fee, up to 2.5 percent, for railroads that haul crude oil. The increase in regulatory fees allows the commission to hire additional inspectors in the areas of track, hazardous materials, motive power and equipment, signal and train control and operating practices.

First Class City Opt-In: First-class cities are exempt from the commission's railroad safety jurisdiction. However, the influx of hazardous materials and train traffic has overwhelmed the resources of some first-class cities. This provision allows first-class cities to opt-in to the commission's grade crossing inspection program. There is also a requirement that first-class cities inform the commission when crossings are opened or closed.

Financial Responsibility Reporting: ESHB 1449 requires each railroad company to provide information on the company's ability to pay for a reasonable worst case spill in its annual report to the commission. The commission is prohibited from using the information in the reports as a basis for developing economic regulations or issuing penalties against railroad companies.[3]

[3] Financial responsibility is explained in greater detail in the justification section of the memo.

Background: There have been significant changes in the transportation of crude oil in the state. Historically, ninety percent of crude oil used by Washington refineries was delivered by tank ship. However, in 2014, pipeline and rail delivery accounted for approximately thirty percent of the oil imported. In addition to the increase in oil being imported via rail, there is a concern surrounding the volatility of some of the types of oil, like Bakken crude.[4]

[4] https://fortress.wa.gov/ecy/publications/SummaryPages/1508010.html.

Concerns regarding oil transportation led the legislature to authorize the oil transportation study in April 2014. The objective of the study was to analyze the risks to public health and safety associated with the transport of oil in Washington. Final recommendations were delivered to the legislature and governor in March 2015. Prior to completion of the study, in October 2014, Governor Inslee requested a preliminary set of recommendations regarding oil transportation. The commission provided a list of recommendations that were incorporated into governor-request legislation (ESHB 1449) and ultimately signed into law.

Notice of Opportunity to File Written Comments: On May 22, 2015, the commission published a "Notice of Opportunity to File Written Comments" and distributed it to the list of rail stakeholders on file at the commission, those individuals that signed up and/or testified at one of the legislative hearings on oil by rail, the railroads in the state and legislative staff. The commission also posted it on its web site. The notice served the purpose of informing interested persons of a scheduled workshop to discuss the rule making and to ask three questions related to the rule making. The commission asked the following questions:

1. What is your definition of a reasonably likely worst case spill of oil?

2. What is a reasonable per-barrel cleanup and damage cost of spilled oil?

3. What risk factors should the commission consider in establishing safety standards on private crossings?

The commission accepted comments until June 22, 2015, and received more than two hundred forty responses. A summary of the comments are below.

Many of the comments focused on the need for the commission to stop oil trains and oil facilities, as well as the need to guarantee safety before allowing trains to transit Washington state. Federal preemption precludes the commission from stopping trains, setting train speeds or interfering with interstate commerce.

In general, comments can be summarized as follows:

1. In looking at a "reasonable worst case spill" consider:

- A spill could include 1 to 3.5 million gallons of fuel.
- An explosion could result, causing further damage and clean-up costs.
- Environmental impacts can drive up costs.
- A worst case spill should be calculated at the largest foreseeable discharge of oil.
- A worst case spill should be considered one tank car.

2. Reasonable clean-up costs should be calculated at:

- $78,750 per barrel.
- The clean-up amounts estimated in ecology studies.
- The cost of all impacts, including environmental, human, economic, etc.
- $175 per barrel.

3. Rules for private crossing safety should include risk factors such as traffic, type of cargo and location of the crossing. Railroads suggest maintaining existing contractual relationships between the railroads and private crossing owners.

4. The commission should stop oil projects and trains completely.

5. The commission needs to keep federal preemption in mind in thinking about any new rules.

Workshop: A workshop was held at the commission on July 8, 2015. The comments received at the workshop were from the railroad industry and concerns from the Confederated Tribes of the Warm Springs Reservation of Oregon.

CR-101 Draft Language: On August 21, 2015, the commission issued draft language on opt-in for first class cit-

ies, private crossing signage standards, an increase in the regulatory fee paid by railroads hauling crude oil and financial responsibility standards for railroads that haul crude oil. The commission received comments from eight respondents.

Stakeholder Response: The comments received from respondents to the draft language can be summarized as follows:

1. First Class Cities Opt-In

a. Karen Hengerer

i. UTC should require participation.

2. Private Crossings

a. Tacoma Rail

i. Recently made significant investment to comply with federal emergency notification system (ENS) regulation 49 C.F.R. 234.

ii. Requests language that would honor investments already made on existing signage.

b. Kennewick Terminal Railroad & Western Washington Railroad.

i. Language is duplicative and conflicts with federal standards.

ii. Ninety days is not enough time to respond to a commission finding.

c. Dow Constantine

i. Supports language.

d. Confederated Tribes of the Warm Springs Reservation of Oregon.

i. Recommends installation of stop signs where no automatic grade crossing protective device is installed.

e. Johan Hellman (BNSF)

i. Supports language in the private crossing section.

3. Regulatory Fees

a. No comments received.

4. Financial Responsibility

a. Tacoma Rail

i. Kinetic energy scale-down is flawed.

ii. Consideration should be given to railroads that operate at speeds less than forty-five miles per hour.

iii. Tacoma Rail does not exceed ten miles per hour.

b. Kennewick Terminal Railroad & Western Washington Railroad

i. Item 2(d), relating to information sufficient to demonstrate a railroad's ability to pay the cost of a reasonable worst case spill, is burdensome and potentially in conflict with federal requirements.

c. Karen Hengerer

i. $400 gallon is not high enough.

d. Dow Constantine

i. Supports definition of reasonable worst case.

ii. Recommends a per-gallon cleanup of $1,880 (Lac-Megantic costs).

iii. $400 per gallon only captures cleanup and not loss of life, property damage, loss of tribal access, etc.

e. Confederated Tribes of the Warm Springs Reservation of Oregon

i. Reasonable worst case should be the largest foreseeable discharge.

ii. There should be no cap on liability.

iii. There should be a format for reimbursement to federal, state, tribal and local governments.

iv. Natural resource damage assessment should be included.

f. Johan Hellman (BNSF)

i. Concerns with the definition of reasonable worst case and clean-up costs of $400 gallon.

ii. PHMSA never defined reasonable worst case in scale-down approach.

iii. Lac-Megantic is not representative of a worst case.

iv. Numerous safety enhancements have been adopted and reduce PHMSA scale-down calculation.

v. PHMSA's scale-down costs were in the event that federal rules were not adopted.

vi. Supports using historical data to determine reasonable worst case instead of Lac-Megantic.

5. Other

a. Jeanne Poirier

i. Concerns regarding oil and coal transportation.

ii. Draft language does not go far enough.

b. Karen Hengerer

i. Rules should not be on an opt-in basis.

c. Confederated Tribes of the Warm Springs Reservation of Oregon

i. Opposed to the transportation of oil in general due to the impact to the tribe.

CR-102 Draft Language: Technical changes were made in the CR-101 draft language stage to address stakeholder comments. Some of the changes that were addressed dealt with:

- Private crossings - allowing one hundred twenty days to correct deficiency from the time of notification.
- Financial responsibility reporting - converting the clean-up costs to a per barrel basis instead of per gallon and allowing the reporting requirement to be based on operating speed.

Federal Action: The federal government has taken several actions that may impact the movement of oil by railroad within our state. These include:

- A study that may remove electronically controlled pneumatic brakes from the federal enhanced tank car rule (Docket No. PHMSA-2012-0082 (HM-251)). This would eliminate the only derailment mitigation measure addressed in the rule making. A separate action, in HR-22, Fixing America's Surface Transportation Act, Section 7311, directs the comptroller general to conduct an independent evaluation of electronically controlled pneumatic brakes and determine whether or not the benefits outweigh the costs.
- HR-22, Section 7310, requires the USDOT secretary to initiate a study on the levels and structure of insurance for railroads transporting hazardous materials.
- On December 18, 2015, President Obama signed the law removing the ban on crude oil exports. Crude oil export restrictions were introduced in the United States in 1975 in the middle of the energy crisis. It is unknown how many more unit trains will traverse Washington due to lifting the export ban.

Financial Responsibility Methodology: In its determination of financial responsibility reporting, the definition of a

"reasonable worst case" spill and the scope and costs associated with cleanup, the commission staff relied heavily on the federal agencies charged with regulating the railroads and the tank cars that are used by railroads, PHMSA and FRA. PHMSA is an agency within the USDOT and is responsible for establishing and enforcing requirements for the safe transport of hazardous materials by all modes of transportation. This includes the design of railroad tank cars carrying crude oil. PHMSA was created in 2004 to provide USDOT with a more focused research organization and establish an operating administration for the inspection and enforcement of requirements for pipeline safety and hazardous materials transportation. The FRA is also an agency within the USDOT and has jurisdiction over railroad safety at the federal level. FRA was created by Department of Transportation Act of 1966 and was charged with the uniform administration of the Federal Railroad Safety Act. Under the FRA region designation, Washington is located in FRA Region 8, along with Alaska, Idaho, Montana, North Dakota, Oregon, South Dakota, and Wyoming.[5]

[5] Oil transportation study, page 86.

The commission was charged with defining a "reasonable worst case" spill and calculating costs for the purposes of reporting by the railroads that haul crude oil. Staff looked at the implementing legislation in determining the scope of the definition and intent. As originally drafted, the financial responsibility reporting was intended to be a certificate of financial responsibility that would be reported to ecology. The legislature amended the language to create a simple reporting function on the railroads annual report submitted to the commission. The legislature specifically prohibited any punitive actions based on the information provided and expressly stated that the report was not a means of economic regulation. Instead of defining the reporting for a "worst case" spill, the legislature used the term "reasonable worst case" for the purposes of reporting. Commission staff looked to the federal agencies charged with regulating railroads and at the conditions and requirements for a certificate of financial responsibility in determining the necessary scope for the reporting requirement. According to the Pacific States/B.C. Oil Spill Task Force, the certificate of financial responsibility requirements for the west coast states are as follows:[6]

[6] http://www.oilspilltaskforce.org/docs/project_reports/CofrMatrix2.pdf.

RESPONSIBLE PARTY OR DAMAGE TYPE	**ALASKA (SEE CITATIONS BELOW)**	**BRITISH COLUMBIA (CANADA)[2]**	**WASHINGTON** (SEE RCS 88.40)	**OREGON** (SEE ORS 468B.390)	**CALIFORNIA** (CCR TITLE 14, SECTIONS 791-797 S.8670.32 AND S.8670.56.5)
Small Tank Barges	Same as for large tank barges (see below)	See below	Tank barges < 300 GT: Greater of $2 million or $3,000/bbl for persistent oil or $1500/bbl for non-persistent oils	None	Tank barges <150,000 bbls: $12,500 x 30% maximum cargo capacity
Tank Vessels and Large Barges	Greater of $469.80/bbl of crude capacity or $156.6 million, per incident; or Greater of $156.60/bbl of noncrude capacity or $1.566 million per incident, up to a maximum of $54,810,000 See AS 46.04.040 and 18 AAC 75.235	The Canada Shipping Act differentiates between convention ships and nonconvention ships since Canada is party to the CLC/Fund scheme of 69/71 as recently amended in 1992. A safety convention means seagoing ship wherever registered carrying in bulk as cargo, crude oil, fuel oil, heavy oil, lubricating oil or any other persistent hydrocarbon mineral oil or on a voyage following any such carriage of oil, unless it is proved that there is no residue of the oil on board. The maximum liability under section of a convention ship in respect of an occurrence is if the ship has a tonnage of not more than 5,000 tons, 4,510,000 units of account (SDRs) and if the ship has a tonnage of more than 5,000 tons, 4,510,000 units of account for the first 5,000 tons and 631 units of account for each additional ton, not exceeding 89,770,000 units of account in the aggregate.	For all tank ships and tank barges =>300 GT $500 million ($1 billion after 1/1/04)	>300 GT & < 3000 GT: Greater of $2 million or $1200/gross ton >3000 GT: Greater of $10 million or $1200/gross ton[3]	

In addition to reviewing the certificate of financial responsibility requirements, commission staff looked to the state of California in its recently adopted regulation on certificate of financial responsibility and contingency plan standards on railroads that haul crude oil.[7] The state of California defined a "reasonable" worst case spill as "(C) Railroads: Twenty percent (20%) of the maximum volume of oil cargo that a railroad may transport by a single train within the state (e.g. a manifest train or a "unit train"), based on 714 barrels per tank car."[8] Because the commission started its rule making before California's certificate of financial responsibility rule was finalized and because commission staff could not determine the methodology that California used in its regulation, staff relied on the federal enhanced tank car rule, Docket No. PHMSA-2012-0082 to determine "reasonable worst case" spill of oil and the associated clean-up costs. The data that PHMSA and FRA presented in its rule making was the most complete and exhaustive analysis available on the subject.

[7] https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=107198.

[8] 14 CCR § 817.04 § 817.04. Inland Facilities.

In determining a "reasonable" worst case for the purposes of the regulation, staff needed to look at a scenario that would be less than the worst case scenario described in the certificate of financial responsibility and less than the worst recorded tragedy in North America. However, staff did not believe that a "reasonable" worst case spill was synonymous with a most probable or an average derailment. In the United States, historical evidence of derailments show an average derailment of nine cars.[9] The largest derailment of crude and ethanol in the United States is thirty-one cars.[10] In looking for a comparison of "reasonable worst case," the commission noted that it is similar but not necessarily interchangeable with the PHMSA analysis of high consequence event used in the previously referenced enhanced tank car rule.

[9] Journal of Hazardous Materials 276 (2014) 442-451, http://railtec.illinois.edu/articles/Files/Journal%20Articles/2014/Liu%20et%20al%202014%20JHM%20Multiple%20Car%20Release.pdf.

[10] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 98.

PHMSA determined that high consequence events are "events that exceed the "typical" derailment event because they would result either in multiple fatalities or injuries, or would cause greater environmental damages than a typical derailment."[11] In its evaluation of criteria for calculating costs of a reasonable worst case spill, commission staff elected to use the PHMSA scale down methodology that was used in the federal Enhanced Tank Car Rule. The PHMSA approach was applied, in determining reasonable worst case, primarily for two reasons. First, the tragedy in Lac Mégantic, Quebec is to date the worst case example of a catastrophic derailment in North America involving crude oil. Using the tragedy in Lac Mégantic, Quebec as a worst case scenario seems appropriate. While it is true that a catastrophic event like what was seen in Lac Mégantic, Quebec could be exponentially worse, staff considered that the catastrophe in Quebec was the result of a number of failures, and that the USDOT has adopted regulations to ensure such an event would not happen again. Staff considered new federal regulations adopting enhanced tank car requirements to mitigate the risks associated with moving crude oil by rail. Ultimately, staff chose to move forward with the scale down approach used by PHMSA because, while there were safety measures adopted through the enhanced tank car rule, those safety measures would not be fully implemented for ten years. However, since it appears the electronically controlled pneumatic brakes may be removed from the enhanced tank car regulations, staff believes it is prudent to define a "reasonable worst case" as though there were no additional safety measures adopted at the federal level.

[11] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 52.

In applying the scale down calculation, staff accepts the PHMSA assertion that kinetic energy varies directly with the square of speed. In Lac Mégantic, the train in question was traveling at a rate of 65 mph[12] and resulted in the loss of approximately seventy-eight percent of its crude oil cargo or 1.59 million gallons. PHMSA calculations on average train derailments in the United States use an average speed of forty-one mph in determining a "scale down" calculation of Lac Mégantic. While this is used to illustrate monetary assumptions, an assumption on damage should be calculated using the operating speeds in the state. Kinetic energy = 1/2 Mass x (Velocity)2. Staff agreed with the PHMSA assumption that loaded high hazard flammable trains are of equal mass. While the purpose of the kinetic force scale down calculation in the federal Enhanced Tank Car Rule was to show the projected number of high consequence events over the next twenty years in the absence of the federal Enhanced Tank Car Rule, staff believes that because it will take ten years to phase out older tank cars, and because the only mitigating factor in derailments will likely be removed, the calculation can be used to determine a "reasonable worst case."

[12] Railway Investigation Report R13D0054, http://www.tsb.gc.ca/eng/rapports-reports/rail/2013/R13D0054/R13D0054.pdf.

As an example, a railroad that operates crude oil trains at a maximum speed of forty-five mph would have a reasonable worst case spill of approximately forty-eight percent.

There were a number of factors the commission staff weighed in the evaluation of the definition of "reasonable." These include comments received (Dow Constantine, Confederated Tribes of the Warm Springs Reservation, Tacoma Rail and BNSF), history of derailments, safety measures in place to prevent or reduce derailment impacts, damages of largest crude oil train, tribal impacts, implementation of the federal Enhanced Tank Car Rule, environmental impacts of a spill, consistency with federal and state standards, and regulatory authority of the commission. Staff also considered the federal agencies that regulate railroads, the data used in determining safety considerations for enhanced tank cars, existing regulations pertaining to certificates of financial responsibility and states that have adopted regulations on "reasonable" worst case spills and the cost calculation used to determine the necessary financial resources needed by a railroad.

The cost for a cleanup of a "reasonable worst case" spill was weighed using the same data. It would not seem reasonable to have a clean-up cost disproportionately greater than existing financial responsibility reporting requirements. Staff

needed to determine the scope of the clean-up costs and damages as used in the legislation. Given that the financial reporting requirement started as a certificate of financial responsibility and that the term damages were not defined, staff used the certificate of financial responsibility and the final bill report as a guide. As stated in the ESHB 1449 bill report, "Railroads that transport oil as bulk cargo must provide information to the UTC regarding their ability to pay for a reasonable worst-case spill of oil, an amount which is to be calculated by multiplying the reasonable anticipated per-barrel cleanup costs by the reasonable worst case spill volume. This information is to be provided to the UTC as part of railroad's annual report, and the UTC may not use this information to economically regulate or penalize a railroad."[13]

[13] http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bill%20Reports/House/1449-S.E%20HBR%20FBR%2015.pdf.

In evaluating how the per barrel costs should be calculated, commission staff received comments requesting that it look towards ecology['s] past rule makings in its calculations. Ecology is in the process of adopting contingency plan standards for railroads, which commission staff supports, but available data on cleanup and damage costs by ecology do not seem to be appropriate for this reporting function. Ecology costs are more applicable to maritime. The commission will be interested in the calculations that ecology uses in its ongoing rule making.

	Costs by Quantity and Oil Type [14] Environmental Damage		Socioeconomic Cost
Oil Type	Volume (Gallons)	2005$/ Gallon	2005$/ Gallon
Volatile Distillates	<500	$51	$69
	500-1,000	$48	$281
	1,000-10,000	$37	$425
	10,000-100,000	$32	$191
Light Fuels	<500	$90	$85
	500-1,000	$85	$350
	1,000-10,000	$74	$531
	10,000-100,000	$69	$212
Heavy Oils	<500	$101	$159
	500-1,000	$96	$637
	1,000-10,000	$90	$955
	10,000-100,000	$80	$531
Crude Oil	<500	$96	$53
	500-1,000	$92	$212
	1,000-10,000	$85	$318
	10,000-100,000	$77	$149

[14] Final cost-benefit analysis for oil spill contingency planning.

Table 7.1:

Environmental and Socioeconomic Damage Estimates: The weighted average of these costs provides an estimate of the value that may accrue for removal on an overall per gallon basis for a large number of spills. The costs were weighted based on the share of spills in each of the sized classes. Further weighting by the shares of light and heavy oils give an average value of $124 per gallon for socioeconomic damages and $86 for environmental losses

The commission determined that a clean-up cost of $400 per gallon should be used in determining the financial reporting, based primarily on the federal Enhanced Tank Car Rule. In determining the clean-up costs associated with a "reasonable worse case" spill, the commission looked at costs associated with the spill and did not take into account those costs outside of the spill or spill cleanup. In addition, the commission looked at the PHMSA enhanced tank car regulation, where the federal government determined that an event like Lac Mégantic "would not be representative of damages from a typical accident or even a high consequence accident."[15] One recent higher consequence event was the Lynchburg, Virginia, incident which resulted in thirty thousand gallons spilled. The emergency response and clean-up costs for that incident were reported to FRA by CSX as $8.99 million. Of this $8.99 million cost, an estimated $5 million was due to environmental damage. The CSX estimate of the costs of Lynchburg results in a cost per gallon of crude of about $300.[16]

[15] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 87.

[16] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 87.

The weighted average of the per gallon estimates from all the federal Enhanced Tank Car Rule listed literature, including marine, pipeline and rail, is between $407 to $415 per gallon spilled of crude oil or ethanol. It is unlikely that any of these estimates capture the full comprehensive societal damages that result from these incidents.[17] The PHMSA Final Regulatory Impact Analysis for the federal Enhanced Tank Car Rule stated that costs for crude oil for rail carriers was estimated at $200 per gallon but "the review found that damages could be as high as twice that amount for crude oil spills."[18] Further, the 1999 Etkin[19] crude oil study had a cost of $326 per gallon for cleanup and the 2012 Marruffo[20] study showed a clean-up cost of $378.34 for crude oil by rail.[21]

[17] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 115.

[18] Final Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 86.

[19] Etkin, D.S. "Estimating Clean-up Costs for Oil Spills." Proceedings, International Oil Spill Conference, 1999.

[20] Marruffo, Amanda, Hongkyu Yoon, David J. Schaeffer, Christopher P. L. Barkan, Mohd Rapik Saat, and Charles J. Werth. "NAPL Source Zone Depletion Model and Its Application to Railroad-Tank-Car Spills." Groundwater 50, no. 4 (2012): 627-632.

[21] The model described in Marruffo (2012) model is used to predict the relative impact of crude oil or ethanol released from railroad-tank car accidents on soil and groundwater contamination and cleanup times, but no monetized costs are presented. (page 115).

Based on the available information, the commission has elected to propose a reasonable worst case definition that would use the kinetic force scale down formula, using the railroad's maximum operating speed for a train moving oil. The clean-up cost to be used in the reporting regulation is $16,800 per barrel, or $400 per gallon.

TR-151079 Oil Train Safety Rule-Making
Comment Summary Matrix CR-102
December 24, 2015

Section	Commenter	Comments	Staff Response
WAC 480-62-270 Safety standards at private crossings.	Citizen, Jean Avery	The commenter believes: 1. Crossing areas should include distances on both sides of the tracks and in all directions. 2. Crossings should include a posting of the largest area of possible impact of a crude oil spill (similar to the "tsunami zone" signs).	1. The recommendations and safety measures contained in WAC 480-62-270 are consistent with the federal government and provide additional safety precautions to ensure that the crossing is well marked and there is a process if the crossing has hazards that require more than signage. 2. HB [ESHB] 1449 did not direct the commission to create impact zones associated with crude oil movement by rail.
WAC 480-62-270 Safety standards at private crossings.	Union Pacific (UP), Melissa Hagan	1. In WAC 480-62-270(2), UP is concerned that the railroads only have ninety days following the adoption of the rule to install signage at private crossings. The timeline would impose a significant burden on UP. UP requests the commission allow one hundred eighty days to comply. 2. UP suggests the commission consider including an exception to its signage requirement for private crossings where only a de minimis amount of crude oil is transported. 3. UP suggests a technical change to the language in WAC 480-62-270(4). UP stated that the rule would require an additional crossbuck to be installed within ninety days of the adoption of the rule. UP believes this is a clerical mistake and the language should read "within ninety days of notification of the insufficient sight restriction."	1. The ninety day timeline UP cited is from a previous draft of the proposed rules. The CR-102 language that was drafted and posted to the commission web site allows for one hundred twenty days following the adoption of the rule to install signage at private crossings. 2. If a railroad uses a private crossing to haul a de minimis amount of oil and believes an exemption from the rule is in order, the railroad may apply for an exemption from the commission. 3. The ninety day timeline UP cited is from a previous draft of the proposed rules. The CR-102 language that was drafted and posted to the commission web site reads that a railroad is required to install an additional crossbuck within one hundred twenty days of receiving notification of the hazard from commission staff.
WAC 480-62-300 Annual reports—Regulatory fees.	Senator Christine Rolfes	The commenter believes: 1. The proposed definition of reasonable worst case spill is far too conservative. 2. The calculation of a potential amount of oil spilled assumes the train will follow the maximum operating speed. A reasonable worst case should cover circumstances when a train is out of control and, therefore, exceeding the maximum speed. 3. Planning and estimating for reasonable worst case should be calculated and assessed for a large metropolitan area such as Spokane or Seattle. 4. The estimate of the per barrel clean-up cost seems excessively low.	1. The commission researched similar definitions in other states and at the federal level. The state of California limits the definition to twenty percent of the train. PHMSA, while not defining a reasonable worst case, calculates a high consequence event in the recently adopted Enhanced Tank Car Rule. The commission utilized the PHMSA calculation as the preferred methodology. 2. The commission explored ways to calculate a reasonable worst case scenario that was not unduly punitive to railroad operators that operate on small sections of track at speeds less than ten mph. 3. The commission looked to other states for guidelines on financial responsibility and PHMSA in its regulatory impact analysis of the federal Enhanced Tank Car Rule. The commission estimate exceeds other states (i.e. California) and matches the PHMSA calculations. 4. The per barrel cleanup cost was calculated using the data available in the PHMSA Enhanced Tank Car Rule regulatory impact analysis.
WAC 480-62-300 Annual reports—Regulatory fees.	Ecology, Dale Jensen	The commenter states: 1. Ecology supports the commission's effort to promote and secure a demonstration of financial responsibility for the clean-up costs of oil spills.	1. The commission looks forward to working in partnership with ecology on its contingency plan rule making.

Section	Commenter	Comments	Staff Response
		2. The proposed rule appears to establish a reasonable level of financial responsibility for clean-up costs associated with an oil spill.	2. Commission staff agrees.
		3. Ecology notes that the estimated clean-up cost of $400 per gallon is only a portion of the overall costs of an oil spill. The potential costs for restoration of property and natural resources along with loss of life would be additional costs above and beyond the cost for cleanup of spilled oil.	3. The commission agrees that the potential costs associated with loss of life and restoration of property and natural resources would far exceed the costs of cleanup. The commission supports ecology as it evaluates the contingency plan rules for the state related to railroads and believes that the rule process may find that clean-up costs exceed the documented studies and reports available at this time.
		4. In the event of a worst case spill, the true cost of damages incurred could certainly exceed the level established within the proposed rule.	4. The commission agrees that an absolute worst case spill could exceed any level of cost that staff was able to find in federal or state rules or in available studies. However, HB 1449 refers to a "reasonable" worst case spill and not an absolute worst case spill.
		5. Ecology recommends the adoption of the rule as currently proposed.	5. Commission staff agrees.
WAC 480-62-300 Annual reports—Regulatory fees.	BNSF, Johan Hellman	The commenter suggests: 1. The definition of reasonable worst case in the CR-101 and CR-102 are flawed. The formula focuses on one aspect of rail safety - speed. There are numerous other factors that may influence the potential of a rail car carrying crude oil to derail and spill.	1. The commission researched available options to calculate reasonable worst case and found that speed was the one variable that could reduce the amount of kinetic force involved in a derailment. The commission explored some of the other factors BNSF previously mentioned, but chose to follow the PHMSA calculations.
		2. The authority of any state to regulate train speeds is questionable since the federal government has exclusive jurisdiction over train speed.	2. The commission agrees with BNSF that the state does not have the authority to regulate train speeds. The requirement in the annual report for reporting financial responsibility is for informational purposes only. It does not authorize the commission to economically regulate railroads or railroad speed, nor do the draft rules propose to do so.
		3. A definition of worst case spill based solely on speed could negatively impact other aspects of rail safety and operations across the state, including at public crossings.	3. The commission does not believe that a reporting feature on an annual report will cause a railroad to changes its speeds or operating practices. The commission is expressly prohibited from economic regulation of railroads, may not use the information submitted by a railroad as a basis for penalties and nothing in the report may be construed as assigning liability.
WAC 480-62-300 Annual reports—Regulatory fees.	UP, Melissa Hagan	The commenter states: 1. The imposition of financial reporting would conflict with federal law.	1. Commission staff does not believe that requirements of an annual report conflicts with federal law.
		2. Adoption of the Surface Transportation Board (STB) R-1 report should be a sufficient reporting mechanism for meeting the requirements of the statute.	2. The commission currently allows and asks for the STB R-1 as a portion of its annual report but the STB R-1 does not include financial responsibility for spill data as required by Washington state statute.
		3. Aspects of the annual reporting provisions remain under the exclusive jurisdiction of the federal government for the preservation of common carrier service obligations.	3. Commission staff does not believe that requirements of an annual report violate common carrier service obligations or the jurisdiction of the federal government.
		4. UP is concerned about the "financial fitness" and insurance requirements in the draft rule.	4. The annual report is not used to determine financial fitness, Section 10 of HB [ESHB] 1449 expressly prohibits the commission from economic regulation of railroads. The data in the annual report is for informational purposes only.

Section	Commenter	Comments	Staff Response
		5. Requirements that railroads provide annual reporting statements that identify all insurance carried by the railroad, including coverage amounts, limitations, and other conditions of the insurance as well as a reasonable worst case spill of oil are preempted by federal law. Such requirements compromise the integrity of UP's confidential business records and are "blatantly discriminatory" on their face.	5. The commission is sensitive to the need for the railroad industry to maintain confidential business records. However, the requirements in the rule language, including insurance and worst case scenarios, are issues openly discussed by UP. As stated in the UP 2014 STB Annual Report on page 10, "We transport certain hazardous materials and other materials, including crude oil, ethanol, and toxic inhalation hazard (TIH) materials, such as chlorine, that pose certain risks in the event of a release or combustion … A rail accident or other incident or accident on our network, at our facilities, or at the facilities of our customers involving the release or combustion of hazardous materials could involve significant costs and claims for personal injury, property damage, and environmental penalties and remediation in excess of our insurance coverage for these risks …." Further, on page 11 of the same 2014 Annual Report, UP concedes that hauling hazardous materials like crude oil may impact the company's operations, "We could incur significant costs as a result of any of the foregoing, and we may be required to incur significant expenses to investigate and remediate known, unknown, or future environmental contamination, which could have a material adverse effect on our results of operations, financial condition, and liquidity."
		6. Congress's assertion of federal authority over the railroad industry has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." The ICC Termination Act confers exclusive jurisdiction over licensing and economic regulation of interstate railroad operations on the STB.	6. The reporting requirements are for informational purposes only. The commission is expressly prohibited from economically regulating railroads or using the information for punitive measures.
		7. STB has stated that the ICC Termination Act Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.	7. Please see answer #6.
		8. Federal courts and the STB have found two types of state regulations of railroads to be so pernicious as to be "categorically" preempted without any inquiry into the state's reason. First, states are categorically prevented from intruding into matters that are directly regulated by the STB - any form of state economic regulation which may include a financial fitness inquiry. Second, states cannot impose permitting or preclearance requirements.	8. Please see answer #6.
		9. UP is required to transport all commodities, including crude oil. Railroads cannot stop transporting crude oil through the state.	9. The rules in no way limit transportation of crude oil in the state.
		10. The commission cannot regulate the amount of insurance to be held by a federally licensed rail carrier. Regulating financial fitness of rail carriers is quintessential economic regulation that is preempted.	10. Please see answer #6.
		11. The commission cannot superimpose another layer of economic regulation by forcing carriers to demonstrate they have obtained a minimum level of insurance.	11. Please see answer #6.

Section	Commenter	Comments	Staff Response
		12. UP's R-1 for 2014 reports net revenue from railway operations of $8.5 billion. Legislation requires no disclosure beyond that already made publicly available in the R-1.	12. HB [ESHB] 1449 requires railroads to report to the commission related to the railroad's ability to pay damages in the event of a spill or accident involving the transport of crude oil, including a statement of whether the railroad has the ability to pay for damages resulting from a reasonable worst case spill. Please also refer to answer #5.
		13. Coverage amounts, limitations, and other conditions of the insurance would require UP to divulge the terms of insurance coverage that UP has negotiated with its insurance providers.	13. Filings by railroads to the STB disclose insurance levels and rates when the railroad company is interested in increased fees or protection from liability under common carrier provisions.
WAC 480-62-300 Annual reports—Regulatory fees.	Columbia Riverkeeper, Friends of the Columbia Gorge, Forest Ethics, RE Sources for Sustainable Communities, Sierra Club Washington Chapter, The Lands Council, Washington Environmental Council, Washington Physicians for Social Responsibility	The commenter includes, in its comments: 1. Concerns regarding the worst case spill cost in WAC 480-62-300 (2)(d).	1. The commission used available study and report data, as well as the PHMSA regulatory impact analysis to set spill cost.
		2. Objections to the adoption of the worst case scenario cost of oil spill cleanup.	2. The commission used available data, through the PHMSA federal Enhanced Tank Car Rule to determine reasonable worst case scenario.
		3. The monetary amount of $16,800 per barrel multiplied by the percentage of the largest train of crude oil gravely underestimates the potential cost of an oil train disaster.	3. The commission used the available data to determine per barrel clean-up costs. The percentage was extracted from the PHMSA Enhanced Tank Car Rule.
		4. The commission deviated significantly from the charge in the legislation which does not call for financial assurance for a "typical accident" or "high consequence accident" but for a "worst case spill."	4. The commission was charged with defining a "reasonable" worst case spill. The definition of "reasonable" is subjective but the commission believes that if the legislature had intended an absolute worst case spill, then the quantifier "reasonable" would not have been included. A high consequence event from the PHMSA Enhanced Tank Car Rule was used because it calculated costs, showed potential impacts and predicted possible derailments.
		5. Lac Megantic may not be the worst case spill scenario. An oil spill in an area with a denser population, such as Seattle, or an area that is environmentally sensitive, such as the Columbia River, could have clean-up costs much higher than Lac Megantic on a per barrel basis.	5. The commission agrees that there are numerous scenarios where an absolute worst case spill would be significantly more than what was drafted in the CR-102 and in Lac Megantic. The annual report is for informational purposes only and is not intended to be an absolute worst case scenario but rather a "reasonable" worst case.
		6. Recommends looking at real world examples like Lac Megantic and "near miss" incidents to model what could happen.	6. The commission reviewed available data related to crude oil transportation by rail and used a methodology that was based in fact and accepted by the federal agencies that regulate railroads and tank cars - PHMSA and FRA.
		7. Suggests the commission use the worst high consequence event considered in the Final PHMSA Regulatory Impact Analysis on page 110.	7. The commission reviewed the PHMSA regulatory impact analysis on the worst high consequence event for fatality and nonfatality damages. The commission focused the methodology on clean-up costs and damages associated with the spilled oil and not fatality, nonfatality and societal costs.

Section	Commenter	Comments	Staff Response
		8. PHMSA projected a 95th percentile high consequence derailment that simulates the cost of a derailment in a high population density area. The cost of these events would be far more serious at an estimate of $6.3 billion.	8. The commission agrees that an absolute worst case spill, and in particular an accident that takes into account fatalities and societal costs could exceed the clean-up costs envisioned in the proposed rule. However, the legislation required the commission to define a "reasonable" worst case spill and not an absolute worst case.
		9. USDOT believes that in any given year, there is a five percent chance that a major derailment will happen in an urban setting in the United States with a cost of $6.3 billion.	9. See answer #6, 7 and 8.
		10. The cost of a $6.3 billion spill results in a per gallon cost of $2,100.	10. The cost per gallon proposed by the commenter includes the costs of fatalities and damages outside the scope of the commission's rule making. See answer #6, 7 and 8.
		11. HB [ESHB] 1449 states that the purpose of the bill is to ensure that responsible parties are liable, and have the resources and ability to respond to spills and provide compensation for all costs and damages (Section 1 (3)(c)). The commission only considered clean-up costs and ignored the separate cost of damages.	11. See answer #6, 7 and 8.
		12. The proposal unlawfully limits the potential costs in ways that are inconsistent with the governing legislation. Legislature used the word "damages" rather than "cleanup costs."	12. See answer #6, 7 and 8.
		13. Damages should account for both economic damages and noneconomic damages.	13. See answer #6, 7 and 8.
		14. The commission focused on clean-up costs and the analysis should fully account for both spills and accidents.	14. See answer #6, 7 and 8.
		15. Worst case planning should include all risk categories.	15. See answer #6, 7 and 8.
		16. Maximum possible speed should be factored into worst case and not the fastest operating speed.	16. The commission used the maximum operating speed to determine the reasonable worst case spill methodology to ensure that railroad operators that travel at lower speeds for limited distances would not be subjected with the same cost calculation as unit trains traveling at higher rates of speed throughout the state.
		17. Rule, as written, sets a weak standard.	17. The rule requires specific data from the railroads for informational purposes only, it does not bestow the commission with any economic regulatory authority and, therefore, sets no standards.
WAC 480-62-300 Annual reports—Regulatory fees.	Citizen, Jean Avery	The commenter believes that clean-up requirements should include short and long-term mitigation for neighborhoods, waterways, wetlands, aquatic life and environmental regions and habitats near the tracks.	The rule requires specific data from the railroads for informational purposes only. The commission supports ecology in its contingency plan rule making which will have measures in place to mitigate oil spills.
WAC 480-62-300 Annual reports—Regulatory fees.	Rail Safety Policy Expert, Fred Millar	The commenter states: 1. The commission should apply federal regulatory precedents in chemical accident prevention to objectively define reasonable worst case oil spill.	1. The commission looked at the federal agencies that regulate railroads and utilized the data available to define reasonable worst case spill.

Section	Commenter	Comments	Staff Response
		2. Worst case should be based on the capacity of the longest crude by rail train and not half a train.	2. The commission used the PHMSA Enhanced Tank Car Rule to establish a methodology for determining a reasonable worst case spill. The quantifier "reasonable" is interpreted to mean less than the largest amount of oil being carried.
		3. The rule should cover oil spills and other kinds of harmful discharges (fire, explosion, toxic gas cloud).	3. Discharges are defined in the oil spill statutes at the state level and do not include fires, explosions or toxic gas clouds.
		4. The commission should make a direct request to each crude by rail carrier to provide information relevant to any state assessment of crude by rail risks, railroads worst case scenarios, catastrophic insurance coverage limits, comprehensive emergency response plans, routing analysis and route selection documents.	4. Commissioners requested information pertaining to company calculations on worst case spills and insurance levels at the rule-making workshop, but has not received any information from the railroads.
		5. Scaling down the worst case understates the common public understanding and longstanding federal regulatory definitions.	5. The scale down approach was used in the PHMSA Enhanced Tank Car Rule and was the best available data for the commission to review in determining a reasonable worst case spill.
		6. Worst case needs to include dense cities or sensitive environmental areas.	6. The commission supports ecology in its rule making on contingency plan standards including spill risks in environmentally sensitive areas. Reporting financial responsibility data as required in HB [ESHB] 1449 is for informational purposes only and relates directly to clean-up costs.
		7. Discharges go beyond the bare "oil cleanup" costs.	7. The commission believes the intent of the legislature, as stated in the bill analysis before final amendment, relates directly to oil spill cleanup and damages directly related to the spilled oil.
		8. HB [ESHB] 1449, Section 5(3), mandates that the department "determine the contingency plan requirements for railroads transporting oil in bulk." HB [ESHB] 1449 does not include, in subsections (4) through (11), the requirement that a railroad provide calculations of its worst case scenario, as in other federal accident prevention and emergency response legislation.	8. The requirement in HB [ESHB] 1449, Section 5(3), requires ecology, not the commission, to determine contingency plan requirements. The commission supports ecology in its rule making on contingency plans.
		9. Legislation fails to require the railroad to provide documentation on its worst case scenarios for hazardous cargoes.	9. The commission is limited to the scope of the legislation.
		10. The commission should define "reasonable" as what could happen versus what has already happened.	10. The commission used the PHMSA Enhanced Tank Car Rule to determine reasonable worst case spill.
		11. The commission's clean-up cost calculations are dubious.	11. The per barrel clean-up cost was calculated using the data available in the PHMSA Enhanced Tank Car Rule regulatory impact analysis and in reviewing the standards in California on railroads. Washington's per barrel costs are higher than California and is consistent with the studies and reports used for the PHMSA regulatory impact analysis.
		12. The commission process for calculating fees does not properly weight [weigh] safety.	12. Commission rail program staff is supported by the railroad industry through a regulatory fee. The fee is used to promote rail safety. Oil underlies only a portion of the duties performed by rail staff.
		13. The commission relies on estimates on future railroad compliance with voluntary speed limits. Human error or criminal negligence is a key causal factor in runaway train disasters.	13. The commission relies on operating speed as a determination of reasonable and to allow railroads that operate at very low speeds to not have the same reporting requirement as railroads operating at fifty-five mph.

Section	Commenter	Comments	Staff Response
		14. The commission should look at federal regulatory regimes besides the PHMSA HHFT rule for worst case scenario.	14. The commission reviewed the PHMSA Enhanced Tank Car Rule and standards related to oil pollution and contingency planning.
		15. The entire train should be used to calculate release potential.	15. The commission had the obligation to define "reasonable" which is something less than the absolute worst case spill.
		16. New HHFT rule does not include the societal costs of crude by rail accidents.	16. The commission agrees and does not believe that HB [ESHB] 1449 is intended to account for all societal costs in the reporting function of the annual report.
		17. The EPA definition of worst case scenario is based on the largest release of what could happen.	17. For the purposes of this rule making, the commission used the PHMSA Enhanced Tank Car Rule to determine reasonable worst case spill. The commission would not oppose a worst case scenario that was defined broadly if used by ecology in its contingency plan rules.
		18. The PHMSA HHFT regulatory impact analysis underlying most of the commission's analysis is a cost-benefit analysis and used to justify the cost of the new safety regulations.	18. The commission agrees that the regulatory impact analysis is primarily a cost-benefit analysis.
		19. HHFT regulations are less than maximally stringent for accident protection regarding speed and tank car puncture resistance.	19. The commission submitted comments to the PHMSA Enhanced Tank Car Rule requesting more stringent standards. Further, the commission wrote congress to express opposition to the removal of the electronically controlled pneumatic brakes from the PHMSA Enhanced Tank Car Rule.
		20. The commission should not be limited to scaling down a worst case scenario since any regulations in this area are heavily preempted.	20. The commission believes that the qualifier "reasonable" requires a regulation that is less than an absolute worst case spill.
		21. HB [ESHB] 1449 is only an information law.	21. The commission agrees that the financial reporting requirement contained in HB [ESHB] 1449 is for informational purposes only. The commission is expressly prohibited from economically regulating railroads or using the information collected for punitive measures.

Appendix B
(WAC 480-62 - RULES)

AMENDATORY SECTION (Amending WSR 01-04-026, filed 1/30/01, effective 3/2/01)

WAC 480-62-130 Application of this chapter. The rules in this chapter apply within certain cities and to any railroad company subject to the jurisdiction of the commission under RCW 81.04.010 and chapters 81.04, 81.24, 81.28, 81.36, 81.40, 81.44, 81.48, 81.52, 81.53, 81.54, 81.60, and 81.61 RCW, as set forth below:

(1) To all Class I, II, and III railroad companies operating within the state of Washington, with the exceptions noted in subsections (2), (3), and (4) of this section.

(2) To and within first-class cities except for WAC 480-62-145, 480-62-150, ((~~480-62-155,~~)) and 480-62-225.

(3) To and within cities with a population of more than 400,000 except for WAC 480-62-145, 480-62-150, ((~~480-62-155,~~)) 480-62-225, 480-62-230, and 480-62-235.

(4) To logging and industrial railroads except for WAC 480-62-200, 480-62-205, 480-62-215, 480-62-240, 480-62-245, 480-62-250, 480-62-300, the portions of WAC 480-62-310 that do not involve grade crossing accidents, WAC 480-62-315 (2), (4) and (5), and WAC 480-62-325.

NEW SECTION

WAC 480-62-260 First-class cities opt-in. (1) Participation in the commission's rail safety program. RCW 81.53.240 allows a first-class city to request participation in the commission's crossing safety inspection program. For the purposes of this section, the commission's crossing safety inspection program shall mean the inspection of grade crossings to ensure proper design and maintenance, as set forth in WAC 480-62-225. For the purposes of this section participation in the crossing safety inspection program shall not include the crossing petition process outlined in RCW 81.53.030 and 81.53.060.

(2) Process for opt-in. A first-class city must notify the commission of its intent to opt-in to the commission's rail safety program at least sixty days prior to the effective date requested by the city. A first-class city's request to opt-in must be accompanied by documentation demonstrating that the city's governing body has approved the terms and conditions set forth in a memorandum of understanding between

the city and the commission governing the commission's assumption of rail crossing safety inspection authority within the city limits. A first-class city's request to opt-in will become effective on the date requested by the city or the first day of the month following commission approval of the memorandum of understanding referenced in this section, whichever occurs later.

(3) Technical assistance to first-class cities. For first-class cities that opt-in to the commission's crossing safety inspection program, the commission will provide technical assistance on grade crossing safety, maintenance, and modifications as agreed between the city and the commission.

(4) Process to opt-out. First-class cities that opt-in to the commission's crossing safety inspection program may opt-out of the program by submitting to the commission documentation that the city's governing body has approved the withdrawal of the city from the commission's crossing safety inspection program. A city's notice of withdrawal must be submitted to the commission at least ninety days prior to the date upon which the city intends to assume all rail crossing safety inspections within its jurisdiction.

NEW SECTION

WAC 480-62-270 Safety standards at private crossings. (1) For the purposes of this section, the term "private crossings" has the same meaning as in RCW 81.53.010(8).

(2) At every private crossing through which any amount of crude oil is transported, the railroad must ensure that the following are installed on each side of the crossing within one hundred twenty days after this rule becomes effective:

(a) A thirty-inch or larger R1-1 stop sign, defined as a standard R1-1 in the *Manual on Uniform Traffic Control Devices*;

(b) An emergency notification system (ENS) sign that:

(i) Displays the necessary information for the dispatching railroad to receive reports of unsafe conditions at the crossing including, at a minimum:

(A) The toll-free telephone number of the railroad company established to receive reports;

(B) An explanation of the purpose of the sign (e.g., "Report emergency or problem to __"); and

(C) The United States Department of Transportation (USDOT) National Crossing Inventory number assigned to that crossing.

(ii) Measures at least twelve inches wide by nine inches high;

(iii) Is retroreflective;

(iv) Has legible text (i.e., letters and numerals) with a minimum character height of one inch; and

(v) Has white text set on a blue background with a white border, except that the USDOT National Crossing Inventory number may be black text set on a white rectangular background.

(c) A rectangular sign, at least three hundred square inches (twenty thousand square centimeters) in size, with the legend "Private Crossing" and the crossbuck symbol.

(3) All signs must have retroreflective tape applied to the sign posts.

(4) If the commission finds, after investigation, that a restricted sight distance, unfavorable roadway or crossing configuration, or other hazard exists at a private crossing, the commission will notify the railroad and to the extent the commission has contact information, the landowner. The railroad must ensure that additional safety measures are installed at the crossing including, but not necessarily limited to, signs authorized in the *Manual on Uniform Traffic Control Devices*, within one hundred twenty days of receiving notification of the hazard from commission staff.

(5) At private crossings where crude oil is transported, the commission will conduct inspections giving priority to private crossings with a high frequency of oil trains, in industrial areas, and high population centers.

(6) Nothing in this section modifies existing agreements between the railroad company and the landowner governing liability or cost allocation at the private crossing.

AMENDATORY SECTION (Amending WSR 04-05-031, filed 2/11/04, effective 3/13/04)

WAC 480-62-300 Annual reports—Regulatory fees. (1) The surface transportation board annual report form R1 must be used by Class I railroad companies ((~~as~~)) in addition to the annual report form ((~~for submission to~~)) published by the commission. Class II and Class III railroad companies must use report forms periodically published by the commission.

(2) Any railroad company that transports crude oil in Washington must submit to the commission, in addition to its annual report, a statement that contains:

(a) All insurance carried by the railroad company that covers any losses resulting from a reasonable worst case spill.

(b) Coverage amounts, limitations, and other conditions of the insurance identified in (a) of this subsection.

(c) Average and largest crude oil train, as measured in barrels, operated in Washington by the railroad company in the previous calendar year.

(d) Information sufficient to demonstrate the railroad company's ability to pay the costs to clean up a reasonable worst case spill of oil as defined in (e) of this subsection including, but not necessarily limited to, insurance, reserve accounts, letters of credit, or other financial instruments or resources on which the company can rely to pay all such costs. For the purposes of this section, the railroad company must calculate the total cleanup costs for a reasonable worst case spill based on a minimum cost of sixteen thousand eight hundred dollars per barrel multiplied by the percentage of the largest train of crude oil described in (e) of this subsection.

(e) For the purposes of this section, a reasonable worst case spill for railroads shall mean the percent of the largest train load of crude oil, as measured in barrels, moved by that company in the previous calendar year, as described below:

$$[(\text{Maximum Operating Speed}/65)^2 = \text{Reasonable Worst Case Percent}]$$

(f) For the purposes of this section, maximum operating speed shall mean the top speed that the railroad company operates any train carrying crude oil in the state.

(3) Each year every railroad company is responsible for obtaining the proper report form from the commission. Reports must be completed for the preceding calendar year's operations. One copy of the completed annual report, along with the regulatory fee, must be submitted to the commission no later than May 1st of each year.

(((~~(3)~~))) (4) **Regulatory fees.** The railroad company regulatory fee for Class I railroads and companies that haul crude oil is set by statute at ((~~one~~)) two and one-half percent of gross intrastate operating revenue. The regulatory fee for all other railroad companies shall be set at one and one-half percent of gross intrastate operating revenue.

(a) The maximum regulatory fee is assessed each year, unless the commission issues an order establishing the regulatory fee at an amount less than the statutory maximum.

(b) The minimum regulatory fee that a railroad company must pay is twenty dollars.

(c) The twenty dollar minimum regulatory fee is waived for any railroad company with less than one thousand three hundred dollars in gross intrastate operating revenue.

(d) The commission does not grant extensions for payment of regulatory fees.

(e) If a company does not pay its regulatory fee by May 1st, the commission will assess an automatic late fee of two percent of the amount due, plus one percent interest for each month the fee remains unpaid.

Reviser's note: The brackets and enclosed material in the text of 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.

WSR 16-06-038
PERMANENT RULES
UTILITIES AND TRANSPORTATION COMMISSION

[Docket U-144155, General Order R-586, filed February 23, 2016, 1:24 p.m., effective March 25, 2016]

In the matter of amending and adopting rules in WAC 480-90-178 and 480-100-178, natural gas and electric companies billing requirements and payment date and adding new rules to address billing correction requirements.

1 **STATUTORY OR OTHER AUTHORITY:** The Washington utilities and transportation commission (commission) takes this action under Notice No. WSR 15-23-102, filed with the code reviser on November 18, 2015. The commission has authority to take this action pursuant to RCW 80.01.040 and 80.04.160.

2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

3 **DATE OF ADOPTION:** The commission amends and adopts this rule on the date this order is entered.

4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW 34.05.325(6) requires the commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the commission's reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the commission's responses to the comments reflecting the commission's consideration of them.

5 To avoid unnecessary duplication in the record of this docket, the commission designates the discussion in this order, including appendices, as its concise explanatory statement. This order provides a complete but concise explanation of the agency's actions and its reasons for taking those actions.

6 **REFERENCE TO AFFECTED RULES**: This order amends and adopts the following sections and subsections of the Washington Administrative Code:

Amending WAC 480-90-178 Billing requirements and payment date and 480-100-178 Billing requirements and payment date.

7 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:** The commission filed a preproposal statement of inquiry (CR-101) on February 18, 2015, at WSR 15-05-082. The statement advised interested persons that the commission was considering entering a rule making to determine if a rule making is necessary to develop a new rule and/or modify existing rules in chapter 480-90 WAC, Gas companies and chapter 480-100 WAC, Electric companies, to address problems with inaccurate energy usage metering, which results in retroactive billing of electric and natural gas customers. The inquiry addressed key concerns of both the companies and commission staff (staff) regarding reducing the length of retroactive bills while recognizing: (1) Equipment breaks; (2) the failure of some customers to notify the company immediately upon moving in; and (3) that companies may not have complete control over how quickly these issues can be identified without significantly increasing costs that would ultimately be borne by all ratepayers.

8 The commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the commission's list of persons requesting such information pursuant to RCW 34.05.320(3) and by sending notice to all registered natural gas and electric companies and the commission's list of natural gas and electric company attorneys. Pursuant to the notice, the commission received written comments by the due date of March 23, 2015. The notice also informed the stakeholders of a scheduled stakeholder workshop in this rule making on May 20, 2015, in the Commission's Hearing Room, Richard Hemstad Building, 1300 South Evergreen Park Drive S.W., Olympia, WA.

9 Staff incorporated the comments received from the regulated utilities and made some modifications to the rules. The commission's initial goals in this proceeding were to:

- Establish standards for regulated energy companies to identify and correct billing errors due to meter failure, meter malfunction, and meters with unidentified energy usage within six months, and
- Provide incentives for companies to reduce the duration of retroactive bills.

10 The energy companies worked collaboratively on their input and provided a completely revised version of the

initial draft rules. As a result of the comments received and after further discussion, the commission decided to expand the rule making to address any situation where energy usage was not billed, or was inaccurately billed. On September 2, 2015, the commission filed a supplemental CR-101 notice at WSR 15-05-082 to consider expanding the rule making to all corrected billing situations. The supplemental CR-101 was filed with the code reviser at WSR 15-18-121 requesting comments by October 5, 2015.

11 **NOTICE OF PROPOSED RULE MAKING:** The commission filed a notice of proposed rule making (CR-102) on November 18, 2015, at WSR 15-23-102. The commission scheduled this matter for oral comment and adoption under that notice at 1:30 p.m., Thursday, January 21, 2016, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 South Evergreen Park Drive S.W., Olympia, WA. The notice provided interested persons the opportunity to submit written comments to the commission by December 21, 2015.

12 **WRITTEN COMMENTS:** The commission received six written comments in response to the WSR 15-23-102 notice from The Energy Project, Cascade Natural Gas Corporation (CNG), Avista Corporation (Avista), Pacific Power & Light (Pacific Power), Puget Sound Energy (PSE), and Northwest Natural Gas (NWNG). A summary of the written comments and the commission's response is contained in Appendix A, shown below, and made part of this order.

13 **RULE-MAKING HEARING:** The commission considered the proposed rules for adoption at a rule-making hearing on Thursday, January 21, 2016, before Chairman David W. Danner and Commissioner Ann E. Rendahl. The commission heard oral comments from Roger Kouchi, representing commission staff; Shawn Bonfield, representing Avista; Onita King, representing NWNG; Kathie Barnard, representing PSE; Natasha Siores, representing Pacific Power; and Del Herner, representing CNG.

14 **SUGGESTIONS FOR CHANGE THAT ARE ACCEPTED:** Written and oral comments suggested changes to the proposed rules. The suggested changes and the commission's reason for rejecting or accepting the suggested changes are included in Appendix A. The commission expands on its explanation for its actions related to four of those suggested changes and addresses several additional clarifications in the following paragraphs.

15 **Exceptions for Issuing a Corrected Bill for Underbilled Amounts.** When a utility discovers that it has underbilled a customer for energy usage, proposed WAC 480-90-178 (5)(a) and 480-100-178 (5)(a) prohibit the utility from collecting underbilled amounts for any period greater than six months from the date the error occurred, except as provided in WAC 480-90-178(7) or 480-100-178(7).[1] At the adoption hearing and in written comments, regulated companies requested additional exceptions for nonresidential accounts and situations where it is uneconomical to issue a corrected bill. We adopt limited exceptions to the requirement to issue a corrected bill in those specific circumstances, as described below.

[1] As proposed, these exceptions include when an underbilling is due to tampering or interference with the utility's property, use of service through an illegal connection, or the fraudulent use of utility service.

1. Nonresidential accounts

16 Both in written comments and at the adoption hearing, PSE and Pacific Power stated that a longer period of time should be allowed for underbilling adjustments for nonresidential customers because of the complexity of nonresidential metering, the large size of some nonresidential customers' bills, and the seasonal nature of some nonresidential customers' usage.[2]

[2] Comments of PSE, at 1-2 (December 21, 2015); Comments of Pacific Power, at 1 (December 21, 2015).

17 According to data requested by staff in the course of this rule making, the number of nonresidential accounts billed in excess of six months is very small, and the total corrected amounts billed to nonresidential customers is nearly equal to the total corrected amounts billed to residential customers. Accordingly, we do not believe that the data supports treating nonresidential customers, as a whole, different than residential customers.

18 We do recognize, however, that there are certain circumstances beyond a utility's control where it may be reasonable to make an exception to the six month requirement for nonresidential customers. Therefore, we adopt a limited exception in WAC 480-90-178(7) and 480-100-178(7) to allow utilities to extend the six month period for issuing corrected bills to nonresidential customers for good cause. Good cause may include circumstances such as the complexity of a specific account, a change in metering configuration, large industrial customer load change, special meter configuration involving current transformers, or wiring reconfigurations by the customer. In circumstances where a utility decides to rely on this exception, it must report to the commission within sixty days a summary of its reasons for making an adjustment in excess of six months.

2. Situations where it is uneconomical to issue a corrected bill

19 NWNG and Avista suggested that the commission consider adopting a threshold amount for which a utility would be required to issue a corrected bill for underbilling. Avista requested that the rule allow, rather than require, a utility to issue a corrected bill for underbilling.[3] According to Avista, this is consistent with Oregon's requirements.[4] We disagree with this approach. Washington law stipulates that energy companies are prohibited from charging similarly situated customers different rates for the same service.[5] Absent a specific standard for when the utility may choose not to issue a corrected bill for underbilling, we are concerned that a permissive provision could be construed as allowing discriminatory or preferential treatment.

[3] Comments of NWNG, at 3 (December 18, 2015).

[4] Comments of Avista, at 2 (December 21, 2015).

[5] See RCW 80.28.100.

20 Alternatively, Avista and NWNG suggest that the rule allow a utility not to issue a corrected bill for underbilling when it is uneconomical to do so, or when the bill is below a certain dollar threshold.[6] This argument is based on the companies' practice of spreading fixed costs associated with customer billing across all customers. At a certain dollar threshold, utilities argue that it may be more cost-effective

for all customers to absorb the underbilled amount rather than to require the utility to issue a corrected bill.

[6] Comments of Shawn Bonfield, on behalf of Avista, and Onita King, on behalf of NWNG. (January 21, 2016, Adoption Hearing).

21 We acknowledge that it is not reasonable to require utilities to incur additional costs to issue a corrected bill when it is uneconomical to do so. However, adoption of the proposed "uneconomical" standard concerns us for the same reason the proposed flexible and permissive language does, i.e., the standard could be interpreted differently by different utilities, or applied differently across customer classes. It could also vary based on factors such as weather, fuel costs, labor costs, and even postage rates. Ultimately, we are concerned that adopting this standard would increase the administrative burden to both the utility and commission staff, who must determine whether a corrected bill should or should not be issued under the rule. We also lack sufficient evidence in the record of this rule making to distinguish the point at which it may become uneconomical for a utility to issue a corrected bill for an underbilled account.

22 Accordingly, we believe it is appropriate to adopt a dollar amount under which a utility may choose not to issue a corrected bill, and set the threshold at $50. Adopting a $50 threshold removes the uncertainty associated with the "uneconomical" standard and the need for any additional analysis at the time a corrected bill is issued. It meets the utilities' need for increased flexibility while ensuring that the same standard is applied to all customers to avoid preferential or discriminatory treatment.

23 **Requirement to Develop and Maintain Procedures.** As proposed, WAC 480-90-178 (5)(c) and 480-100-178 (5)(c) require utilities to develop and maintain procedures to establish practices for the prompt identification, repair, and replacement of meters that are not functioning correctly, and for identification of unassigned energy usage meters. This subsection also requires utilities to file a plan outlining their procedures with the commission by May 1, 2016, and file a new plan with the commission within thirty days from the date of any addition or change to those procedures.

24 NWNG requests that this section be eliminated entirely.[7] Pacific Power and PSE request to remove the requirement to file a plan with the commission.[8] The companies argue that this requirement is administratively burdensome and of questionable value. The companies further argue that this requirement imposes an unnecessary degree of oversight, and that the commission can obtain this information as needed through other means.

[7] Comments of NWNG, at 6 (December 18, 2015).
[8] Comments of Pacific Power, at 2 (December 21, 2015).

25 We decline to eliminate subsection (5)(c) in its entirety. This subsection contains important requirements for utilities to develop and maintain procedures and practices to mitigate the number of underbilling occurrences that exceed six months in duration. The criteria included in subsections (5)(c)(i), (ii), and (iii) describe elements of good utility practice that we believe are reasonable expectations for prudent utility operations under the rule. We do, however, agree that it is unnecessary for the utilities to file a plan with the commission describing their procedures for complying with the commission's rule, and we remove this requirement. We expect that commission staff will review companies' procedures for compliance with this subsection at some point after the rule's adoption, and recognize that staff, at any time, may request information from a regulated company about its policies and procedures for identifying and correcting billing errors.

26 **Information Provided on Corrected Bills.** WAC 480-90-178(6) and 480-100-178(6) require utilities to provide certain information on a corrected bill, bill insert, letter, or any combination thereof. Avista objects to subsection (6)(e), which requires the utility to include information about the actions taken to resolve the cause of the bill correction.[9] Avista argues that its ability to include added messaging on a bill is limited, so the rule should not require more information than is necessary.

[9] Comments of Avista, at 2-3 (December 21, 2015).

27 The purpose of this subsection is to ensure that the customer understands that they have received a corrected bill and the reasons for the correction. We agree with the company that the rule should not require more information than necessary to achieve that end. Other sections of the rule require utilities to have procedures in place to remedy the causes of certain billing errors. Subsection (6)(a) also requires the utility to explain the reason for the bill correction. In light of these factors, we believe it is reasonable for a customer to assume that receipt of a corrected bill means the underlying issue has been resolved. Accordingly, we agree that it is not necessary for the utility to provide a description of the actions taken to resolve the cause of the bill correction, and remove subsection (6)(e).

28 **Conflict with Complaint Meter Test Rule, WAC 480-90-183(5) and 480-100-183(5).** As proposed, WAC 480-90-183(5) and 480-100-183(5) require a utility, upon confirmation of a metering error, to adjust a customer's bill for proper usage from the date the error occurred. In the event the date of the error cannot be identified, the utility must adjust the customer's bill for proper usage for a period not to exceed six months. Subsection (5) of the proposed rule provides that a utility cannot, in any circumstances, adjust a customer's bill for underbilled amounts for a period longer than six months.

29 Pacific Power expressed concerns that the proposed rule conflicts with WAC 480-90-183(5) and 480-100-183(5).[10] NWNG also raised this issue at the adoption hearing.[11] The companies argue that if a utility discovers a meter error through a customer-requested meter test and determines the customer was underbilled for twelve months, WAC 480-100-183 (5)(a) would require the utility to adjust the customer's bill for the full twelve month period. However, if the same meter error was discovered by the utility, the adjustment would be limited to six months.

[10] Comments of Pacific Power, at 2 (December 21, 2015).
[11] Comments of Onita King, on behalf of NWNG, at January 21, 2016 adoption hearing.

30 We disagree. WAC 480-90-183 (5)(a) and 480-100-183 [(5)](a) require that, if the utility can identify the date the customer was first billed from a defective meter, the utility

must refund or bill the customer for the proper usage from that date forward. Proposed WAC 480-90-178(5) and 480-100-178(5) further clarify that when a utility's investigation finds that it has underbilled energy usage, it may not collect underbilled amounts for any period greater than six months from the date the error occurred. In other words, if the date identified in accordance with the complaint meter test rule is more than six months prior to the replacement of the defective meter, then the utility should bill the customer for underbilled amounts as required by the corrected bill rule, that is, for amounts not to exceed six months.

31 If this later proves to be confusing for regulated companies or customers, we will consider initiating a rule making in WAC 480-90-183 and 480-100-183 to further clarify this issue.

32 **Other Clarifications of the Rule.** Based on comments received following the CR-102, we also make the following changes to the final rules: (1) Removal of references to "billing error"; (2) clarification of rate schedule in effect; (3) application of rule to unassigned energy usage; and (4) application of rule to overbilling. We discuss these clarifying changes below. Other minor changes are discussed in Appendix A.

1. Removal of references to "billing error."

33 Language in proposed WAC 480-90-178 (5)(a) and 480-100-178 (5)(a) required that a utility must issue a corrected bill upon finding that an underbilling or overbilling occurred as a result of a "meter failure, meter malfunction, meter with unassigned energy usage, *or other billing error* …" (emphasis added). NWNG commented that the phrase "other billing error" implied that meter failures, malfunctions, and unassigned energy usage are billing errors. The company requests that the rule distinguish between a "billing error" and a bill correction necessitated by a mechanical issue with a meter or due to a third party action or inaction (unassigned usage).[12] NWNG suggests amending the language to read: "or any situation where energy usage was not billed or was inaccurately billed." We accept this clarifying revision.

[12] Comments of NWNG, at 2 (December 18, 2015).

2. Clarification of rate schedule in effect.

34 Subsection (5)(a) of the proposed rules stated that "the utility must use the rate schedule in effect at the time of each affected billing period(s) covered by the corrected bill." NWNG commented that this sentence is overly broad and proposed clarifying language that does not change the intent or effect of the rule.[13] We accept NWNG's clarification and revise this subsection to read, "The utility must use the rates and rate schedule in effect during the billing period(s) covered by the corrected bill."

[13] Comments of NWNG, at 2 (December 18, 2015).

3. Application of rule to unassigned energy usage.

35 Several companies commented that the proposed rule should not apply to unassigned energy usage. CNG commented that a bill is not issued for meters that have no customer of record for the premise. Since bills are not automatically generated for sites with no active account and no customer of record, the company argued that unassigned energy usage is not a billing error.[14] PSE commented that it currently does not investigate unassigned energy usage below a certain usage threshold. PSE argues that its current practice balances fairness, cost, and customer experience.[15]

[14] Comments of CNG, at 1-2 (December 11, 2015).

[15] Comments of PSE, at 2-3 (December 21, 2015).

36 We believe that, despite the issues raised by the companies, unassigned energy usage should be easy to detect and correct within six months. Rather than allowing unassigned energy usage to continue beyond six months, we agree with staff that a company should take immediate action to contact the occupant and notify them of their obligation to apply for service. If a customer fails to respond, the company should take timely action to disconnect service to prevent lengthy corrected bills. We further expect companies to address processes to investigate meter usage from unassigned energy usage meters, as required in subsection (5)(c)(iii) of the rule.

37 While we decline to remove unassigned energy usage from the proposed rule, we recognize that it is not a "billing error." As discussed above, we have removed the "billing error" language from the rule, but will continue to include unassigned energy usage as a reason for which a utility must issue a corrected bill.

4. Application of rule to overbilling.

38 The proposed rule did not include language specifying the time period for which a utility must issue a refund for overbilling. Pacific Power requests the rule clarify that the maximum adjustment period utilities are required to adjust bills for overbilling is six years.[16] We agree that it is appropriate to specify this in the rule, and we adopt clarifying language in WAC 480-90-178 (5)(a) and 480-100-178 (5)(a).

[16] Comments of Pacific Power, at 2 (December 21, 2015).

39 NWNG commented that it did not agree with the six year requirement for customer refunds. The company recommended that the commission consider twenty-four months for refunding overbilled amounts.[17] Current commission practice is to allow customers the maximum refund for overbilled amounts allowed by law under RCW 4.16.040, which allows six years for an action upon accounts receivable. We see no reason to change this practice at this time.

[17] Comments of NWNG, at 5 (December 21, 2015).

40 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the commission finds and concludes that it should amend and adopt the rules as proposed in the CR-102 at WSR 15-23-102 with the changes described below.

41 **CHANGES FROM PROPOSAL:** The commission adopts the proposal with the following changes from the text noticed at WSR 15-23-102:

WAC 480-90-178 (5)(a) WAC 480-100-178 (5)(a)	First sentence - delete "Upon discovery of an underbilling or overbilling resulting from a meter failure, meter malfunction, meter with unassigned energy usage, or any other billing error, a."
	Insert "A" before utility.
	Delete "the customer" after "must issue."

	Insert "upon finding that an underbilling or overbilling occurred as a result of a meter failure, meter malfunction, meter with unassigned energy usage, or any other situation where energy usage was not billed or was inaccurately billed" after "a corrected bill."
	Delete "to recover or refund billed amounts" after "inaccurately billed."
	Second sentence - insert "rates and" before "rate schedule in effect."
	Delete "at" after "in effect" and replace with "during."
	Delete "time of each affected billing" before "period" and replace with "billing."
	Add "(s)" to "period" before "covered by the corrected bill."
	Fourth sentence - delete "the underbilling or overbilling" at the end of the sentence and replace with "that an account had been under or overbilled."
	Fifth sentence - delete "However, e" at the beginning of the sentence.
	Capitalize "Except" at the beginning of the sentence.
	Delete "for" after "as provided."
	Add a possessive "'s" to the word "utility" after "when a."
	Delete "discovers" and replace with "investigation finds" after "when a utility's."
	Delete "a customer" and replace with "energy usage" after "that it has underbilled."
	Delete "seek to" after "it may not."
	Insert "underbilled amounts" after "collect."
	Add a sixth sentence that states, "The maximum period for which utilities are required to adjust bills for overbilling is six years."
WAC 480-90-178 (5)(b) WAC 480-100-178 (5)(b)	Delete "subsection" and replace with "rule."
WAC 480-90-178 (5)(b)(ii) WAC 480-100-178 (5)(b)(ii)	First sentence - delete "For the purpose of this rule," at the beginning of the sentence.
	Insert "An" at the beginning of the sentence.
WAC 480-90-178 (5)(b)(iii) WAC 480-100-178 (5)(b)(iii)	Delete subsection.
WAC 480-90-178 (5)(c) WAC 480-100-178 (5)(c)	First sentence - delete "to identify and repair or replace meters not functioning correctly and identify meter usage from" and replace with "that establish practices for the prompt identification, repair and replacement of meters that are not functioning correctly and for identification of" after "must develop and maintain procedures."
	Second sentence - delete "These" and replace with "The" at the beginning of the sentence.
	Delete "procedures shall address steps taken to prevent corrected bills for underbilling errors" and replace with "objective of such procedures shall be to mitigate the number of underbilling occurrences" before "that exceed six months in duration."
	Delete third sentence.
	Delete fourth sentence.
	Fifth sentence - delete "The plan must include" and replace with "These procedures must address."
WAC 480-90-178 (5)(c)(i) WAC 480-100-178 (5)(c)(i)	Delete "Procedures" and replace with "Practices" at the beginning of the sentence.
	Delete "billing errors resulting from, but not limited to, billing errors" and replace with "the issuance of corrected bills" before "due to incorrect prorated bills."
	Delete "mislabeled meter bases" and replace with "improperly assigned meters" after "due to incorrect prorated bills."
	Delete "or" before "incorrect billing multipliers."
	Insert ", or any other event that may affect billing accuracy" after "incorrect billing multipliers."
WAC 480-90-178 (5)(c)(ii) WAC 480-100-178 (5)(c)(ii)	Delete "Procedures for investigating meter errors including, but not limited to, those created by stopped, slowed, and erratic usage meters" and replace with "Processes for the investigation of meter issues include, but are not limited to, stopped, slowed, and erratic usage meters."
WAC 480-90-178 (5)(c)(iii) WAC 480-100-178 (5)(c)(iii)	Delete "Procedures for investigating" and replace with "Processes for the investigation of."
WAC 480-90-178(6) WAC 480-100-178(6)	First sentence - insert "or bimonthly" after "subsequent monthly."
WAC 480-90-178 (6)(e) WAC 480-100-178 (6)(e)	Delete subsection.
WAC 480-90-178 (6)(f) WAC 480-100-178 (6)(f)	Change subsection designation from (f) to (e).
WAC 480-90-178(7) WAC 480-100-178(7)	First sentence - insert "Exceptions to billing correction rules."
	Second sentence, insert subsection (a) before "Corrected bills."
	Delete "issued for the following purposes are exempt from the provisions of subsection (5)(a) of this section: Meter failure or malfunction of billing error related to customer tampering with the utility's property" and replace with "related to an underbilling due to tampering or interfering with the utility's property."
	Delete "customer fraudulently obtaining service" after "use of the utility's service through an illegal connection, or the" and replace with "fraudulent use of a utility's service, are exempt from the six-month restriction set forth in subsection (5)(a) of this rule."

	Insert new subsection (b): "Adjustments for underbilling of nonresidential customers will be limited to six months. However, the utility may extend this period for good cause if a longer period is appropriate due to circumstances such as the complexity of certain accounts, changing metering configurations, load changes of large industrial customers, special meter configurations involving current transformers, or wiring reconfigurations by the customer. Utilities must report to the commission within sixty days the reasons for any adjustments longer than six months." Insert new subsection (c): "The utility may choose not to issue a corrected bill to recover underbilled amounts of less than $50.00."
WAC 480-90-178 (7)(b) WAC 480-100-178 (7)(b)	Change to new subsection WAC 480-90-178(8) and 480-100-178(8). First sentence - delete "billing error" after "a meter failure or malfunction or a" and replace with "situation where energy usage was inaccurately billed." Second sentence - insert "(correction)" after "A bill true-up."

STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE: After reviewing the entire record, the commission determines that WAC 480-90-178 and 480-100-178 should be amended and adopted to read as set forth in Appendix B, as rules of the Washington utilities and transportation commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the code reviser.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 2, repealed 0.

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

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.

ORDER

THE COMMISSION ORDERS:

43 (1) The commission amends and adopts WAC 480-90-178 and 480-100-178 to read as set forth in Appendix B as rules of the Washington utilities and transportation commission, to take effect on the thirty-first day after the date of filing with the code reviser pursuant to RCW 34.05.380(2).

44 (2) This order and the rule set out below, after being recorded in the order register of the Washington utilities and transportation commission, shall be forwarded to the code reviser for filing pursuant to chapters 80.01 and 34.05 RCW and 1-21 WAC

DATED at Olympia, Washington, February 23, 2016.

Washington Utilities and Transportation Commission

David W. Danner, Chairman

Ann E. Rendahl, Commissioner

Appendix A
U-144155
Corrected Billing Issues
Rule-Making Comment Summary Matrix

WAC 480-90-178 480-100-178 Topic	Commenter	Comments	Staff Response
Subsection (5)(a) Billing errors.	NWNG	The phrase "other billing error" implies that the listed scenarios (meter failure, meter malfunction, meter with unassigned energy usage) for which a corrected bill is required are billing errors. This is not the case. A bill correction necessitated by a mechanical issue with a meter or due to a third party action or inaction (unassigned usage) is not synonymous with a "billing error." NWNG suggests amending the language to read: "or any situation where energy usage was not billed or was inaccurately billed."	Staff agrees.
	Pacific Power	Pacific Power disagrees with staff's recommended six-month adjustment period for underbilling related to billing errors. Pacific Power proposes to limit underbilling adjustments for billing errors to six months, unless the utility shows good cause why a longer period is necessary due to circumstances beyond the utility's control.	Staff disagrees. Underbilling, whether it is the result of a meter malfunction or other anomaly, results in the issuance of corrected bills that are burdensome for consumers. Establishing reasonable time limits for corrected bills will ensure the regulated energy utilities have a system for promptly identifying and resolving corrected billing issues.

WAC 480-90-178 480-100-178 Topic	Commenter	Comments	Staff Response
Subsection (5)(a) Corrected bills	NWNG	The proposed rule states that "The utility must use the rate schedule in effect at the time of each affected billing period(s) covered by the corrected bill." NWNG finds that this sentence is overly broad and suggests the following clarification: "The utility must use the rates and rate schedule in effect during the billing period(s) covered by the corrected bill."	Staff agrees.
Subsection (5)(a) Discovery	NWNG	NWNG had previously expressed concern about staff's use of the word "discovers" in this section as it is used to identify the timing of the issuance of a bill correction. Specifically, as written it is unclear if the date of discovery is the point at which a problem is suspected (e.g. the meter technician observes something in the field and removes the meter) or if it is the time that the utility knows for certain that a problem occurred (the meter has been tested and other investigation performed as needed). NWNG suggests the following edits: "The utility must issue the corrected bill within sixty days from the date the utility confirmed that an account had been under or overbilled."	Staff disagrees. To ensure prompt investigation of an under or overbilled situation, the utility must issue the corrected bill within sixty days of discovery of the under or overbilling situation.
Subsection (5)(a) Corrected bill amounts	NWNG	NWNG suggests that the new rule provisions provide a threshold at which the utility could decide not to issue a corrected bill. There has been little or no discussion about the time and cost involved in issuing a corrected bill. NWNG suggests the following new language be added: "The utility may choose to not issue a corrected bill for amounts less than $1.00."	Staff agrees. The companies have not provided evidence that this is a pressing issue (i.e., cost and number of bills involved). However, it does not make sense to require companies to incur additional costs to issue a corrected bill for amounts less than $50.00 when it is uneconomical to do so. Staff disagrees with Avista's proposal to allow unlimited flexibility in issuing a corrected bill because of the potential problems of being perceived as preferential treatment. However, staff does agree to add the following exception to the rules: The utility may choose not to issue a corrected bill to recover underbilled amounts less than $50.00. Staff believes that there may be instances where adjusting these smaller amounts would be in the public interest due to the cost of issuing a corrected bill and extenuating circumstances that would lend itself to an exception.
	Avista	Avista again proposes that the language in the first sentence, "a utility must issue a corrected bill to a customer to recover or refund billed amounts" be modified to read, "a utility **may** issue a corrected bill to a customer to recover billed amounts and must issue a corrected bill to a customer to refund billed amounts." This modification gives the utility flexibility to not back bill a customer who has been underbilled.	
Subsection (5)(a) Underbilled amounts for nonresidential customers	NWNG	NWNG does not agree with staff's proposed six month limitation on collecting for underbilled amounts for all customer classes (i.e., nonresidential). The company agrees to disagree. The company stated that should this proposal be adopted, the outcome will be that all ratepayers will absorb some amount of additional cost. NWNG's current practice is to adjust underbilled amounts for up to twelve months.	Staff disagrees. Again, the companies have failed to provide compelling reasons and evidence why nonresidential customers should be excluded from this rule making. In fact, the data shows the number of nonresidential accounts billed in excess of six months is very small, and the total amounts billed on corrected bills to nonresidential customers in excess of six months is similar to the total amounts for residential customers. See below for table showing company comparisons. The amounts reported for nonresidential customers are very small in comparison to the companies' total revenues, and the difference between the impact of corrected bills issued in excess of six months to nonresidential customers and those issues [issued] to residential customers is not significant.
	PSE	The nonresidential cases may be fewer in number, but they are drastically more complex to address and require greater flexibility. PSE agrees to disagree with staff's proposed six month limitation on collecting for underbilled amounts for nonresidential meter classes.	However, staff would agree to add an exception which requires nonresidential adjustments for underbilling to be limited to six months, unless the utility shows good cause why a longer period is necessary due to circumstances related to the complexity of specific accounts such as changing metering configuration, load changes of large industrial customers, special meter configurations involving current transformers, and wiring reconfigurations made by the customer. Staff would ask that

WAC 480-90-178 480-100-178 Topic	Commenter	Comments	Staff Response
			the utilities provide a report within sixty days of making an exception. The report should summarize each instance where the utility made an exception.
	Pacific Power	Pacific Power believes a longer period should be allowed for underbilling adjustments for nonresidential customers. Not only can the complexity of nonresidential metering make it difficult for utilities to identify problems, billing errors could be directly related to the nonresidential customer failing to notify the utility of changes they have made in their operations or wiring. The company recommended modifying the language to state: Nonresidential adjustments for underbilling will be limited to six months, unless the utility shows good cause why a longer period is necessary due to circumstances beyond the utility's control.	Staff disagrees. Companies always have the latitude to petition the commission for relief addressing rare events. The company did not provide any information regarding the number of times these events occur, the costs involved, and historical data (i.e., three to five years) to substantiate the longer period to recover underbilled amounts for nonresidential customers.
Subsection (5)(a) Unassigned energy usage (UEU)	PSE	PSE's current practices for addressing UEU are based on a usage threshold, which is a more practical way to balance fairness, cost and positive customer experience. The practical impact of including UEU in the rules will be for PSE to make expensive truck rolls a first resort rather than a last resort to notify or disconnect service for a customer.	Staff disagrees. Unassigned energy usage occurs when there is usage but no assigned customer. The utility sees the usage and knows the address. The company can send a letter to the residence and ask them to contact the company to sign up for service by a certain date. If the customer fails to respond, the company should go out and disconnect service. Staff continues to believe unassigned energy usage is easy to detect and correct within six months. The company should take immediate action to contact the occupant to apply for service. If a customer fails to respond, the company should take timely action to disconnect service to preclude undue lengthy, corrected bills.
	CNGC	A bill is not issued for meters that have no customer of record for the premise. Since bills are not automatically generated for sites with no active account and no customer of record, unassigned energy is not a billing error.	Staff changed the language in subsection (5)(a) to read: "A utility must issue a corrected bill upon finding that an underbilling or overbilling occurred as a result of a meter failure, meter malfunction, meter with unassigned energy usage, or any other situation where energy usage was not billed or was inaccurately billed."
Subsection (5)(a) Customer references	NWNG	NWNG has concerns with the terms "discovers" and "… that it has underbilled a customer…" in the last sentence in subsection (5)(a). NWNG suggests the following language: "… when the utility's investigation finds that it has underbilled energy usage, …"	Staff agrees.
Subsection (5)(a) Overbilled amounts	NWNG	NWNG does not agree with the six year requirement to refund. The company is recommending the commission consider twenty-four months for refunding overbilled amounts. NWNG does not suggest that the limitation on overbilled refunds should be the same as the six month underbilled limitation. The company recognizes that there is a different dynamic that is associated with a bill correction that is a collection and one that is a refund.	Staff appreciates the company's understanding that there is a different dynamic involved with a bill correction that is a collection and one that is a refund. Staff believes that customers should be allowed the maximum refund for overbilled amounts allowed by law. RCW 4.16.040 allows six years for an action upon an account receivable.
	Pacific Power	Having a specific adjustment period for overbillings plainly defined in the rules eliminates confusion for all parties. Pacific Power recommends the rule state the maximum adjustment period utilities are required to adjust bills for overbilling is six years.	Staff agrees.
Subsection (5)(b)	NWNG	NWNG recommends the following change to the first sentence: "For the purposes of this rule:"	Staff agrees.

WAC 480-90-178 480-100-178 Topic	Commenter	Comments	Staff Response
Subsection (5)(c) Develop and maintain procedures	NWNG	NWNG recommends that this section be eliminated in the entirety. The rule requires the utility to develop and maintain procedures relating to meters and unassigned usage. The rule also requires the utility to file a "plan delineating the procedures." If the intent is for each utility to simply file a summary of its processes and procedures related to the implementation of these rule provisions, then NWNG could retract its object [objection] to this provision. Staff uses the term "mislabeled meter bases" in this section in reference to a required procedure. NWNG suggests , at least for purposes of the gas rule, that a more generic term be used as "Improperly assigned meters."	Staff disagrees. The reporting requirements are not overly burdensome. The companies already reported this information in response to a data request as part of this rule making. The intent is for each utility to file a plan of its processes and procedures related to the implementation of the rule provisions. Again, staff continues to believe the one-time initial report with updates as necessary would be helpful for the following reasons: (1) It serves as a frame of reference when reviewing the companies' procedures; and (2) The plans can be helpful in comparing best practices of the regulated companies. However, staff would agree to remove the requirement to file the plan and updates with the commission. Staff agrees with NWNG's request to remove any reference to the term plan. Staff would agree to the language change from mislabeled meter bases to "improperly assigned meters."
	PSE	PSE remains highly concerned about the provisions requiring utilities to file billing correction procedures and updates with the commission. The company states this practice is administratively burdensome, of questionable value, and imposes an unnecessary degree of oversight and uncertainty that seems to result in little more than micromanagement of utility practices.	
	Pacific Power	Requiring utilities to develop, maintain, and file with the commission procedures to identify and correct metering errors, billing errors, and unassigned usage situations is unnecessary. The commission can determine the effectiveness of a utility's procedures by evaluating the types of complaints the commission receives from the utility's customers and may request the same information of the utility should an inquiry of investigation in [be] initiated.	Staff disagrees. Informal complaint investigation establishes trending information for more formal investigations. See staff response above to NWNG and PSE's comment on this issue.
Subsection (6) (e)	Avista	Avista again proposes that item (e), "The actions taken to eliminate the cause of the bill correction" be removed. The reason for the bill correction is already included in part (a), therefore the company does not believe this requirement will add additional value. Messaging is limited on a bill so the company proposes to eliminate any requirement that may not be needed. Issuing a letter will be necessary in some situations, but also comes at an added cost.	Staff agrees to remove item (e).
Subsection (6)(f) Customer communications	PSE	PSE currently has an efficient, automated process in place that automatically sets up an installment plan for the customer to address a billing correction. Creating an expanded explanation customer communication piece would require an extensive process redesign and would be onerous.	Staff believes customer communication is important. It is important to fully explain the reasons for a bill correction. WAC 480-90-178 and 480-100-178 detail extensive billing requirements for the companies to follow. The commission rules require a significant amount of detail on consumer bills so the customer can fully understand the bill and the payment requirements. It follows that the company should issue a full explanation of the corrected bill so the customer can fully understand the reason(s) for the correction.

WAC 480-90-178 480-100-178 Topic	Commenter	Comments	Staff Response
Subsection (7)(a) Exceptions	NWNG	NWNG understands that the exemption is intended to be specific to the six month restriction on the time period for which an underbilled amount can be collected. As such, subsection (7) should be restated as follows: "Corrected bills related to an underbilling due to tampering or interference with the utility's property, use of the utility's service through an illegal connection, or the fraudulent use of a utility's service, are exempt from the six month restriction set forth in subsection (5)(a) of this rule."	Staff agrees.
Subsection (7)(b) Exemptions	NWNG	Part (b) is more appropriately presented as a standalone section. NWNG recommends this become subsection (8) of the rules. "(8) An estimated meter read made in accordance with subsection (1)(i) of this section is not considered a meter failure or malfunction or a situation where energy usage was inaccurately billed. A bill true-up based on an actual meter reading after one or more estimated bills is not considered a corrected bill for purposes of subsection (5)(a) of this rule."	Staff agrees.
Conflict with WAC 480-100-183 Complaint meter test	Pacific Power	The company maintains that a conflict exists between WAC 480-100-183 (5)(a) and proposed 480-100-178(5). The company contends that if a utility discovered a meter error through a customer requested meter test and determined the customer was underbilled for twelve months, to comply with WAC 480-100-183 (5)(a), the utility would be required to adjust the customer's bill for the full twelve month period. However, had the meter error been identified by the utility's processes or procedures discussed in WAC 480-100-178 (5)(c), that same underbilling adjustment would be limited to six months.	Staff disagrees. WAC 480-100-183 (5)(a) does not specify the time frame for the corrected bill. The rule simply provides that if the utility can identify the date the customer was first billed from a defective meter, the utility must refund or bill the customer for the proper usage from that date. WAC 480-100-178(5) provides additional clarification regarding the collection period for the corrected bill.

Appendix showing table mentioned in staff response regarding underbilled amounts for nonresidential customers.

The amounts reported for nonresidential customers are very small in comparison to the companies' total revenues, and the difference between the impact of corrected bills issued in excess of six months to nonresidential customers and those issued to residential customers is not significant.

	Nonresidential			Residential			
	Number of accounts billed in excess of six months (2012-2014)	Average annual total amount billed in excess of six months (2012-2014)	Percent of average annual revenue	Number of accounts billed in excess of six months (2012-2014)	Average annual total amount billed in excess of six months (2012-2014)	Percent of average annual revenue	Average annual revenue
Avista	8	$12,944	0.002%	18	$3,115	0.000%	$650,789,883
PSE	267	$467,684	0.015%	1,541	$406,967	0.013%	$3,184,100,333
NWNG	3	$49,037	0.068%	4	$51	0.000%	$71,836,882
PPL	2	$280	0.000%	7	$1,010	0.000%	$311,712,138
CNGC	Not reported	Not reported		Not reported	Not reported		

Appendix B

AMENDATORY SECTION (Amending WSR 11-06-032, filed 2/25/11, effective 3/28/11)

WAC 480-90-178 Billing requirements and payment date. (1) Customer bills must:

(a) Be issued at intervals not to exceed two one-month billing cycles, unless the utility can show good cause for delaying the issuance of the bill. The utility must be able to show good cause if requested by the commission;

(b) Show the total amount due and payable;

(c) Show the date the bill becomes delinquent if not paid;

(d) Show the utility's business address, business hours, and toll-free telephone number and emergency telephone number by which a customer may contact the utility;

(e) Show the current and previous meter readings, the current read date, and the total amount of therms used;

(f) Show the amount of therms used for each billing rate, the applicable billing rates per therm, the basic charge or minimum bill;

(g) Show the amount of any municipal tax surcharges or their respective percentage rates;

(h) Clearly identify when a bill has been prorated. A prorated bill must be issued when service is provided for a fraction of the billing period. Unless otherwise specified in the utility's tariff, the charge must be prorated in the following manner:

(i) Flat-rate service must be prorated on the basis of the proportionate part of the period that service was rendered;

(ii) Metered service must be billed for the amount metered. The basic or minimum charge must be billed in full;

(i) Clearly identify when a bill is based on an estimation.

(i) A utility must detail its method(s) for estimating customer bills in its tariff;

(ii) The utility may not estimate for more than four consecutive months unless the cause of the estimation is inclement weather, terrain, or a previous arrangement with the customer; and

(j) Clearly identify determination of maximum demand. A utility providing service to any customer on a demand basis must detail in its filed tariff the method of applying charges and of ascertaining the demand.

(2) The minimum time allowed for payment after the bill's mailing date must be fifteen days, if mailed from within the states of Washington, Oregon, or Idaho, or eighteen days if mailed from outside the states of Washington, Oregon, and Idaho.

(3) The utility must allow a customer to change a designated payment-due date when the customer has a satisfactory reason for the change. A satisfactory reason may include, but is not limited to, adjustment of a designated payment-due date to parallel receipt of income. The preferred payment date must be prior to the next billing date.

(4) With the consent of the customer, a utility may provide billings in electronic form if the bill meets all the requirements for the use of electronic information in this chapter. The utility must maintain a record of the consent as a part of the customer's account record, and the customer may change from electronic to printed billing upon request, as provided in this chapter. The utility must complete the change within two billing cycles of the request.

(5) Corrected bills:

(a) A utility must issue a corrected bill upon finding that an underbilling or overbilling occurred as a result of a meter failure, meter malfunction, meter with unassigned energy usage, or any other situation where energy usage was not billed or was inaccurately billed. The utility must use the rates and rate schedule in effect during the billing period(s) covered by the corrected bill. The utility must issue the corrected bill within sixty days from the date the utility discovered that an account had been underbilled or overbilled. Except as provided in subsection (7) of this section, when a utility's investigation finds that it has underbilled energy usage, it may not collect underbilled amounts for any period greater than six months from the date the error occurred. The maximum period for which utilities are required to adjust bills for overbilling is six years.

(b) For the purposes of this rule:

(i) A meter failure or malfunction is defined as: A mechanical malfunction or failure that prevents the meter or any ancillary data collection or transmission device from registering or transmitting the actual amount of energy used. A meter failure or malfunction includes, but is not limited to, a stopped meter, a meter that is faster or slower than the metering tolerance specified in WAC 480-90-338, or an erratic meter.

(ii) An unassigned energy usage meter is defined as a meter that is installed at a valid service address and accurately records energy usage during a period of time where there was no active gas service account at that premises.

(c) A utility must develop and maintain procedures that establish practices for the prompt identification, repair and replacement of meters that are not functioning correctly and for identification of unassigned usage meters. The objective of such procedures shall be to mitigate the number of underbilling occurrences that exceed six months in duration. These procedures must address, at a minimum:

(i) Practices to prevent the issuance of corrected bills due to incorrect prorated bills, improperly assigned meters, incorrectly installed meters, incorrect billing rate schedules, incorrect billing multipliers, or any other event that may affect billing accuracy.

(ii) Processes for the investigation of meter issues include, but are not limited to, stopped, slowed, and erratic usage meters.

(iii) Processes for the investigation of meter usage from unidentified usage meters.

(6) For the purpose of this rule, a corrected bill may take the form of a newly issued bill or may be reflected as a line item adjustment on a subsequent monthly or bimonthly bill. When a corrected bill is issued, the utility must provide the following information on the corrected bill, in a bill insert, letter, or any combination of methods that clearly explains all the information required to be sent to the customer:

(a) The reason for the bill correction;

(b) A breakdown of the bill correction for each month included in the corrected bill;

(c) The total amount of the bill correction that is due and payable;

(d) The time period covered by the bill correction; and

(e) When issuing a corrected bill for underbilling, an explanation of the availability of payment arrangements in accordance with WAC 480-90-138(1) payment arrangements.

(7) Exceptions to billing correction rules:

(a) Corrected bills related to an underbilling due to tampering or interference with the utility's property, use of the utility's service through an illegal connection, or the fraudulent use of a utility's service, are exempt from the six-month restriction set forth in subsection (5)(a) of this section.

(b) Adjustments for underbilling of nonresidential customers will be limited to six months. However, the utility may extend this period for good cause if a longer period is appropriate due to circumstances such as the complexity of specific accounts, changing metering configurations, load changes of large industrial customers, special meter configuration involving current transformers, or wiring reconfigurations by the customer. Utilities must report to the commission within sixty days the reasons for any adjustments longer than six months.

(c) The utility may choose not to issue a corrected bill to recover underbilled amounts less than fifty dollars.

(8) An estimated meter read made in accordance with subsection (1)(i) of this section is not considered a meter failure or malfunction or a billing error. A bill true-up based on an actual meter reading after one or more estimated bills is not considered a corrected bill for purposes of subsection (5)(a) of this section.

AMENDATORY SECTION (Amending WSR 11-06-032, filed 2/25/11, effective 3/28/11)

WAC 480-100-178 Billing requirements and payment date. (1) Customer bills must:

(a) Be issued at intervals not to exceed two one-month billing cycles, unless the utility can show good cause for delaying the issuance of the bill. The utility must be able to show good cause if requested by the commission;

(b) Show the total amount due and payable;

(c) Show the date the bill becomes delinquent if not paid;

(d) Show the utility's business address, business hours, and a toll-free telephone number and an emergency telephone number by which a customer may contact the utility;

(e) Show the current and previous meter readings, the current read date, and the total amount of kilowatt hours used;

(f) Show the amount of kilowatt hours used for each billing rate, the applicable billing rates per kilowatt hour, the basic charge or minimum bill;

(g) Show the amount of any municipal tax surcharges or their respective percentage rates;

(h) Clearly identify when a bill has been prorated. A prorated bill must be issued when service is provided for a fraction of the billing period. Unless otherwise specified in the utility's tariff, the charge must be prorated in the following manner:

(i) Flat-rate service must be prorated on the basis of the proportionate part of the period the service was rendered;

(ii) Metered service must be billed for the amount metered. The basic or minimum charge must be billed in full.

(i) Clearly identify when a bill is based on an estimation.

(i) The utility must detail its method(s) for estimating customer bills in its tariff;

(ii) The utility may not estimate for more than four consecutive months, unless the cause of the estimation is inclement weather, terrain, or a previous arrangement with the customer;

(j) Clearly identify determination of maximum demand. A utility providing service to any customer on a demand basis must detail in its filed tariff the method of applying charges and of ascertaining the demand.

(2) The minimum time allowed for payment after the bill's mailing date must be fifteen days, if mailed from within the states of Washington, Oregon, or Idaho, or eighteen days if mailed from outside the states of Washington, Oregon, and Idaho.

(3) The utility must allow a customer to change a designated payment-due date when the customer has a satisfactory reason for the change. A satisfactory reason may include, but is not limited to, adjustment of a designated payment-due date to parallel receipt of income. The preferred payment date must be prior to the next billing date.

(4) With the consent of the customer, a utility may provide billings in electronic form if the bill meets all the requirements for the use of electronic information in this chapter. The utility must maintain a record of the consent as a part of the customer's account record, and the customer may change from electronic to printed billing upon request, as provided in this chapter. The utility must complete the change within two billing cycles of the request.

(5) Corrected bills:

(a) A utility must issue a corrected bill upon finding that an underbilling or overbilling occurred as a result of a meter failure, meter malfunction, meter with unassigned energy usage, or any other situation where energy usage was not billed or was inaccurately billed. The utility must use the rates and rate schedule in effect during the billing period(s) covered by the corrected bill. The utility must issue the corrected bill within sixty days from the date the utility discovered that an account had been underbilled or overbilled. Except as provided in subsection (7) of this section, when a utility's investigation finds that it has underbilled energy usage, it may not collect underbilled amounts for any period greater than six months from the date the error occurred. The maximum period for which utilities are required to adjust bills for overbilling is six years.

(b) For the purposes of this rule:

(i) A meter failure or malfunction is defined as: A mechanical malfunction or failure that prevents the meter or any ancillary data collection or transmission device from registering or transmitting the actual amount of energy used. A meter failure or malfunction includes, but is not limited to, a stopped meter, a meter that is faster or slower than the metering tolerance specified in WAC 480-100-338, or an erratic meter.

(ii) An unassigned energy usage meter is defined as a meter that is installed at a valid service address and accu-

rately records energy usage during a period of time where there was no active electric service account at that premises.

(c) A utility must develop and maintain procedures that establish practices for the prompt identification, repair and replacement of meters that are not functioning correctly and for identification of unassigned usage meters. The objective of such procedures shall be to mitigate the number of underbilling occurrences that exceed six months in duration. These procedures must address, at a minimum:

(i) Practices to prevent the issuance of corrected bills due to incorrect prorated bills, improperly assigned meters, incorrectly installed meters, incorrect billing rate schedules, incorrect billing multipliers, or any other event that may affect billing accuracy.

(ii) Processes for the investigation of meter issues include, but are not limited to, stopped, slowed, and erratic usage meters.

(iii) Processes for the investigation of meter usage from unidentified usage meters.

(6) For the purpose of this rule, a corrected bill may take the form of a newly issued bill or may be reflected as a line item adjustment on a subsequent monthly or bimonthly bill. When a corrected bill is issued, the utility must provide the following information on the corrected bill, in a bill insert, letter, or any combination of methods that clearly explains all the information required to be sent to the customer:

(a) The reason for the bill correction;

(b) A breakdown of the bill correction for each month included in the corrected bill;

(c) The total amount of the bill correction that is due and payable;

(d) The time period covered by the bill correction; and

(e) When issuing a corrected bill for underbilling, an explanation of the availability of payment arrangements in accordance with WAC 480-100-138(1) payment arrangements.

(7) Exceptions to billing correction rules:

(a) Corrected bills related to an underbilling due to tampering or interference with the utility's property, use of the utility's service through an illegal connection, or the fraudulent use of a utility's service, are exempt from the six-month restriction set forth in subsection (5)(a) of this section.

(b) Adjustments for underbilling of nonresidential customers will be limited to six months. However, the utility may extend this period for good cause if a longer period is appropriate due to circumstances such as the complexity of specific accounts, changing metering configurations, load changes of large industrial customers, special meter configuration involving current transformers, or wiring reconfiguration by the customer. Utilities must report to the commission within sixty days the reasons for any adjustments longer than six months.

(c) The utility may choose not to issue a corrected bill to recover underbilled amounts less than fifty dollars.

(8) An estimated meter read made in accordance with subsection (1)(i) of this section is not considered a meter failure or malfunction or a situation where energy usage was inaccurately billed. A bill true-up (correction) based on an actual meter reading after one or more estimated bills is not considered a corrected bill for purposes of subsection (5)(a) of this section.

WSR 16-07-003

PERMANENT RULES

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

(Economic Services Administration)

[Filed March 3, 2016, 10:28 a.m., effective April 3, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The department is amending WAC 388-444-0030 to incorporate the annual update to Washington's supplemental nutrition assistance program state plan concerning able-bodied adults without dependents (ABAWD) time limits, work requirements, and waivers for all counties in Washington state except King, Snohomish, and most of Pierce County. The cities of Tacoma and Lakewood in Pierce County will remain exempt. The current ABAWD waiver expired December 31, 2015.

Citation of Existing Rules Affected by this Order: Amending WAC 388-444-0030.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.055, 74.04.057, 74.04.510, 74.08.090, 74.04.500, and 74.08A.120.

Other Authority: This rule filing reflects the new partial-state waiver in state administrative code. This rule was filed as an emergency rule on December 28, 2015, as WSR 16-02-011 effective January 1, 2016. All nonexempt ABAWD individuals in King, Snohomish, and parts of Pierce County could lose Basic Food benefits as early as April 1, 2016, if they are not participating in an approved work activity. The current ABAWD waiver expired December 31, 2015.

Adopted under notice filed as WSR 16-02-106 on January 5, 2016.

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: March 2, 2016.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 15-18-042, filed 8/26/15, effective 9/26/15)

WAC 388-444-0030 What additional work requirements and time limits is an able-bodied adult without dependents (ABAWD) subject to in order to be eligible for Basic Food? (1) An able-bodied adult without dependents (ABAWD) is a person who:

(a) Is ((~~required to register for work under WAC 388-444-0005~~)) age eighteen through forty-nine; and

(b) Is ((~~age eighteen through forty-nine~~)) fit for work and not exempted under WAC 388-444-0035(1); and

(c) Does not ((~~live with any minor children~~)) receive food assistance in an assistance unit (AU) that includes a minor child, even if the minor child is not eligible to receive food assistance in that AU; or

(d) Is not otherwise exempt under WAC 388-444-0035.

(2) If you are an ABAWD, you must participate in ((~~employment and training~~)) work activities under subsection (4) unless you are exempt from ABAWD requirements under WAC 388-444-0035.

(3) Nonexempt ABAWDs who ((~~fail to participate~~)) live outside of King county, Snohomish county or Pierce county, and nonexempt ABAWDs who live within the city of Tacoma or the city of Lakewood, may continue to receive food assistance until December 31, ((~~2015~~)) 2016, even if the ABAWD fails to participate.

(4) Beginning January 1, 2016, a nonexempt ABAWD is not eligible to receive food assistance for more than three full months, not including any partial benefit months in a thirty-six month period, unless ((~~that person participates in at least twenty hours a week averaged monthly in any of the following~~)) the ABAWD:

(a) ((~~Paid work~~)) Works at least twenty hours per week, averaged monthly (eighty hours per month). Working includes:

(i) Work in exchange for money;

(ii) Work in exchange for goods or services ("in kind" work);

(iii) Unpaid work that is verified according to department requirements; or

(iv) Any combination of (4)(a)(i) through (4)(a)(iii).

Or

(b) ((~~On the job training (OJT), which may include paid work and classroom training time;~~

~~(c) An unpaid work program as provided in WAC 388-444-0040; or~~

~~(d)~~)) Participates in one of the following work programs and is meeting the requirements of that work program:

(i) The Workforce Innovation and Opportunity Act of 2014;

(ii) Section 236 of the Trade Act of 1974; ((~~or~~))

(iii) A state-approved employment and training program; or

(iv) An unpaid work program as provided in WAC 388-444-0040.

WSR 16-07-006
PERMANENT RULES
HEALTH CARE AUTHORITY
(Washington Apple Health)
[Filed March 3, 2016, 3:06 p.m., effective April 3, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: To improve clarity and align with 42 C.F.R. 435.603.

Citation of Existing Rules Affected by this Order: Amending WAC 182-506-0010.

Statutory Authority for Adoption: RCW 41.05.021, 41.05.160.

Adopted under notice filed as WSR 15-24-110 on December 1, 2015.

Changes Other than Editing from Proposed to Adopted Version: **WAC 182-506-0010 Medical assistance units for MAGI-based programs.** This section applies to applicants or recipients whose financial eligibility for Washington apple health coverage is based on modified adjusted gross income methodology under WAC 182-503-0510 and 182-509-0300.

(1) General medical assistance unit (MAU) rules.

(a) The rules in this section describe how the medicaid agency must determine who is in an applicant's or recipient's MAU.

~~(b) In this section and WAC 182-506-0012, "applicant" means a person applying for or receiving coverage.~~

(~~e~~b) Each person will have an individualized MAU and may have different eligibility results than other people on the same application.

(~~d~~c) The countable income used to determine a person's eligibility is the sum of the countable income of everyone in the person's MAU.

(2) Rules regardless of tax filing status.

(a) If a married couple resides together, the agency must include both people in each other's MAU regardless of tax filing status.

(b) If a member of the MAU is pregnant, the number of people in the MAU increases by one for each unborn child.

(c) A deceased person does not count in the MAU of other applicants or recipients except in the month the person died.

(3) People residing in an institution under chapter 182-514 WAC. An applicant or recipient is the only person in the MAU if the applicant or recipient:

(a) Has resided in a medical institution, institution for mental diseases (IMD), or inpatient psychiatric facility for thirty consecutive days; or

(b) Based on an assessment by the department of social and health services, is likely to reside in a medical institution, IMD, or inpatient psychiatric facility for thirty consecutive days.

WAC 182-506-0012 Determining a person's medical assistance unit. This section applies to people whose financial eligibility for Washington apple health coverage is based on modified adjusted gross income methodology.

(1) Determining a tax filer's medical assistance unit (MAU).

(a) A tax filer is a person who:

(i) Expects to file a federal income tax return; and

(ii) Does not expect to be claimed as a tax dependent on a federal income tax return.

(b) If the applicant or recipient is a tax filer, the following people constitute the applicant's or recipient's MAU:

(i) The tax filer;

(ii) The tax filer's spouse, if residing with the tax filer; and

(iii) Everyone the tax filer expects to claim as a tax dependent.

(2) Determining a tax dependent's MAU.

(a) A tax dependent is a person who expects to be claimed as a tax dependent on a tax filer's federal income tax return.

(b) If the applicant or recipient is a tax dependent:

(i) The following people constitute the tax dependent's MAU unless the tax dependent meets one of the exceptions in (b)(ii) of this subsection:

(A) The tax dependent;

(B) The tax dependent's spouse, if living with the tax dependent;

(C) The tax filer who claims the tax dependent;

(D) The spouse of the tax filer who claims the tax dependent, if living with the tax filer; and

(E) All tax dependents claimed by the tax filer.

(ii) A tax dependent who meets one of the exceptions below is treated as a nonfiler under subsection (3) of this section:

(A) A tax dependent who is neither the spouse nor the child of the tax filer;

(B) A child under age nineteen who resides with both parents and those parents do not file a joint tax return; or

(C) The tax dependent expects to be claimed by a noncustodial parent.

(3) Determining a nonfiler's MAU.

(a) A nonfiler is a person who does not expect to file a federal income tax return and either:

(i) Does not expect to be claimed as a dependent; or

(ii) Meets one of the exceptions listed in subsection (2)(b)(ii) of this section.

(b) If the applicant or recipient is a nonfiler, the nonfiler and the following people constitute the applicant or recipient's MAU, but only if residing with the nonfiler:

(i) The nonfiler's spouse;

(ii) The nonfiler's children under age nineteen; and

(iii) If the nonfiler is under age nineteen, the nonfiler's parents and the nonfiler's siblings under age nineteen.

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 1, 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 1, Amended 1, Repealed 0.

Date Adopted: March 3, 2016.

Wendy Barcus
Rules Coordinator

AMENDATORY SECTION (Amending WSR 14-01-021, filed 12/9/13, effective 1/9/14)

WAC 182-506-0010 Medical assistance units (((~~(MAU)~~))) for MAGI-based ((~~Washington apple health~~)) programs. (((~~(1) A person's financial eligibility for programs that use modified adjusted gross income (MAGI) methodology, as described in WAC 182-509-0300, is based on multiple factors including relationship to other household members, age, tax status and pregnancy. The rules in this section describe which household members' income is counted in determining a person's eligibility. These household members comprise the person's "medical assistance unit" (MAU). Members of a single household may have different MAUs.~~

~~(2) The determination of countable income for MAGI-based programs is described in chapter 182-509 WAC.~~

~~(3) A person's MAGI-based countable income equals the total countable income of the members of the person's MAU (see WAC 182-509-0001). This income is compared to the income standard for the MAU size when determining eligibility for programs based on a federal poverty limit standard.~~

~~(4) The number of persons in the MAU is increased by one for each unborn child for each pregnant woman already included in the MAU under this section.~~

~~(5) For any given tax year in which an initial eligibility determination, renewal of eligibility, post-eligibility review or change of circumstance is made, MAUs are determined as follows:~~

~~(a) The MAU for a person who expects to file a federal tax return and does not expect to be claimed as a tax dependent by another tax filer includes the following:~~

~~(i) The person (tax filer) and all persons the tax filer expects to claim as a tax dependent; and~~

~~(ii) The following additional persons, but only if they live in the same residence:~~

~~(A) The person's spouse;~~

~~(B) The person's natural, adopted and step-children less than nineteen years of age;~~

~~(C) If the person is less than nineteen years of age, the person's natural, adopted and step-parents; and~~

~~(D) If the person is less than nineteen years of age, the natural, adoptive and step siblings who are less than nineteen years of age.~~

~~(b) The MAU for a person who expects to be claimed as a tax dependent by a tax filer includes:~~

~~(i) The person (tax dependent), the tax filer, and any other persons in the tax filer's MAU (as determined according to (a) of this subsection), except if:~~

~~(A) The person is not the spouse or biological, adopted, or natural child of the tax filer;~~

~~(B) The person is under age nineteen and living in the same residence as both parents, but is expected to be claimed as a tax dependent by only one parent, either because the parents are unmarried or do not expect to file taxes jointly; or~~

~~(C) The person is under age nineteen and expects to be claimed by a noncustodial parent.~~

~~(ii) If (b)(i)(A), (B) or (C) of this section applies, the person's MAU is determined according to the nonfiler rules described in (c) of this subsection.~~

~~(c) The MAU for a person who does not expect to file a federal tax return and who either does not expect to be claimed as a tax dependent or meets one of the tax dependent exceptions in (b) of this subsection includes the following persons, but only if they live in the same residence:~~

~~(i) The person (self);~~

~~(ii) The person's spouse;~~

~~(iii) The person's natural, adopted and step-children less than nineteen years of age;~~

~~(iv) If the person is less than nineteen years of age, the person's natural, adopted and step-parents; and~~

~~(v) If the person is less than nineteen years of age, the natural, adoptive and step-siblings who are less than nineteen years of age.~~)) This section applies to applicants or recipients whose financial eligibility for Washington apple health coverage is based on modified adjusted gross income methodology under WAC 182-503-0510 and 182-509-0300.

(1) General medical assistance unit (MAU) rules.

(a) The rules in this section describe how the medicaid agency must determine who is in an applicant's or recipient's MAU.

(b) Each person will have an individualized MAU and may have different eligibility results than other people on the same application.

(c) The countable income used to determine a person's eligibility is the sum of the countable income of everyone in the person's MAU.

(2) Rules regardless of tax filing status.

(a) If a married couple resides together, the agency must include both people in each other's MAU regardless of tax filing status.

(b) If a member of the MAU is pregnant, the number of people in the MAU increases by one for each unborn child.

(c) A deceased person does not count in the MAU of other applicants or recipients except in the month the person died.

(3) People residing in an institution under chapter 182-514 WAC. An applicant or recipient is the only person in the MAU if the applicant or recipient:

(a) Has resided in a medical institution, institution for mental diseases (IMD), or inpatient psychiatric facility for thirty consecutive days; or

(b) Based on an assessment by the department of social and health services, is likely to reside in a medical institution, IMD, or inpatient psychiatric facility for thirty consecutive days.

NEW SECTION

WAC 182-506-0012 Determining a person's medical assistance unit. This section applies to people whose financial eligibility for Washington apple health coverage is based on modified adjusted gross income methodology.

(1) Determining a tax filer's medical assistance unit (MAU).

(a) A tax filer is a person who:

(i) Expects to file a federal income tax return; and

(ii) Does not expect to be claimed as a tax dependent on a federal income tax return.

(b) If the applicant or recipient is a tax filer, the following people constitute the applicant's or recipient's MAU:

(i) The tax filer;

(ii) The tax filer's spouse, if residing with the tax filer; and

(iii) Everyone the tax filer expects to claim as a tax dependent.

(2) Determining a tax dependent's MAU.

(a) A tax dependent is a person who expects to be claimed as a tax dependent on a tax filer's federal income tax return.

(b) If the applicant or recipient is a tax dependent:

(i) The following people constitute the tax dependent's MAU unless the tax dependent meets one of the exceptions in (b)(ii) of this subsection:

(A) The tax dependent;

(B) The tax dependent's spouse, if living with the tax dependent;

(C) The tax filer who claims the tax dependent;

(D) The spouse of the tax filer who claims the tax dependent, if living with the tax filer; and

(E) All tax dependents claimed by the tax filer.

(ii) A tax dependent who meets one of the exceptions below is treated as a nonfiler under subsection (3) of this section:

(A) A tax dependent who is neither the spouse nor the child of the tax filer;

(B) A child under age nineteen who resides with both parents and those parents do not file a joint tax return; or

(C) The tax dependent expects to be claimed by a noncustodial parent.

(3) Determining a nonfiler's MAU.

(a) A nonfiler is a person who does not expect to file a federal income tax return and either:

(i) Does not expect to be claimed as a dependent; or

(ii) Meets one of the exceptions listed in subsection (2)(b)(ii) of this section.

(b) If the applicant or recipient is a nonfiler, the nonfiler and the following people constitute the applicant's or recipient's MAU, but only if residing with the nonfiler:

(i) The nonfiler's spouse;

(ii) The nonfiler's children under age nineteen; and

(iii) If the nonfiler is under age nineteen, the nonfiler's parents and the nonfiler's siblings under age nineteen.

WSR 16-07-012
PERMANENT RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 16-41—Filed March 4, 2016, 3:08 p.m., effective April 4, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Recent clam and oyster survey data, sport harvest projections, and negotiations affecting intertidal treaty

and nontreaty fisheries, along with public health considerations and administrative tasks, call for recreational clam and oyster seasons to be opened or extended on some public beaches and requires some beaches to be closed, removed, or the seasons shortened. This proposal reflects those openings and closures.

Reasons Supporting Proposal: This rule change proposal was discussed during the fish and wildlife commission meeting and public hearing on February 26, 2016. The proposed changes were adopted by the commission on the March 4, 2016, commission conference call. The changes will allow recreational clam and oyster seasons to be opened or extended on some public beaches and closed on other beaches to achieve maximum recreational opportunity while conserving shellfish resources.

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

Statutory Authority for Adoption: RCW 77.04.012, 77.04.020, 77.04-055 [77.04.055], 77.12.045, and 77.12.047.

Adopted under notice filed as WSR 16-01-192 on December 23, 2015.

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 2, Repealed 0.

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

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

Date Adopted: March 4, 2016.

Brad Smith, Chair
Fish and Wildlife Commission

AMENDATORY SECTION (Amending WSR 15-09-046, filed 4/10/15, effective 5/11/15)

WAC 220-56-350 Clams other than razor clams, mussels—Areas and seasons. It is permissible to take, dig for, and possess clams and mussels for personal use ((~~on Puget Sound~~)) from public tidelands year-round, except the following restrictions apply to the public tidelands at the beaches listed below:

(1) Ala Spit: All public tidelands of Ala Spit are open May 1 through May 31 only.

(2) Alki Park: Closed year-round.

(3) Alki Point: Closed year-round.

(4) Bay View State Park: Closed year-round.

(5) Belfair State Park: Open ((~~January 1 through May 31 only~~)) year-round.

(6) Blake Island State Park Marina: Closed year-round.

(7) Blowers Bluff North: Closed year-round.

(8) Brown's Point Lighthouse: Closed year-round.

((~~(7)~~)) (9) Budd Inlet: All state-owned tidelands of Budd Inlet south of a line drawn due west from the southern boundary of Burfoot Park to the opposite shore near 68th Avenue N.W. are closed year-round.

(10) Cama Beach State Park: Closed year-round.

((~~(8)~~)) (11) Camano Island State Park: Closed year-round.

((~~(9)~~)) (12) Chimacum Creek Tidelands (Irondale Beach Park): Public tidelands south of the main Chimacum Creek channel are closed year-round.

(13) Chuckanut Bay: All tidelands of Chuckanut Bay north of the BNSF Railroad trestle are closed year-round.

((~~(10)~~)) (14) Coupeville: Closed year-round.

((~~(11)~~)) (15) Dave Mackie County Park: Closed year-round.

((~~(12)~~)) (16) Des Moines City Park: Closed year-round.

((~~(13)~~)) (17) Discovery Park: Closed year-round.

((~~(14)~~)) (18) DNR-142: Closed year-round.

((~~(15)~~)) (19) DNR-144 (Sleeper): Closed year-round.

((~~(16)~~)) (20) Dockton County Park: Closed year-round.

((~~(17)~~)) (21) Dosewallips State Park: Open year-round only in the area defined by boundary markers and signs posted on the beach.

((~~(18)~~)) (22) Dosewallips State Park South: Closed year-round south of the line defined by boundary markers on the beach.

(23) Drayton West: ((~~Closed, except open April~~)) All public tidelands of Drayton Harbor are closed year-round, except tidelands identified as conditionally approved by the department of health and defined by boundary markers and signs posted on the beach are open February 1 through October 31 ((~~only in the area defined by boundary markers and signs posted on the beach~~)).

((~~(19)~~)) (24) Dungeness Spit and Dungeness National Wildlife Refuge Tidelands: Open May 15 through September 30 only.

((~~(20)~~)) (25) Eagle Creek: Open July 1 through July 31 only.

((~~(21)~~)) (26) East San de Fuca: ((~~Closed year-round~~)) Tidelands east of the Rolling Hills Glencairn Community dock are closed year-round.

((~~(22)~~)) (27) Evergreen Rotary Park (Port Washington Narrows): Closed year-round.

(28) Fay Bainbridge Park: Closed year-round.

((~~(23)~~)) (29) Fort Flagler State Park ((~~including that portion of the spit west of the park boundary (Rat Island)~~)): Open May 15 through ((~~December 31 only~~)) August 31 only, except that portion of Rat Island and the spit west and south of the park boundary is closed year-round from two white posts on the north end of the island at the vegetation line south to the end of the island.

((~~(24)~~)) (30) Freeland County Park: Open ((~~April~~)) March 1 through May 15 only.

((~~(25)~~)) (31) Frye Cove County Park: Open May 1 through May 31 only.

((~~(26)~~)) (32) Fudge Point State Park: Closed year-round.

(33) Garrison Bay: The tidelands at Guss Island and those tidelands at British Camp between the National Park Service dinghy dock at the north end and the park boundary at the south end are closed year-round.

(((~~27~~))) (34) Gertrude Island: All tidelands at Gertrude Island are closed year-round.

(((~~28~~))) (35) Golden Gardens: Closed year-round.

(((~~29~~))) (36) Graveyard Spit: Closed year-round.

(((~~30) Harrington Beach: Closed year-round.~~

~~31~~))) (37) Hoodsport: Tidelands at Hoodsport Salmon Hatchery are closed year-round.

(((~~32~~))) (38) Hope Island State Park (South Puget Sound): Open May 1 through May 31 only.

(((~~33~~))) (39) Howarth Park: Closed year-round.

(((~~34~~))) (40) Illahee State Park: Open April 1 through July 31 only.

(((~~35~~))) (41) Indian Island County Park/Lagoon ((~~Beach/Isthmus Beach: Open July 1 through August 15~~)) Beach: From the jetty boundary with Port Townsend Ship Canal east to the beach access stairs on Flagler Road near milepost 4 open August 15 through September 15 only.

(((~~36~~))) (42) Kayak Point County Park: Closed year-round.

(((~~37~~))) (43) Kitsap Memorial State Park: Closed year-round.

(((~~38~~))) (44) Kopachuck State Park: Open June 1 through July 31 only.

(((~~39~~))) (45) Lent Landing (Port Washington Narrows): Closed year-round.

(46) Liberty Bay: All state-owned tidelands in Liberty Bay north and west of the Keyport Naval Supply Center are closed year-round.

(((~~40~~))) (47) Lincoln Park: Closed year-round.

(((~~41~~))) (48) Lions Park (Bremerton): Closed year-round.

(((~~42) Little Clam Bay: Closed year-round.~~

~~43~~))) (49) Lofall: Closed year-round.

(50) Long Point West: Closed year-round.

(51) Lower Roto Vista Park: Closed year-round.

(((~~44~~))) (52) Manchester State Park: Closed year-round.

(((~~45~~))) (53) March Point Recreation Area: Closed year-round.

(54) McNeil Island: All tidelands on McNeil Island are closed year-round.

(((~~46~~))) (55) Meadowdale County Park: Closed year-round.

(((~~47~~))) (56) Mee-Kwa-Mooks Park: Closed year-round.

(((~~48~~))) (57) Monroe Landing: Closed year-round.

(((~~49~~))) (58) Mukilteo State Park: Closed year-round.

(((~~50~~))) (59) Mystery Bay State Park: Open October 1 through April 30 only.

(((~~51~~))) (60) Nisqually National Wildlife Refuge: ((~~Closed~~)) All state-owned tidelands of the Nisqually River delta south of a line drawn from Luhr Beach boat ramp to Sequalitchew Creek are closed year-round.

(((~~52~~))) (61) North Beach County Park: Closed year-round.

(((~~53~~))) (62) North Fort Lewis: Closed year-round.

(((~~54~~))) (63) North Tabook Point: Closed year-round.

(((~~55) Northeast Cultus Bay: Closed year-round.~~

~~56~~))) (64) Oak Bay County Park: Open ((~~April~~)) May 1 through May 31 only.

(((~~57~~))) (65) Oak Harbor Beach Park: Closed year-round.

(66) Oak Harbor City Park: Closed year-round.

(((~~58~~))) (67) Old Mill County Park (Silverdale): Closed year-round.

(68) Olympia Shoal: Closed year-round.

(((~~59~~))) (69) Oyster Reserves: Puget Sound and Willapa Bay state oyster reserves are closed year-round except as follows:

(a) North Bay: State-owned oyster reserves and contiguous state-owned tidelands south and east of the powerline crossing are open May 1 through May 31 and September 1 through September 30 only.

(b) Oakland Bay: State-owned oyster reserves open year-round except in areas defined by boundary markers and signs posted on the beach.

(c) Willapa Bay - Long Island oyster reserve: Northwest side of Long Island between reserve monuments 39 and 41 and southwest side of Long Island between reserve monuments 58 and 59 are open year-round.

(((~~60~~))) (70) Pat Carey Vista Park: Closed year-round.

(71) Penrose Point State Park: Open March 1 through May 15 only.

(((~~61~~))) (72) Picnic Point County Park: Closed year-round.

(((~~62~~))) (73) Pitship Point: Closed year-round.

(((~~63~~))) (74) Pitt Island: All tidelands on Pitt Island are closed year-round.

(((~~64~~))) (75) Pleasant Harbor State Park: Closed year-round.

(((~~65~~))) (76) Pleasant Harbor WDFW Boat Launch: Closed year-round.

(77) Point Defiance: Closed year-round.

(((~~66~~))) (78) Point No Point South: Closed year-round.

(79) Point Whitney (((~~excluding Point Whitney Lagoon): Closed year-round~~)) Lagoon: Open January 1 through April 30 only.

(((~~67~~))) (80) Point Whitney ((~~Lagoon: Open January 1 through March 31 only~~)) Tidelands (excluding Point Whitney Lagoon): Open January 1 through March 15 only.

(((~~68) Port Angeles Coast Guard: Closed year-round.~~

~~69~~))) (81) Port Angeles Harbor: ((~~Closed~~)) All public tidelands of Port Angeles Harbor and interior tidelands of Ediz Hook are closed year-round.

(((~~70~~))) (82) Port Gamble Heritage Park Tidelands: Open January 1 through June 30 only.

(83) Port Gardner: Closed year-round.

(((~~71~~))) (84) Port Townsend Ship Canal/Portage Beach: Open January 1 through July ((~~15~~)) 31 only.

(((~~72~~))) (85) Post Point: Closed year-round.

(((~~73~~))) (86) Potlatch DNR tidelands: Open ((~~June 1 through September~~)) April 1 through July 15 only.

(((~~74~~))) (87) Potlatch State Park: Open ((~~June 1 through September~~)) April 1 through July 15 only.

(((~~75~~))) (88) Priest Point County Park: Closed year-round.

(((~~76~~))) (89) Purdy Spit County Park: The southern shore of the spit from the boat ramp east to the southern utility tower near Purdy Bridge is open April 1 through April 30 only.

(((~~77~~))) (90) Quilcene Bay Tidelands: All state-owned tidelands in Quilcene Bay north of a line drawn from the

Quilcene Boat Haven to Fisherman's Point are closed to the harvest of clams year-round, except those state-owned tidelands on the west side of the bay north of the Quilcene Boat Haven are open April 1 through December 31, daily from official sunrise to official sunset only.

(((~~78~~))) (91) Reid Harbor - South Beach: Closed year-round.

(((~~79~~))) (92) Retsil: Closed year-round.

(((~~80~~))) (93) Richmond Beach Saltwater Park: Closed year-round.

(((~~81~~))) (94) Salt Creek Recreation Area: Closed year-round.

(95) Saltair Beach (Kingston Ferry Terminal): Closed year-round.

(96) Saltwater State Park: Closed year-round.

(((~~82~~))) (97) Samish ((~~Beach: Closed~~)) Bay: Public tidelands of Samish Bay between Scotts Point and an unnamed point on the shore (latitude N48.5745°; longitude W122.4440°) are closed year-round.

(((~~83~~))) (98) Scenic Beach State Park: Closed year-round.

(((~~84~~))) (99) Seahurst County Park: Closed year-round.

(((~~85~~))) (100) Semiahmoo: Closed year-round.

(((~~86~~))) (101) Semiahmoo County Park: Closed year-round.

(((~~87~~))) (102) Semiahmoo Marina: Closed year-round.

(103) Sequim Bay State Park: Open ((~~May~~)) April 1 through ((~~May 31~~)) June 30 only.

(((~~88~~))) (104) Shine Tidelands State Park: Open January 1 through May 15 only.

(((~~89~~))) (105) Silverdale Waterfront Park: Closed year-round.

(((~~90~~))) (106) Sinclair Inlet: ((~~Closed~~)) All public tidelands of Sinclair Inlet west of a line drawn from the intersection of Bancroft Road and Beach Drive East northerly to Point Herron are closed year-round.

(((~~91~~))) (107) Skagit Bay Estuary Wildlife Areas: All public tidelands of Skagit Bay Estuary Wildlife Area, Fir Island Farms Reserve Wildlife Area, Island Wildlife Area, Camano Island Wildlife Area and Leque Island Wildlife Area are closed year-round.

(((~~92~~))) (108) South Carkeek Park: Closed year-round.

(((~~93~~))) (109) South Gordon Point: Closed year-round.

(((~~94~~))) (110) South Mukilteo Park: Closed year-round.

(((~~95) South Oro Bay: Closed year-round.~~

~~96~~))) (111) Southworth Ferry Dock: Closed year-round.

(((~~97~~))) (112) Spencer Spit State Park: Open March 1 through July 31 only.

(((~~98~~))) (113) Taylor Bay: Closed year-round.

(((~~99~~))) (114) Triton Cove Tidelands: Open July 15 through August 31 only.

(((~~100~~))) (115) Twanoh State Park: Open ((~~September~~)) August 1 through September 30 only.

(((~~101~~))) (116) Walker County Park: Closed year-round.

(((~~102~~))) (117) West Dewatto: DNR Beach 44A open July 1 through September 30 only.

(((~~103~~))) (118) West Pass Access: Closed year-round.

(((~~104~~))) (119) Willapa Bay: State-owned tidelands east of the department Willapa Bay Field Station and Nahcotta Tidelands Interpretive Site are closed year-round.

(((~~105~~))) (120) Wolfe Property State Park: Open January 1 through May 15 only.

(((~~106~~))) (121) Woodard Bay Natural Resource Conservation Area: Closed year-round.

It is permissible to take, dig for, and possess clams, cockles, borers, and mussels, not including razor clams, for personal use in Grays Harbor and Willapa Harbor year-round, except from state oyster reserves, which are closed to clam digging year-round.

It is permissible to take, dig for, and possess clams, cockles, borers, and mussels, not including razor clams, for personal use from the Pacific Ocean beaches from November 1 through March 31 only.

AMENDATORY SECTION (Amending WSR 15-09-046, filed 4/10/15, effective 5/11/15)

WAC 220-56-380 Oysters—Areas and seasons. It is permissible to take and possess oysters for personal use from public tidelands year-round except the following restrictions apply to the public tidelands at the beaches listed below:

(1) Ala Spit: All public tidelands of Ala Spit open May 1 through May 31 only.

(2) Alki Park: Closed year-round.

(3) Alki Point: Closed year-round.

(4) ((~~Bangor: Closed year-round.~~

~~5~~))) Bay View State Park: Closed year-round.

(5) Blake Island State Park Marina: Closed year-round.

(6) Blowers Bluff North: Closed year-round.

(7) Brown's Point Lighthouse: Closed year-round.

(((~~7~~))) (8) Budd Inlet: All state-owned tidelands of Budd Inlet south of a line drawn from the southern boundary of Burfoot Park to the opposite shore near 68th Avenue N.W. are closed year-round.

(9) Cama Beach State Park: Closed year-round.

(((~~8~~))) (10) Camano Island State Park: Closed year-round.

(((~~9~~))) (11) Chuckanut Bay: All tidelands of Chuckanut Bay north of the BNSF Railroad trestle are closed year-round.

(((~~10~~))) (12) Chimacum Creek Tidelands (Irondale Beach Park): Public tidelands south of the main Chimacum Creek channel are closed year-round.

(13) Coupeville: Closed year-round.

(((~~11~~))) (14) Dave Mackie County Park: Closed year-round.

(((~~12~~))) (15) Des Moines City Park: Closed year-round.

(((~~13~~))) (16) Discovery Park: Closed year-round.

(((~~14~~))) (17) DNR-142: Closed year-round.

(((~~15~~))) (18) DNR-144 (Sleeper): Closed year-round.

(((~~16~~))) (19) Dockton County Park: Closed year-round.

(((~~17~~))) (20) Dosewallips State Park: Open year-round only in the area defined by boundary markers and signs posted on the beach.

(21) Dosewallips State Park South: Closed year-round south of the line defined by boundary markers on the beach.

(22) Drayton West: ((~~Closed, except open April~~)) All public tidelands of Drayton Harbor are closed year-round, except tidelands identified as conditionally approved by the department of health and defined by boundary markers and

signs posted on the beach are open February 1 through October 31 only ((~~in the area defined by boundary markers and signs posted on the beach~~)).

(((~~18~~))) (23) Dungeness Spit/National Wildlife Refuge: Open May 15 through September 30 only.

(((~~19~~))) (24) East San de Fuca: ((~~Closed year-round~~)) Tidelands east of the Rolling Hills Glencairn Community dock are closed year-round.

(((~~20~~))) (25) Evergreen Rotary Park (Port Washington Narrows): Closed year-round.

(26) Fay Bainbridge Park: Closed year-round.

(((~~21~~))) (27) Fort Flagler State Park ((~~including that portion of the spit west of the park boundary (Rat Island)~~)): Open May 15 through ((~~December 31 only~~)) August 31 only, except that portion of Rat Island and the spit west and south of the park boundary is closed year-round from two white posts on the north end of the island at the vegetation line south to the end of the island.

(((~~22~~))) (28) Freeland County Park: Open ((~~April~~)) March 1 through May 15 only.

(((~~23~~))) (29) Frye Cove County Park: Open May 1 through May 31 only.

(((~~24~~))) (30) Fudge Point State Park: Closed year-round.

(31) Garrison Bay: The tidelands at Guss Island and those tidelands at British Camp between the National Park Service dinghy dock at the north end and the park boundary at the south end are closed year-round.

(32) Golden Gardens: Closed year-round.

(((~~25~~))) (33) Graveyard Spit: Closed year-round.

(((~~26) Harrington Beach: Closed year-round.~~

~~(27)~~))) (34) Hoodsport: Tidelands at the Hoodsport Salmon Hatchery are closed year-round.

(((~~28~~))) (35) Hope Island State Park (South Puget Sound): Open May 1 through May 31 only.

(((~~29~~))) (36) Howarth Park: Closed year-round.

(((~~30~~))) (37) Illahee State Park: Open April 1 through July 31 only.

(((~~31~~))) (38) Indian Island County Park/Lagoon ((~~Beach/Isthmus Beach: Open July 1 through August 15~~)) Beach: From the jetty boundary with Port Townsend Ship Canal east to the beach access stairs on Flagler Road near milepost 4 open August 15 through September 15 only.

(((~~32~~))) (39) Kayak Point County Park: Closed year-round.

(((~~33~~))) (40) Kitsap Memorial State Park: Closed year-round.

(((~~34~~))) (41) Kopachuck State Park: Open March 1 through July 31 only.

(((~~35~~))) (42) Lent Landing (Port Washington Narrows): Closed year-round.

(43) Liberty Bay: All state-owned tidelands in Liberty Bay north and west of the Keyport Naval Supply Center are closed year-round.

(((~~36~~))) (44) Lincoln Park: Closed year-round.

(((~~37~~))) (45) Lions Park (Bremerton): Closed year-round.

(((~~38) Little Clam Bay: Closed year-round.~~

~~(39)~~))) (46) Lofall: Closed year-round.

(47) Long Point West: Closed year-round.

(48) Lower Roto Vista Park: Closed year-round.

(((~~40~~))) (49) Manchester State Park: Closed year-round.

(((~~41~~))) (50) March Point Recreation Area: Closed year-round.

(51) Meadowdale County Park: Closed year-round.

(((~~42~~))) (52) Mee-Kwa-Mooks Park: Closed year-round.

(((~~43~~))) (53) Monroe Landing: Closed year-round.

(((~~44~~))) (54) Mukilteo State Park: Closed year-round.

(((~~45~~))) (55) Mystery Bay State Park: Open October 1 through April 30 only.

(((~~46~~))) (56) Nisqually National Wildlife Refuge: All state-owned tidelands of the Nisqually River delta south of a line drawn from Luhr Beach boat ramp to Sequalitchew Creek are closed year-round.

(((~~47~~))) (57) North Beach County Park: Closed year-round.

(((~~48~~))) (58) North Fort Lewis: Closed year-round.

(((~~49~~))) (59) North Tabook Point: Closed year-round.

(((~~50) Northeast Cultus Bay: Closed year-round.~~

~~(51)~~))) (60) Oak Bay County Park: Open ((~~April~~)) May 1 through May 31 only.

(((~~52~~))) (61) Oak Harbor Beach Park: Closed year-round.

(((~~53~~))) (62) Oak Harbor City Park: Closed year-round.

(((~~54~~))) (63) Old Mill County Park (Silverdale): Closed year-round.

(64) Olympia Shoal: Closed year-round.

(((~~55~~))) (65) Oyster Reserves: Puget Sound and Willapa Bay oyster reserves are closed year-round except ((~~the following are open during the dates specified~~)) as follows:

(a) North Bay: State-owned reserves and contiguous state-owned tidelands south and east of the powerline crossing are open May 1 through May 31 and September 1 through September 30 only.

(b) Oakland Bay: State-owned oyster reserves are open year-round except in areas defined by boundary markers and signs posted on the beach.

(((~~(b) North Bay: State-owned reserves are open May 1 through May 31 and September 1 through September 30 only.~~)))

(c) Willapa Bay - Long Island oyster reserve: Northwest side of Long Island between reserve monuments 39 and 41 and southwest side of Long Island between reserve monuments 58 and 59 are open year-round.

(((~~56~~))) (66) Pat Carey Vista Park: Closed year-round.

(67) Penrose Point State Park: Open March 1 through May 15 only.

(((~~57~~))) (68) Pitship Point: Closed year-round.

(69) Picnic Point: Closed year-round.

(((~~58~~))) (70) Pitt Island: Closed year-round.

(((~~59~~))) (71) Pleasant Harbor State Park: Closed year-round.

(((~~60~~))) (72) Pleasant Harbor WDFW Boat Launch: Closed year-round.

(73) Point Defiance: Closed year-round.

(((~~61~~))) (74) Point No Point South: Closed year-round.

(75) Point Whitney Tidelands (excluding Point Whitney Lagoon): Open January 1 through June 30 only.

(((~~62) Port Angeles Coast Guard: Closed year-round.~~

((~~(63)~~)) (76) Port Angeles Harbor: All public tidelands of Port Angeles Harbor and interior tidelands of Ediz Hook are closed year-round.

((~~(64)~~)) (77) Port Gamble Heritage Park Tidelands: Open January 1 through June 30 only.

(78) Port Gardner: Closed year-round.

((~~(65)~~)) (79) Port Townsend Ship Canal/Portage Beach: Open January 1 through ((~~July 15~~)) July 31 only.

((~~(66)~~)) (80) Post Point: Closed year-round.

((~~(67)~~)) (81) Potlatch DNR Tidelands: Open ((~~June 1 through September~~)) April 1 through July 15 only.

((~~(68)~~)) (82) Potlatch State Park: Open ((~~June 1 through September~~)) April 1 through July 15 only.

((~~(69)~~)) (83) Priest Point County Park: Closed year-round.

((~~(70)~~)) (84) Purdy Spit County Park: The southern shore of the spit from the boat ramp east to the southern utility tower near Purdy Bridge is open April 1 through April 30 only.

((~~(71)~~)) (85) Quilcene Bay Tidelands: All state-owned tidelands in Quilcene Bay north of a line drawn from the Quilcene Boat Haven to Fisherman's Point are closed year-round except those state-owned tidelands on the west side of the bay north of the Quilcene Boat Haven are open April 1 through December 31, daily from official sunrise to official sunset, only.

((~~(72)~~)) (86) Reid Harbor - South Beach: Closed year-round.

((~~(73)~~)) (87) Retsil: Closed year-round.

((~~(74)~~)) (88) Richmond Beach Saltwater Park: Closed year-round.

((~~(75)~~)) (89) Salt Creek Recreation Area: Closed year-round.

(90) Saltair Beach (Kingston Ferry Terminal): Closed year-round.

(91) Saltwater State Park: Closed year-round.

((~~(76)~~)) (92) Samish ((~~Beach:~~)) Bay: Public tidelands of Samish Bay between Scotts Point and an unnamed point on the shore (latitude N48.5745°; longitude W122.4440°) are closed year-round.

((~~(77)~~)) (93) Scenic Beach State Park: Closed year-round.

((~~(78)~~)) (94) Seahurst County Park: Closed year-round.

((~~(79)~~)) (95) Semiahmoo: Closed year-round.

((~~(80)~~)) (96) Semiahmoo County Park: Closed year-round.

((~~(81)~~)) (97) Semiahmoo Marina: Closed year-round.

(98) Sequim Bay State Park: Open ((~~May~~)) April 1 through ((~~May 31~~)) June 30 only.

((~~(82)~~)) (99) Shine Tidelands State Park: Open January 1 through May 15 only.

((~~(83)~~)) (100) Silverdale Waterfront Park: Closed year-round.

((~~(84)~~)) (101) Sinclair Inlet: All public tidelands of Sinclair Inlet west of a line drawn from the intersection of Bancroft Road and Beach Drive East northerly to Point Herron are closed year-round.

((~~(85)~~)) (102) Skagit Bay Estuary Wildlife Areas: All public tidelands of the Skagit Bay Estuary Wildlife Area, Fir Island Farms Reserve Wildlife Area, Island Wildlife Area, Camano Island Wildlife Area and Leque Island Wildlife Area are closed year-round.

((~~(86)~~)) (103) South Carkeek Park: Closed year-round.

((~~(87)~~)) (104) South Gordon Point: Closed year-round.

((~~(88)~~)) (105) South Mukilteo Park: Closed year-round.

((~~(89) South Oro Bay: Closed year-round.~~

~~(90)~~)) (106) Southworth Ferry Dock: Closed year-round.

((~~(91)~~)) (107) Spencer Spit State Park: Open March 1 through July 31 only.

((~~(92)~~)) (108) Taylor Bay: Closed year-round.

((~~(93)~~)) (109) Walker County Park: Closed year-round.

((~~(94)~~)) (110) West Pass Access: Closed year-round.

((~~(95)~~)) (111) Willapa Bay: State-owned tidelands east of the department Willapa Bay Field Station and the Nahcotta Tidelands Interpretive Site are open only between boundary markers and posted signs.

((~~(96)~~)) (112) Wolfe Property State Park: Open January 1 through May 15 only.

((~~(97)~~)) (113) Woodard Bay Natural Resource Conservation Area: Closed year-round.

WSR 16-07-025
PERMANENT RULES
LIQUOR AND CANNABIS BOARD

[Filed March 9, 2016, 10:35 a.m., effective April 9, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Rules are needed to clarify the requirements for internet sales and delivery by beer and/or wine gift delivery licensees.

Statutory Authority for Adoption: RCW 66.24.550.

Adopted under notice filed as WSR 16-01-100 on December 16, 2015.

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 1, Amended 0, Repealed 0.

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Date Adopted: March 9, 2016.

Jane Rushford
Chairman

NEW SECTION

WAC 314-03-040 Consumer orders, internet sales, and delivery for beer and/or wine gift delivery licenses. A

beer and/or wine gift delivery licensee may accept orders for beer or wine from, and deliver beer or wine to, customers.

(1) **Resale.** Liquor shall not be for resale.

(2) **Stock location.** Liquor must come directly from a licensed retail location.

(3) **How to place an order.** Liquor may be ordered in person at a licensed location, by mail, telephone or internet, or by other similar methods.

(4) **Sales and payment.**

(a) Only a licensee or a licensee's direct employees may accept and process orders and payments. A contractor may not do so on behalf of a licensee, except for transmittal of payment through a third-party service. A third-party service may not solicit customer business on behalf of a licensee.

(b) All orders and payments shall be fully processed before liquor transfers ownership or, in the case of delivery, leaves a licensed premises.

(c) Payment method. Payment methods include, but are not limited to: Cash, credit or debit card, check or money order, electronic funds transfer, or an existing prepaid account. An existing prepaid account may not have a negative balance.

(d) Internet. To sell liquor via the internet, a new license applicant must request internet-sales privileges in his or her application. An existing licensee must notify the board prior to beginning internet sales. A corporate entity representing multiple stores may notify the board in a single letter on behalf of affiliated licensees, as long as the liquor license numbers of all licensee locations utilizing internet sales privileges are clearly identified.

(5) **Delivery location.** Delivery shall be made only to a residence or business that has an address recognized by the United States postal service; however, the board may grant an exception to this rule at its discretion. A residence includes a hotel room, a motel room, or other similar lodging that temporarily serves as a residence.

(6) **Hours of delivery.** Liquor may be delivered each day of the week between the hours of 6:00 a.m. and 2:00 a.m. Delivery must be fully completed by 2:00 a.m.

(7) **Age requirement.**

(a) Per chapter 66.44 RCW, any person under twenty-one years of age is prohibited from purchasing, delivering, or accepting delivery of liquor.

(b) A delivery person must verify the age of the person accepting delivery before handing over liquor.

(c) If no person twenty-one years of age or older is present to accept a liquor order at the time of delivery, the liquor shall be returned.

(8) **Intoxication.** Delivery of liquor is prohibited to any person who shows signs of intoxication.

(9) **Containers and packaging.**

(a) Individual units of liquor must be factory sealed in bottles, cans or other like packaging. Delivery of growlers, jugs or other similar, nonfactory sealed containers is prohibited. For the purposes of this subsection, "factory sealed" means that a unit is in one hundred percent resalable condition, with all manufacturer's seals intact.

(b) The outermost surface of a liquor package, delivered by a third party, must have language stating that:

(i) The package contains liquor;

(ii) The recipient must be twenty-one years of age or older; and

(iii) Delivery to intoxicated persons is prohibited.

(10) **Required information.**

(a) Records and files shall be retained at the licensed premises. Each delivery sales record shall include the following:

(i) Name of the purchaser;

(ii) Name of the person who accepts delivery;

(iii) Street addresses of the purchaser and the delivery location; and

(iv) Time and date of purchase and delivery.

(b) A private carrier must obtain the signature of the person who receives liquor upon delivery.

(c) A sales record does not have to include the name of the delivery person, but it is encouraged.

(11) **Web site requirements.** When selling over the internet, all web site pages associated with the sale of liquor must display a licensee's registered trade name.

(12) **Accountability.** A licensee shall be accountable for all deliveries of liquor made on its behalf.

(13) **Violations.** The board may impose administrative enforcement action upon a licensee, or suspend or revoke a licensee's delivery privileges, or any combination thereof, should a licensee violate any condition, requirement or restriction.

WSR 16-07-046
PERMANENT RULES
DEPARTMENT OF REVENUE
[Filed March 14, 2016, 9:25 a.m., effective April 14, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: WAC 458-20-13601 has been revised based on chapter 5, Laws of 2015 3rd sp. sess. (ESSB 6138) to add:

- To the definition of "manufacturer" a person that is engaged in the development of prewritten computer software that is not transferred to purchasers by means of tangible storage media; and
- The definitions of an affiliated group and an ineligible person. Exemptions provided by RCW 82.08.02565 and 82.12.02565 do not apply to an ineligible person, which includes an affiliated group, effective August 1, 2015, unless the machinery and equipment was first used by the taxpayer in Washington before August 1, 2015.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-13601 Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment.

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

Adopted under notice filed as WSR 16-02-058 on January 4, 2016.

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Recently Enacted State Statutes: New 0, Amended 1, Repealed 0.

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 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: March 14, 2016.

Kevin Dixon
Rules Coordinator

AMENDATORY SECTION (Amending WSR 15-01-005, filed 12/4/14, effective 1/4/15)

WAC 458-20-13601 Manufacturers and processors for hire—Sales and use tax exemptions for machinery and equipment. (1) **Introduction.**

(a) This rule explains the retail sales and use tax exemptions provided by RCW 82.08.02565 and 82.12.02565 for sales to or use by manufacturers or processors for hire of machinery and equipment (M&E) used directly in a manufacturing operation or research and development operation. This rule explains the requirements that must be met to substantiate a claim of exemption. For information regarding the sales and use tax deferral for manufacturing and research/development activities in high unemployment counties, refer to WAC 458-20-24001 and chapter 82.60 RCW. For the high technology business sales and use tax deferral refer to chapter 82.63 RCW.

(b) Effective June 12, 2014, the retail sales and use tax exemptions provided by RCW 82.08.02565 and 82.12.02565 do not apply to:

(i) Sales of machinery and equipment used directly in the manufacturing, research and development, or testing of marijuana; ((~~or~~)) and

(ii) Sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving such machinery and equipment.

(c) Effective August 1, 2015, an ineligible person, as defined in subsection (2)(e) of this rule, does not qualify for the retail sales and use tax exemptions provided by RCW 82.08.02565 and 82.12.02565, unless the taxpayer first used the qualifying machinery and equipment in this state prior to August 1, 2015.

(2) **Definitions.** For purposes of the manufacturing machinery and equipment tax exemptions, the following definitions ((~~will~~)) apply((~~:~~)):

(a) **Affiliated group.** "Affiliated group" means a group of two or more entities that are either:

(i) Affiliated as defined in RCW 82.32.655; or

(ii) Permitted to file a consolidated return for federal income tax purposes.

(b) **Cogeneration.** "Cogeneration" means the simultaneous generation of electrical energy and low-grade heat from the same fuel. See RCW 82.08.02565.

(((~~b~~))) (c) **Device.** "Device" means an item that is not attached to the building or site. Examples of devices are: Forklifts, chainsaws, air compressors, clamps, free standing shelving, software, ladders, wheelbarrows, and pulleys.

(((~~c~~))) (d) **Industrial fixture.** "Industrial fixture" means an item attached to a building or to land. Fixtures become part of the real estate to which they are attached and ((~~upon~~)) at the time of attachment are classified as real property, not personal property. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and certain concrete slabs.

(((~~d~~))) (e) **Ineligible person.** "Ineligible person" means all members of an affiliated group if all of the following apply:

(i) At least one member of the affiliated group was registered with the department of revenue (department) to do business in Washington state on or before July 1, 1981;

(ii) As of August 1, 2015, the combined employment in this state of the affiliated group exceeds forty thousand full-time and part-time employees, based on data reported to the employment security department by the affiliated group; and

(iii) The business activities of the affiliated group primarily include development, sales, and licensing of computer software and services.

(f) **Machinery and equipment (M&E).** "Machinery and equipment" means industrial fixtures, devices, and support facilities, and tangible personal property that becomes an ingredient or component thereof, including repair parts and replacement parts. ((~~"Machinery and equipment"~~)) M&E includes pollution control equipment installed and used in a qualifying operation to prevent air pollution, water pollution, or contamination that might otherwise result from the operation. ((~~"M&E" means "machinery and equipment."~~

(~~e~~))) (g) **Manufacturer.** "Manufacturer" has the same meaning as provided in chapter 82.04 RCW. Manufacturer also includes a person that prints newspapers or other materials; and effective August 1, 2015, a person engaged in the development of prewritten computer software that is not transferred to purchasers by means of tangible storage media. RCW 82.08.02565, chapter 5, Laws of 2015 3rd sp. sess. (ESSB 6138).

(((~~f~~))) (h) **Manufacturing.** "Manufacturing" has the same meaning as "to manufacture" in chapter 82.04 RCW.

(((~~g~~))) (i) **Manufacturing operation.** "Manufacturing operation" means the manufacturing of articles, substances, or commodities for sale as tangible personal property. A manufacturing operation begins at the point where the raw materials enter the manufacturing site and ends at the point where the processed material leaves the manufacturing site. The operation includes storage of raw materials at the site, the storage of in-process materials at the site, and the storage of the processed material at the site. The manufacturing operation is defined in terms of a process occurring at a location. To be eligible as a qualifying use of M&E, the use must take place within the manufacturing operation, unless specifically exempted by law. Storage of raw material or other tangible personal property, packaging of tangible personal property, and other activities that potentially qualify under the "used

directly" ((~~criteria~~)) criterion, and that do not constitute manufacturing in and of themselves, are not within the scope of the exemption unless they take place at a manufacturing site. The statute specifically allows testing to occur away from the site.

The term "manufacturing operation" also includes that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. The term does not include the production of electricity by a light and power business as defined in RCW 82.16.010 or the preparation of food products on the premises of a person selling food products at retail.

(i) Neither duration or temporary nature of the manufacturing activity nor mobility of the equipment determine whether a manufacturing operation exists. For example, operations using portable saw mills or rock crushing equipment are considered "manufacturing operations" if the activity in which the person is engaged is manufacturing. Rock crushing equipment that deposits material onto a roadway is not used in a manufacturing operation because this is a part of the constructing activity, not a manufacturing activity. Likewise, a concrete mixer used at a construction site is not used in a manufacturing operation because the activity is constructing, not manufacturing. Other portable equipment used in nonmanufacturing activities, such as continuous gutter trucks or trucks designed to deliver and combine aggregate, or specialized carpentry tools, do not qualify for the same reasons.

(ii) Manufacturing tangible personal property for sale can occur in stages, taking place at more than one manufacturing site. For example, if a taxpayer processes pulp from wood at one site, and transfers the resulting pulp to another site that further manufactures the product into paper, two separate manufacturing operations exist. The end product of the manufacturing activity must result in an article, substance, or commodity for sale.

((~~(h)~~)) (j) **Marijuana.** "Marijuana" is any product with a THC concentration greater than .03 percent.

((~~(i)~~)) (k) **Processor for hire.** "Processor for hire" has the same meaning as used in chapter 82.04 RCW and as explained in WAC 458-20-136 Manufacturing, processing for hire, fabricating.

((~~(j)~~)) (l) **Qualifying operation.** "Qualifying operation" means a manufacturing operation, a research and development operation, or a testing operation.

((~~(k)~~)) (m) **Research and development operation.** "Research and development operation" means engaging in research and development as defined in RCW 82.63.010 by a manufacturer or processor for hire. RCW 82.63.010 defines "research and development" to mean: Activities performed to discover technological information, and technical and nonroutine activities concerned with translating technological information into new or improved products, processes, techniques, formulas, inventions, or software. The term includes exploration of a new use for an existing drug, device, or biological product if the new use requires separate licensing by the Federal Food and Drug Administration under chapter 21, C.F.R., as amended. The term does not include adaptation or duplication of existing products where the products are not substantially improved by application of the technology, nor does the term include surveys and studies, social science and humanities research, market research or testing, quality control, sale promotion and service, computer software developed for internal use, and research in areas such as improved style, taste, and seasonal design.

((~~(l)~~)) (n) **Sale.** "Sale" has the same meaning as "sale" in chapter 82.08 RCW, which includes by reference RCW 82.04.040. RCW 82.04.040 includes by reference the definition of "retail sale" in RCW 82.04.050. "Sale" includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price.

((~~(m)~~)) (o) **Site.** "Site" means the location at which the manufacturing or testing takes place.

((~~(n)~~)) (p) **Support facility.** "Support facility" means a part of a building, or a structure or improvement, used to contain or steady an industrial fixture or device. A support facility must be specially designed and necessary for the proper functioning of the industrial fixture or device and must perform a function beyond being a building or a structure or an improvement. It must have a function relative to an industrial fixture or a device. To determine if some portion of a building is a support facility, the parts of the building are examined. For example, a highly specialized structure, like a vibration reduction slab under a microchip clean room, is a support facility. Without the slab, the delicate instruments in the clean room would not function properly. The ceiling and walls of the clean room are not support facilities if they only serve to define the space and do not have a function relative to an industrial fixture or a device.

((~~(o)~~)) (q) **Tangible personal property.** "Tangible personal property" has its ordinary meaning.

((~~(p)~~)) (r) **Testing.** "Testing" means activities performed to establish or determine the properties, qualities, and limitations of tangible personal property.

((~~(q)~~)) (s) **Testing operation.** "Testing operation" means the testing of tangible personal property for a manufacturer or processor for hire. A testing operation begins at the point where the tangible personal property enters the testing site and ends at the point where the tangible personal property leaves the testing site. The term also includes that portion of a cogeneration project that is used to generate power for consumption within the site of which the cogeneration project is an integral part. The term does not include the production of electricity by a light and power business as defined in RCW 82.16.010 or the preparation of food products on the premises of a person selling food products at retail. The testing operation is defined in terms of a process occurring at a location. To be eligible as a qualifying use of M&E, the use must take place within the testing operation, unless specifically excepted by law.

(3) **Retail sales and use tax exemptions.** The M&E exemptions provide retail sales and use tax exemptions for machinery and equipment used directly in a manufacturing operation or research and development operation, ((~~with the exception of~~)) except for such sales or use relating to marijuana effective June 12, 2014. Sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving qualifying machinery and

equipment are also exempt from sales tax, ((~~with the exception of~~)) except for such sales or charges relating to marijuana effective June 12, 2014. However, because the exemption is limited to items with a useful life of one year or more, some charges for repair, labor, services, and replacement parts may not be eligible for the exemption. In the case of labor and service charges that cover both qualifying and nonqualifying repair and replacement parts, the labor and services charges are presumed to be exempt. If all of the parts are nonqualifying, the labor and service charge is not exempt, unless the parts are incidental to the service being performed, such as cleaning, calibrating, and adjusting qualifying machinery and equipment.

The exemption may be taken for qualifying machinery and equipment used directly in a testing operation by a person engaged in testing for a manufacturer or processor for hire, with the exception of such testing relating to marijuana effective June 12, 2014.

Sellers remain subject to the retailing B&O tax on all sales of machinery and equipment to consumers if delivery is made within the state of Washington, notwithstanding that the sale may qualify for an exemption from the retail sales tax.

(a) **Sales tax.** The purchaser must provide the seller with an exemption certificate. The exemption certificate must be completed in its entirety. The seller must retain a copy of the certificate as a part of its records. This certificate may be issued for each purchase or in blanket form certifying all future purchases as being exempt from sales tax. Blanket certificates are valid for as long as the buyer and seller have a recurring business relationship. A "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months. RCW 82.08.050 (7)(c).

The form must contain the following information:

(i) Name, address, and registration number of the buyer;

(ii) Name of the seller;

(iii) Name and title of the authorized agent of the buyer/user;

(iv) Authorized signature;

(v) Date; and

(vi) Whether the form is a single use or blanket-use form.

A copy of ((~~a~~)) an M&E certificate form may be obtained from the ((~~department of revenue (department) on the internet~~)) department's web site at ((~~www.~~))dor.wa.gov, or by contacting the department's taxpayer services division at:

Taxpayer Services
Department of Revenue
((~~Taxpayer Services~~))
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706

(b) **Use tax.** The use tax complements the retail sales tax by imposing a tax of like amount ((~~upon~~)) on the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used. ((~~(See also~~)) For additional information on use tax see chapter 82.12 RCW and WAC 458-20-178 ((~~Use tax~~)).((~~)~~)) If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the retail sales tax (commonly referred to as "deferred sales tax") or the use tax directly to the department unless the purchase and/or use is exempt from the retail sales and/or use taxes. A qualifying person using eligible machinery and equipment in Washington in a qualifying manner is exempt from the use tax. If an item of machinery and equipment that was eligible for use tax or sales tax exemption fails to overcome the majority use threshold or is ((~~totally~~)) entirely put to use in a nonqualifying manner, use tax is due on the fair market value at the time the item was put to nonqualifying use. See subsection (9) of this rule for an explanation of the majority use threshold.

(4) **Who may take the exemption((~~,~~))?** The exemption may be taken by a manufacturer or processor for hire who manufactures articles, substances, or commodities for sale as tangible personal property (excluding marijuana), and who, for the item in question, meets the used directly test and overcomes the majority use threshold. (See subsection (8) of this rule for a discussion of the "used directly" ((~~criteria~~)) criterion and see subsection (9) of this rule for an explanation of the majority use threshold.) However, for research and development operations, there is no requirement that the operation produce tangible personal property for sale. A processor for hire who does not sell tangible personal property is eligible for the exemption if the processor for hire manufactures articles, substances, or commodities that will be sold by the manufacturer. For example, a person who is a processor for hire but who is manufacturing with regard to tangible personal property that will be used by the manufacturer, rather than sold by the manufacturer, is not eligible. For additional information on manufacturing, processing for hire, or fabricating, see WAC 458-20-136 and RCW 82.04.110 ((~~for more information~~)). Persons who engage in testing for manufacturers or processors for hire are eligible for the exemption. To be eligible for the exemption, the taxpayer need not be a manufacturer or processor for hire in the state of Washington, but must meet the ((~~Washington~~)) definition of manufacturer provided in subsection (2)(g) of this rule.

(5) **What is eligible for the exemption((~~,~~))?** Machinery and equipment used directly in a qualifying operation by a qualifying person is eligible for the exemption, subject to overcoming the majority use threshold.

There are three classes of eligible machinery and equipment: Industrial fixtures, devices, and support facilities. Also eligible is tangible personal property that becomes an ingredient or component of the machinery and equipment, including repair parts and replacement parts. "Machinery and equipment" also includes pollution control equipment installed and used in a qualifying operation to prevent air pollution, water pollution, or contamination that might otherwise result from the operation.

(6) **What is not eligible for the exemption((~~,~~))?** In addition to items that are not eligible because they do not meet the used directly test or fail to overcome the majority use threshold, ((~~there are~~)) the following four categories of ((~~items that~~)) property are statutorily excluded from eligibility((~~. The following property is not eligible for the M&E exemption~~)):

(a) **Hand-powered tools.** Screw drivers, hammers, clamps, tape measures, and wrenches are examples of hand-

powered tools. Electric powered, including cordless tools, are not hand-powered tools, nor are calipers, plugs used in measuring, or calculators.

(b) **Property with a useful life of less than one year.** All eligible machinery and equipment must satisfy the useful life ((~~criteria~~)) criterion, including repair parts and replacement parts. For example, items such as blades and bits are generally not eligible for the exemption because, while they may become component parts of eligible machinery and equipment, they generally have a useful life of less than one year. Blades generally having a useful life of one year or more, such as certain sawmill blades, are eligible. See subsection (7) of this rule for thresholds to determine useful life.

(c) **Buildings.** Buildings, other than machinery and equipment that is permanently affixed to or becomes a physical part of a building. Buildings provide work space for people or shelter machinery and equipment or tangible personal property. The building itself is not eligible, however some of its components might be eligible for the exemption. The industrial fixtures and support facilities that become affixed to or part of the building might be eligible. The subsequent real property status of industrial fixtures and support facilities does not affect eligibility for the exemption.

(d) **Building fixtures.** Building fixtures that are not integral to the manufacturing operation, testing operation, or research and development operation that are permanently affixed to and become a physical part of a building, such as utility systems for heating, ventilation, air conditioning, communications, plumbing, or electrical. Examples of nonqualifying fixtures are: Fire sprinklers, building electrical systems, or washroom fixtures. Fixtures that are integral to the manufacturing operation might be eligible, depending on whether the item meets the other requirements for eligibility, such as the used directly test.

(7) **The "useful life" threshold.** RCW 82.08.02565 has a per se exception for "property with a useful life of less than one year." Property that meets this description is not eligible for the M&E exemption. The useful life threshold identifies items that do not qualify for the exemption, such as supplies, consumables, and other classes of items that are not expected or intended to last a year or more. For example, tangible personal property that is acquired for a one-time use and is discarded ((~~upon~~)) after use, such as a mold or a form, has a useful life of less than one year and is not eligible. If it is clear from taxpayer records or practice that an item is used for at least one year, the item is eligible, regardless of the answers to the four threshold questions. A taxpayer may work directly with the department to establish recordkeeping methods that are tailored to the specific circumstances of the taxpayer. The following steps should be used ((~~in making a determination~~)) to determine whether an item meets the "useful life" threshold. The series of questions progress from simple documentation to complex documentation. ((~~In order~~)) To substantiate qualification under any step, a taxpayer must maintain adequate records or be able to establish by demonstrating through practice or routine that the threshold is overcome. Catastrophic loss, damage, or destruction of an item does not affect eligibility of machinery and equipment that otherwise qualifies. Assuming the machinery and equipment meets all of the other M&E requirements and does not have a single one-time use or is not discarded during the first year, useful life ((~~can~~)) should be determined by answering the following questions for an individual piece of machinery and equipment:

(a) Is the machinery and equipment capitalized for either federal tax purposes or accounting purposes?

• If the answer is "yes," it qualifies for the exemption.

• If the answer is "no,"

(b) Is the machinery and equipment warranted by the manufacturer to last at least one year?

• If the answer is "yes," it qualifies for the exemption.

• If the answer is "no,"

(c) Is the machinery and equipment normally replaced at intervals of one year or more, as established by industry or business practice? (This is commonly based on the actual experience of the person claiming the exemption.)

• If the answer is "yes," it qualifies for the exemption.

• If the answer is "no,"

(d) Is the machinery and equipment expected at the time of purchase to last at least one year, as established by industry or business practice? (This is commonly based on the actual experience of the person claiming the exemption.)

• If the answer is "yes," it qualifies for the exemption.

• If the answer is "no," it does not qualify for the exemption.

(8) **The "used directly" criteria.** Items that are not "used directly" in a qualifying operation are not eligible for the exemption. The statute provides eight descriptions of the phrase "used directly." The manner in which a person uses an item of machinery and equipment must match one of these descriptions. ((~~If M&E is not "used directly" it is not eligible for the exemption.~~)) Examples of items that are not used directly in a qualifying operation are cafeteria furniture, safety equipment not part of qualifying M&E, packaging materials, shipping materials, or administrative equipment. Machinery and equipment is "used directly" in a manufacturing operation, testing operation, or research and development operation, if the machinery and equipment meets any one of the following criteria:

(a) **Acts on or interacts with.** It acts ((~~upon~~)) on or interacts with an item of tangible personal property. Examples ((~~of this are~~)) include drill presses, concrete mixers (agitators), ready-mix concrete trucks, hot steel rolling machines, rock crushers, and band saws. Also included is machinery and equipment used to repair, maintain, or install tangible personal property. Computers qualify under this ((~~criteria~~)) criterion if:

(i) They direct or control machinery or equipment that acts ((~~upon~~)) on or interacts with tangible personal property; or

(ii) If they act ((~~upon~~)) on or interact with an item of tangible personal property.

(b) **Conveys, transports, handles, or temporarily stores.** It conveys, transports, handles, or temporarily stores an item of tangible personal property at the manufacturing site or the testing site. Examples ((~~of this are~~)) include wheelbarrows, handcarts, storage racks, forklifts, tanks, vats, robotic arms, piping, and concrete storage pads. Floor space in buildings does not qualify under this ((~~criteria. Not~~)) criterion. Also not eligible under this ((~~criteria~~)) criterion are

items that are used to ship the product or in which the product is packaged, as well as materials used to brace or support an item during transport.

(c) **Controls, guides, measures, verifies, aligns, regulates or tests.** It controls, guides, measures, verifies, aligns, regulates, or tests tangible personal property at the site or away from the site. Examples of "away from the site" are road testing of trucks, air testing of planes, or water testing of boats, with the machinery and equipment used off site in the testing eligible under this ((~~criteria~~)) criterion. Machinery and equipment used to take readings or measurements is eligible under this ((~~criteria~~)) criterion.

(d) **Provides physical support.** It provides physical support for or access to tangible personal property. Examples ((~~of this are~~)) include catwalks adjacent to production equipment, scaffolding around tanks, braces under vats, and ladders near controls. Machinery and equipment used for access to the building or to provide a work space for people or a space for tangible personal property or machinery and equipment, such as stairways or doors, is not eligible under this ((~~criteria~~)) criterion.

(e) **Produces power or lubricates.** It produces power for or lubricates machinery and equipment. A generator providing power to a sander is an example of machinery and equipment that produces such power ((~~for machinery and equipment~~)). An electrical generating plant that provides power for a building is not eligible under this ((~~criteria~~)) criterion. Lubricating devices, such as hoses, oil guns, pumps, and meters, whether or not attached to machinery and equipment, are eligible under this ((~~criteria~~)) criterion.

(f) **Produces another item.** It produces another item of tangible personal property for use in the manufacturing operation, testing operation, or research and development operation. Examples include machinery and equipment that make((~~s~~)) dies, jigs, or molds, and printers that produce camera-ready images ((~~are examples of this~~)).

(g) **Packs.** It places tangible personal property in the container, package, or wrapping in which the tangible personal property is normally sold or transported.

(h) **Is integral to research and development.** It is integral to "research and development" as it is defined in RCW 82.63.010.

(9) **The majority use threshold.**

(a) **M&E used both in a qualifying and nonqualifying manner.** Machinery and equipment ((~~both~~)) used both directly in a qualifying operation and ((~~used~~)) also in a nonqualifying manner is eligible for the exemption only if the qualifying use satisfies the majority use requirement. Examples of situations in which an item of machinery and equipment is used for qualifying and nonqualifying purposes include: The use of machinery and equipment in manufacturing and repair activities, such as using a power saw to make cabinets in a shop versus using it to make cabinets at a customer location; the use of machinery and equipment in manufacturing and constructing activities, such as using a forklift to move finished sheet rock at the manufacturing site versus using it to unload sheet rock at a customer location; and the use of machinery and equipment in manufacturing and transportation activities, such as using a mixer truck to make concrete at a manufacturing site versus using it to deliver concrete to a customer. Majority use can be expressed as a percentage, with the minimum required amount of qualifying use being greater than fifty percent compared to overall use. To determine whether the majority use requirement has been satisfied, the person claiming the exemption must retain records documenting the measurement used to substantiate a claim for exemption or, if time, value, or volume is not the basis for measurement, be able to establish by demonstrating through practice or routine that the requirement is satisfied. Majority use is measured by looking at the use of an item during a calendar year using any of the following:

(i) **Time.** Time is measured using hours, days, or other unit of time, with qualifying use of the M&E the numerator, and total time used the denominator. Suitable records for time measurement include employee time sheets or equipment time use logs.

(ii) **Value.** Value means the value to the person, measured by revenue if both the qualifying and nonqualifying uses ((~~both~~)) produce revenue. Value is measured using gross revenue, with revenue from qualifying use of the M&E the numerator, and total revenue from use of the M&E the denominator. If there is no revenue associated with the use of the M&E, such as in-house accounting use of a computer system, the value basis may not be used. Suitable records for value measurement include taxpayer sales journals, ledgers, account books, invoices, and other summary records.

(iii) **Volume.** Volume is measured using amount of product, with volume from qualifying use of the M&E the numerator and total volume from use of the M&E the denominator. Suitable records for volume measurement include production numbers, tonnage, and dimensions.

(iv) **Other comparable measurement for comparison.** The department may agree to allow a taxpayer to use another measure for comparison, provided that the method results in a comparison between qualifying and nonqualifying uses. For example, if work patterns or routines demonstrate typical behavior, the taxpayer with the department's approval can satisfy the majority use test using work site surveys as proof.

(b) **Bundling similar M&E into classes.** Each piece of M&E does not require a separate record if the taxpayer can establish that it is reasonable to bundle M&E into classes. Classes may be created only from similar pieces of machinery and equipment and only if the uses of the pieces are the same. For example, forklifts of various sizes and models can be bundled together if the forklifts are doing the same work, as in moving wrapped product from the assembly line to a storage area. An example of when not to bundle classes of M&E for purposes of the majority use threshold is the use of a computer that controls a machine through numerical control versus use of a computer that creates a camera ready page for printing.

(c) **Industry-wide standards.** Typically, whether the majority use threshold is met is decided on a case-by-case basis, looking at the specific manufacturing operation in which the item is being used. However, for purposes of applying the majority use threshold, the department may develop industry-wide standards. For instance, the aggregate industry uses concrete mixer trucks in a consistent manner across the industry. Based on a comparison of selling prices of the processed product picked up by the customer at the

manufacturing site and delivery prices to a customer location, and taking into consideration the qualifying activity (interacting with tangible personal property) of the machinery and equipment compared to the nonqualifying activity (delivering the product) of the machinery and equipment, the department has determined that concrete trucks qualify under the majority use threshold. Only in those limited instances where it is apparent that the use of the concrete truck is atypical for the industry would the taxpayer be required to provide recordkeeping on the use of the truck ((~~in order~~)) to support the exemption.

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

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

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

Date Adopted: March 14, 2016.

Kevin Dixon
Rules Coordinator

WSR 16-07-047
PERMANENT RULES
DEPARTMENT OF REVENUE

[Filed March 14, 2016, 9:36 a.m., effective April 14, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: WAC 458-20-169 has been revised due to 2015 legislation to:

- Reflect the use tax exemption increase for tangible personal property for values of less than $10,000 to values of less than $12,000 as provided by RCW 82.12.225 (chapter 32, Laws of 2015 3rd sp. sess. (ESB 6013));
- Add information pertaining to the new B&O tax exemption (RCW 82.04.755 (chapter 15, Laws of 2015 (ESHB 1060)) for grants received to fund certain education programs as provided by RCW 70.93.180 (1)(b)(ii); and
- Delete reference to resale certificates, as resale certificates were replaced by reseller permits effective January 1, 2010.

WAC 458-20-272 has been revised due to 2015 legislation to:

- Add information on the new studded tire fee of $5.00, passed during the 2015 3rd sp. sess. (chapter 44 (2ESSB 5987)); and
- Revise the title of the rule to Tire fee—Studded tire fee—Core deposits or credits.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-169 Nonprofit organizations and 458-20-272 Tire fee—Studded tire fee—Core deposits or credits.

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

Adopted under notice filed as WSR 16-02-057 on January 4, 2016.

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

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

AMENDATORY SECTION (Amending WSR 14-13-105, filed 6/17/14, effective 7/18/14)

WAC 458-20-169 Nonprofit organizations. (1) **Introduction.** Unlike the tax systems of most states((~~,~~)) and the federal ((~~tax systems~~)) government, Washington's tax system, ((~~specifically~~)) including its primary business tax, applies to the activities of nonprofit organizations. Washington's business and occupation (B&O) tax is imposed ((~~upon~~)) on all entities that generate gross receipts or proceeds, unless there is a specific statutory exemption or deduction. This rule ((~~reviews~~)) explains how the ((~~business and occupation (~~))B&O((~~)~~)), retail sales, and use taxes apply to activities often performed by nonprofit organizations. Although some nonprofit organizations may be subject to other taxes (e.g., public utility or insurance premium taxes on income from utility or insurance activities), these taxes are not discussed in this rule. The rule describes the most common ((~~exemptions and deductions for the~~)) B&O, retail sales, and use ((~~taxes~~)) tax exemptions and deductions that are specifically provided to nonprofit organizations by state law. Other exemptions ((~~and/or~~)) or deductions not specific to nonprofit organizations may also apply.

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

(b) **Other rules that may be relevant** ((~~to specific activities of~~)), Rules in the following list may contain additional relevant information for nonprofit organizations ((~~include the following~~)):

(((~~(a)~~))) (i) WAC 458-20-167((~~,~~)) Educational institutions, school districts, student organizations, and private schools;

(((~~(b)~~))) (ii) WAC 458-20-168((~~,~~)) Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities;

(((~~(c)~~))) (iii) WAC 458-20-183((~~,~~)) Amusement, recreation, and physical fitness services;

(((~~(d)~~))) (iv) WAC 458-20-249((~~,~~)) Artistic or cultural organizations; and

(((~~(e)~~))) (v) WAC 458-20-256((~~,~~)) Trade shows, conventions and seminars.

(2) **Registration requirements.** Nonprofit organizations with $12,000 or more per year in gross receipts from sales, and/or gross income from services subject to the B&O tax, or that are required to collect or pay to the department of reve-

nue (department) retail sales tax or any other tax or fee which the department administers (regardless of the level of annual gross receipts) must register with the department. Nonprofit organizations with less than twelve thousand dollars per year in gross receipts and that are not required to collect retail sales tax or any other tax or fee administered by the department are not required to register with the department. ((~~Refer to~~)) For more information on whether registration with the department is required see WAC 458-20-101 ((~~(Tax registration and tax reporting) for more information on registration requirements~~)).

(3) **Filing excise tax returns.** Nonprofit organizations making retail sales that require the collection of ((~~the~~)) retail sales tax must file ((~~a~~)) an excise tax return, regardless of the annual level of gross receipts or gross income and whether or not any B&O tax is due. ((~~(See also~~)) For information on when a taxpayer may qualify for a small business B&O tax credit, see WAC 458-20-104((~~, Small business tax relief based on income of business.~~)). The excise tax return with payment is generally filed on a monthly basis. ((~~However,~~)) Under certain conditions the department may authorize taxpayers to file and remit payment on either a quarterly or an annual basis. ((~~Refer to~~)) For information on how reporting frequencies are assigned to taxpayers see WAC 458-20-22801 ((~~(Tax reporting frequency) for more information regarding how reporting frequencies are assigned~~)).

Nonprofit organizations that do not have retail sales tax to remit, but are required to register, do not have to file ((~~a~~)) an excise tax return if they meet certain statutory requirements (e.g., annual gross income of less than $28,000) and are placed on an "active nonreporting" status by the department. ((~~Refer to~~)) For additional information on whether an organization qualifies for the "active nonreporting" status see WAC 458-20-101 ((~~for more information regarding the "active nonreporting" status~~)).

(4) **General tax reporting responsibilities.** While Washington state law provides some tax exemptions and deductions specifically ((~~targeted toward~~)) for nonprofit organizations, these organizations otherwise have the same tax-reporting responsibilities as ((~~those of~~)) for-profit organizations.

(a) **Business and occupation tax.** Chapter 82.04 RCW imposes a B&O tax on every person with substantial nexus in Washington (see RCW 82.04.067) engaged in business activities within this state, unless the income is specifically exempt or deductible under state law. The B&O tax applies to the value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220.

(i) **Common B&O tax classifications.** Chapter 82.04 RCW provides a number of classifications that apply to specific activities. The most common B&O tax classifications applying to income received by nonprofit organizations are the retailing, wholesaling, and service((~~,~~)) and other activities classifications. RCW 82.04.250, 82.04.270, and 82.04.290. If an organization engages in more than one kind of business activity, it must report the gross income from each activity ((~~must be reported~~)) under the appropriate tax classification. RCW 82.04.440(1).

(ii) **Measure of tax.** The most common measures of the B&O tax are "gross proceeds of sales" and "gross income of the business." RCW 82.04.070 and 82.04.080, respectively. These measures include the value proceeding or accruing from the sale of tangible personal property or services rendered without any deduction for the cost of property sold, cost of materials used, labor costs, discounts paid, delivery costs, taxes, losses, or any other expenses.

(b) **Retail sales tax.** A nonprofit organization must collect and remit retail sales tax on all retail sales, unless the sale is specifically exempt by statute. Examples of retail sales tax exemptions that may apply to nonprofit organizations are those for sales of certain food products (see WAC 458-20-244, Food and food ingredients), construction materials purchased by a health or social welfare organization for new construction of alternative housing ((~~for youth in crisis,~~)) to be licensed as a family foster home for youth in crisis (see RCW 82.08.02915), and fund-raising activities (see subsection (5)(g) of this rule). New construction includes renovating an existing structure to provide new housing for youth in crisis.

A nonprofit organization must pay retail sales tax when it purchases goods or retail services for its own use as a consumer, unless the purchase is specifically exempt by statute. Items purchased for resale without intervening use are purchases at wholesale and are not subject to the retail sales tax if the seller takes from the buyer a copy of the buyer's reseller permit. The reseller permit documents the wholesale nature of any sale. Reseller permits replaced resale certificates effective January 1, 2010. For additional information on reseller permits see WAC 458-20-102 ((~~(Reseller permits) for more information on reseller permits and their proper use. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014~~)).

(c) **Use tax.** The use tax is imposed on every person, including nonprofit organizations, using tangible personal property within this state as a consumer, unless such use is specifically exempt by statute. The use tax applies only if retail sales tax has not previously been paid on the item. The rate of tax is the same as the sales tax rate that applies at the location where the property is first used.

A common application of the use tax occurs when items are purchased from an out-of-state seller who has no presence in Washington. ((~~Because~~)) When the out-of-state seller ((~~is under no obligation to~~)) does not collect Washington's retail sales or use tax, the buyer is statutorily required to remit use tax directly to the department. ((~~See~~)) For more information on use tax and the use of tangible personal property see WAC 458-20-178 ((~~for more information regarding the use tax~~)).

Except for fund-raising, use tax exemptions generally correspond to retail sales tax exemptions. For example, the use tax exemption for construction materials acquired by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home (RCW 82.12.02915) corresponds with the retail sales tax exemption described in subsection (4)(b) of this rule for purchasing these construction materials.

(i) **Use tax exemption for donated items.** RCW 82.12.-02595 provides a use tax exemption for personal property donated to a nonprofit charitable organization. This exemption is available for the nonprofit charitable organization and

the donor, if the donor did not previously use the personal property as a consumer. It also applies to the use of property by a donor who is incorporating the property into a nonprofit organization's real or personal property for no charge.

The exemption also applies to another person using property originally donated to a charitable nonprofit organization that is subsequently donated or bailed to that person by the charitable nonprofit organization, provided that person uses the property in furtherance of the charitable purpose for which the property was originally donated to the charitable nonprofit organization. For example, a hardware store donates an industrial pressure washer to a nonprofit community center for neighborhood cleanup, the community center bails this washer to people enrolled in its neighborhood improvement group for neighborhood clean-up projects. No use tax is due from any of the participants in these transactions. An example of a gift that would not qualify is when a car is donated to a church for its staff and the church gives that car to its pastor. The pastor must pay use tax on the car because it serves multiple purposes. It serves the church's charitable purpose, but it also acts as compensation to the pastor and is available for the pastor's personal use. The subsequent donation of property from the charity to another person must be solely for a charitable purpose. If the property is donated or bailed to the third party for a charitable purpose in line with the nonprofit organization's charitable activities, generally, no additional proof is required that this was the charitable purpose for which the property was originally donated.

(ii) **Use tax implications with respect to fund-raising activities.** Subsection (5)(g) of this rule explains that a retail sales tax exemption is available for certain fund-raising sales. However, there is usually no comparable use tax exemption provided to the buyer/user of property purchased at these fund-raising sales. While the nonprofit organization is not obligated to collect use tax from the buyer, the organization is encouraged to inform the buyer of the buyer's possible use tax obligation.

(iii) ((~~Effective~~)) From October 1, 2013, through October 8, 2015, RCW 82.12.225 ((~~provides~~)) provided a use tax exemption for the use of any article of personal property, valued at less than ten thousand dollars, purchased or received as a prize in a contest of chance, as defined in RCW 82.04.285, from a nonprofit organization or a library. Effective October 9, 2015, chapter 32, Laws of 2015 3rd Sp. Sess. (ESB 6013), the exemption applies to qualifying personal property valued at less than twelve thousand dollars. This exemption only applies if the gross income from the sale by the nonprofit organization or library is exempt under RCW 82.04.3651. This exemption is scheduled to expire July 1, ((~~2017~~)) 2020.

(5) **Exemptions.** The following sources of income are specifically exempt from tax. As such, they should not be included or reported as gross income if the organization is required to file an excise tax return.

(a) **Adult family homes.** RCW 82.04.327 exempts from B&O tax amounts received by licensed adult family homes or adult family homes that are exempt from licensing under rules of the department of social and health services.

(b) **Nonprofit assisted living facilities.** RCW 82.04.4262 exempts from B&O tax amounts received by a nonprofit assisted living facility licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the assisted living facility. Nonprofit assisted living facilities were formerly known as "nonprofit boarding homes" in the statute.

(c) **Camp or conference centers.** RCW 82.04.363 and 82.08.830 respectively exempt from B&O tax and retail sales tax amounts received by a nonprofit organization from the sale or furnishing of certain items or services at a camp or conference center conducted on property exempt from the property tax under RCW 84.36.030 (1), (2), or (3). ((~~See~~)) For information about property tax exemptions that may apply see: WAC 458-16-210 (Nonprofit organizations or associations organized and conducted for nonsectarian purposes)((~~,~~)); WAC 458-16-220 (Church camps)((~~,~~)); and WAC 458-16-230 (Character building organizations) ((~~for more information about property tax exemptions that may apply~~)).

Amounts received from the sale of the following items and services are exempt:

(i) Lodging, conference and meeting rooms, camping facilities, parking, and similar licenses to use real property;

(ii) Food and meals;

(iii) Books, tapes, and other products ((~~that are~~)), including electronically transferred items, available exclusively to the participants at the camp, conference, or meeting and ((~~are~~)) not available to the public at large. ((~~Effective July 26, 2009, electronically transferred items are included in the exemption.~~))

(d) **Child care resource and referral services.** RCW 82.04.3395 exempts from B&O tax amounts received by nonprofit organizations for providing child care resource and referral services. Child care resource and referral services do not include child care services provided directly to children.

(e) **Credit and debt services.** RCW 82.04.368 exempts from B&O tax amounts received by nonprofit organizations for providing specialized credit and debt services. These services include:

(i) Presenting individual and community credit education programs including credit and debt counseling;

(ii) Obtaining creditor cooperation allowing a debtor to repay debt in an orderly manner;

(iii) Establishing and administering negotiated repayment programs for debtors; and

(iv) Providing advice or assistance to a debtor with regard to (i), (ii), or (iii) of this subsection.

(f) **Day care provided by churches.** RCW 82.04.339 exempts from B&O tax amounts received by a church for the care of children of any age for periods of less than twenty-four hours, provided the church is exempt from property tax under RCW 84.36.020.

(g) **Fund-raising.** RCW 82.04.3651 and 82.08.02573 ((~~respectfully~~)), respectively, exempt from B&O tax and retail sales tax amounts received from certain fund-raising activities.

These exemptions apply only to the fund-raising income received by the nonprofit organization. For example, commission income received by a nonprofit organization selling books owned by a for-profit entity on a consignment basis is exempt ((~~of~~)) from tax only if the statutory requirements are

satisfied. The nonprofit organization is generally responsible for collecting and remitting retail sales tax ((~~upon~~)) on the gross proceeds of sales when selling items for another person. ((~~See~~)) For additional information on the taxability of sales by agents, auctioneers and other similar types of sellers see WAC 458-20-159 (((~~Consignees, bailees, factors, agents and auctioneers) for more information regarding such sales~~)).

(i) **What nonprofit organizations qualify?** Nonprofit organizations that qualify for this exemption are those that are:

(A) A tax-exempt nonprofit organization described by section 501 (c)(3) (educational and charitable), 501 (c)(4) (social welfare), or 501 (c)(10) (fraternal societies operating as lodges) of the Internal Revenue Code; or

(B) A nonprofit organization that would qualify for tax exemption under section 501 (c)(3), (4), or (10) except that it is not organized as a nonprofit corporation; or

(C) A nonprofit organization that does not pay its members, stockholders, officers, directors, or trustees any amounts from its gross income, except as payment for services rendered, does not pay more than reasonable compensation to any person for services rendered, and does not engage in a substantial amount of political activity. Political activity includes, but is not limited to, influencing legislation and participating in any campaign on behalf of any candidate for political office.

(ii) **Qualifying fund-raising activities.** For the purpose of this exemption, "fund-raising activity" means soliciting or accepting contributions of money or other property, or activities involving the anticipated exchange of goods or services for money between the soliciting organization and the organization or person solicited, for ((~~the purpose of~~)) furthering the goals of the nonprofit organization.

(A) Money raised by a nonprofit charitable group from its annual telephone fund drive to fund its homeless shelters where nothing is promised in return for a donor's pledge is exempt as fund-raising contributions of money to further the goals of the nonprofit organization.

(B) A nonprofit group organized as a community playhouse has an annual telephone fund drive. The group gives the caller a mug, jacket, dinner, or vacation trip depending on the amount of pledge made over the phone. The community playhouse does not sell or exchange the mugs, jackets, dinners, or trips for cash or property, except during this pledge drive. The money is used to produce the next season's plays. The money earned from the pledges is exempt from both B&O tax and retail sales tax to the extent these amounts represent an exchange of goods and services for money to further the goals of the nonprofit group. The money earned from the pledges above the value of the goods and services exchanged is exempt as a fund-raising contribution of money to further the goals of the nonprofit organization.

(C) A nonprofit group sells ice cream bars at booths leased during the two-week runs of three county fairs, for a total of six weeks during the year, to fund youth camps maintained by the nonprofit group. The money earned from the booths is exempt from both B&O tax and retail sales tax as a fund-raising exchange of goods for money to further the goals of the nonprofit group.

(iii) **Contributions of money or other property.** The term contributions includes grants, donations, endowments, scholarships, gifts, awards, and any other transfer of money or other property by a donor, provided the donor receives no significant goods, services, or benefits in return for making the gift. For example, an amount received by a nonprofit educational broadcaster from a group that conditions receipt ((~~upon~~)) on the nonprofit broadcaster airing its seminars is not a contribution regardless of how the amount paid is titled by the two organizations.

It is not unusual for the person making a gift to require some accountability for how the gift is used as a condition for receiving the gift or future gifts. Such gifts remain exempt, provided the "accountability" required does not result in a direct benefit to the donor (examples of direct benefits to a donor are: Money given for a report on the soil contamination levels of land owned by the donor, medical services provided to the donor or the donor's family, or market research benefiting the donor directly). This "accountability" can take the form of conditions or restrictions on the use of the gift for specific charitable purposes or can take the form of written reports accounting for the use of the gift. Public acknowledgment of a donor for the gift is not a significant service or benefit.

(iv) **Nonqualifying activities.** Fund-raising activity does not include the operation of a regular place of business in which services are provided or sales are made during regular hours such as a bookstore, thrift shop, restaurant, legal or health clinic, or similar business. It also does not include the operation of a regular place of business from which services are provided or performed during regular hours such as the provision of retail, personal, or professional services. A regular place of business and the regular hours of that business depend on the type of business being conducted.

(A) In the example demonstrating that an amount received by a nonprofit broadcaster was not a contribution because services were given in return for the funds, this activity must also be examined to see whether the exchange was for services as part of a fund-raising activity. The broadcaster is in the business of broadcasting programs. It has a regular site for broadcasting programs and ((~~runs~~)) broadcasts ((~~for~~)) twenty-four hours every day. Broadcasting is a part of its business activity performed from a regular place of business during regular hours. The money received from the group with the requirement that its seminars be broadcast would not qualify as money received from a fund-raising activity even though the parties viewed the money as a "donation."

(B) A nonprofit organization that makes catalog sales throughout the year with a twenty-four hour telephone line for taking orders has a regular place of business at the location where the sales orders are processed and regular hours of twenty-four hours a day. Catalog sales are not exempt as fund-raising amounts even though the funds are raised for a nonprofit purpose.

(C) A nonprofit group organized as a community playhouse has three plays during the year at a leased theatre. The plays run for a total of six weeks and the group provides concessions at each of the performances. The playhouse has a regular place of business with regular hours for that type of business. The concessions are done at that regular place of

business during regular hours. The concessions are not exempt as fund-raising activities even though amounts raised from the concessions may be used to further the nonprofit purpose of that group.

(D) A nonprofit student group, that raises money for scholarships and other educational needs, sets up an espresso stand that is open for two hours every morning during the school year. The espresso stand is a regular place of business with regular hours for that type of business. The money earned from the espresso stand is not exempt, even though the amounts are raised to further the student group's nonprofit purpose.

(v) **Fund-raising sales by libraries.** RCW 82.04.3651 ((~~specifically~~)) provides that the sale of used books, used videos, used sound recording, or similar used information products in a library is not the operation of a regular place of business, if the proceeds are used solely to support the library. The library must be a free public library supported in whole or in part with money derived from taxes. RCW 27.12.010. ((~~Effective July 1, 2010~~)) In addition to the B&O tax exemption under RCW 82.04.3651, RCW 82.08.02573 provides a comparable retail sales tax exemption for the same sales((~~, as mentioned above,~~)) made by a library. ((~~See RCW 82.04.3651.~~))

(h) **Group training homes.** RCW 82.04.385 exempts from B&O tax amounts received from the department of social and health services for operating a nonprofit group training home. The amounts excluded from gross income must be used for the cost of care, maintenance, support, and training of developmentally disabled individuals. As defined in RCW 71A.22.020, a nonprofit group training home is an approved ((~~nonsectarian~~)) facility equipped, supervised, managed, and operated on a full-time nonprofit basis for the full-time care, treatment, training, and maintenance of individuals with developmental disabilities. ((~~RCW 71A.22.020.~~))

(i) **Sheltered workshops.** RCW 82.04.385 also exempts from B&O tax amounts received by a nonprofit organization for operating a sheltered workshop.

(i) **What is a sheltered workshop?** A sheltered workshop is that part of the nonprofit organization engaged in business activities that are performed primarily to provide evaluation and work adjusted services for a handicapped person or to provide gainful employment or rehabilitation services to a handicapped person. The sheltered workshop can be maintained on or off the premises of the nonprofit organization.

(ii) **What is meant by "gainful employment or rehabilitation services to a handicapped person"?** Gainful employment or rehabilitation services must be an interim step in the rehabilitation process ((~~which~~)) that is provided because the person cannot be readily absorbed into the competitive labor market or because employment opportunities for the person do not exist during that time in the competitive labor market.

"Handicapped," for the purposes of this exemption, means a physical or mental disability that restricts normal achievement, including medically recognized addictions and learning disabilities. However, this term does not include social or economic disadvantages that restrict normal achievement (e.g., prior criminal history or low-income status).

(j) **Student loan services.** RCW 82.04.367 exempts from B&O tax amounts received by nonprofit organizations that are exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code that:

(i) Are guarantee agencies under the federal guaranteed student loan program or that issue debt to provide or acquire student loans; or

(ii) Provide guarantees for student loans made through programs other than the federal guaranteed student loan program.

(k) **Grants received to fund education programs pertaining to litter control, waste reduction, recycling, and composting.** Effective July 24, 2015, RCW 82.04.755 provides a B&O tax exemption for grants received by a nonprofit organization from the matching fund competitive grant program established in RCW 70.93.180 (1)(b)(ii). This program provides funding for local or statewide education programs designed to help the public with litter control, waste reduction, recycling, and composting of primarily products upon which litter tax is imposed. For information on the state litter tax program, see chapter 82.19 RCW. The requirements for the grants are listed in RCW 70.93.180 (1)(b)(ii). Chapter 15, Laws of 2015 (ESHB 1060).

(6) **B&O tax deduction of payments made to health or social welfare organizations.**

(a) **Compensation from public entities.** RCW 82.04.4297 provides a B&O tax deduction to health or social welfare organizations for amounts received from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for or to support health or social welfare services, rendered by a health or social welfare organization, as defined in RCW 82.04.431, or by a municipal corporation or political subdivision. These deductible amounts should be included in the gross income reported on the excise tax return, entered on the deduction page, and then deducted on the return when determining the amount of the organization's taxable income. A deduction is not allowed, however, for amounts that are received under an employee benefit plan.

(b) **Mental health services.** ((~~Effective August 1, 2011,~~)) RCW 82.04.4277 provides a B&O tax deduction for health or social welfare organizations ((~~also qualify for a deduction~~)) for amounts received as compensation for providing mental health services under a government-funded program. Regional support networks, which are renamed behavioral health organizations effective April 1, 2016, may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4277. Persons claiming deductions under RCW 82.04.4277 must file an annual report with the department. See RCW 82.32.534. These deductions are scheduled to expire August 1, 2016.

(c) **Child welfare services.** ((~~Also effective August 1, 2011,~~)) RCW 82.04.4275 provides a B&O tax deduction for health or social welfare organizations ((~~qualify for a deduction~~)) for amounts received as compensation for providing

child welfare services under a government-funded program. Persons may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4275(1).

(d) **What is a health or social welfare organization?** A health or social welfare organization is an organization, including any community action council, providing health or social welfare services as defined in subsection (6)(e) of this rule. To be exempt under RCW 82.04.4297, a corporation must satisfy all of the following conditions:

(i) Be a corporation sole under chapter 24.12 RCW or a domestic or foreign not-for-profit corporation under chapter 24.03 RCW. ((~~It does not include~~)) A corporation providing professional services as authorized under chapter 18.100 RCW does not qualify as a health or social welfare organization;

(ii) Be governed by a board of not less than eight individuals who are not paid corporate employees when the organization is a not-for-profit corporation;

(iii) Not pay any part of its corporate income directly or indirectly to its members, stockholders, officers, directors, or trustees except as executive or officer compensation or as services rendered by the corporation in accordance with its purposes and bylaws to a member, stockholder, officer, or director or as an individual;

(iv) Only pay compensation to corporate officers and executives for actual services rendered. This compensation must be at a level comparable to like public service positions within Washington;

(v) Have irrevocably dedicated its corporate assets to health or social welfare activities. Upon corporate liquidation, dissolution, or abandonment, any distribution or transfer of corporate assets may not inure directly or indirectly to the benefit of any member or individual, except for another health or social welfare organization;

(vi) Be duly licensed or certified as required by law or regulation;

(vii) Use government payments to provide health or social welfare services;

(viii) Make its services available regardless of race, color, national origin, or ancestry; and

(ix) Provide access to the corporation's books and records to the department's authorized agents upon request.

(e) **Qualifying health or welfare services.** The term "health or social welfare services" includes and is limited to:

(i) Mental health, drug, or alcoholism counseling or treatment;

(ii) Family counseling;

(iii) Health care services;

(iv) Therapeutic, diagnostic, rehabilitative, or restorative services for the care of the sick, aged, physically-disabled, developmentally-disabled, or emotionally-disabled individuals;

(v) Activities, including recreational activities, intended to prevent or ameliorate juvenile delinquency or child abuse;

(vi) Care of orphans or foster children;

(vii) Day care of children;

(viii) Employment development, training, and placement;

(ix) Legal services to the indigent;

(x) Weatherization assistance or minor home repairs for low-income homeowners or renters;

(xi) Assistance to low-income homeowners and renters to offset the cost of home heating energy, through direct benefits to eligible households or to fuel vendors on behalf of eligible households; and

(xii) Community services to low-income individuals, families and groups that are designed to have a measurable and potentially major impact on causes of poverty in communities of the state of Washington; and

(xiii) Temporary medical housing, as defined in RCW 82.08.997, if the housing is provided only:

(A) While the patient is receiving medical treatment at a hospital required to be licensed under RCW 70.41.090 or at an outpatient clinic associated with such hospital, including any period of recuperation or observation immediately following such medical treatment; and

(B) By a person that does not furnish lodging or related services to the general public.

AMENDATORY SECTION (Amending WSR 09-19-136, filed 9/22/09, effective 10/23/09)

WAC 458-20-272 Tire fee—Studded tire fee—Core deposits or credits. (1) **Introduction.** This ((~~section~~)) rule describes the tire fee imposed under RCW 70.95.510 and the studded tire fee imposed under RCW 46.37.427 for collection beginning July 1, 2016. See chapter 44, Laws of 2015 (2ESSB 5987). This rule also describes how business and occupation (B&O), sales, and use ((~~tax consequences related to~~)) taxes apply to tire fees, battery core charges and core deposits or credits, including the exemptions described in RCW 82.08.036 and 82.12.038.

(a) **Other rules that may be relevant.** Readers may want to refer to other rules for additional information, including those in the following list:

(i) WAC 458-20-228 Returns, payments, penalties, extensions, interest, stay of collection.

(ii) WAC 458-20-278 Returned goods, defective goods—Motor vehicle lemon law.

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

(2) **Tire fee.**

(a) **What is the tire fee?** The tire fee is a one-dollar fee collected by the seller from the buyer on every retail sale of each new replacement vehicle tire. If new tires are leased, the fee must be collected once at the beginning of the lease.

(b) **How do I report the tire fee?** A seller must report on the excise tax return the number of new replacement vehicle tires sold. Tire sellers may retain ten percent of the fee and must remit the remainder to the department of revenue (department). As a result, the amount that must be reported and paid to the department is the number of new replacement vehicle tires sold during the tax reporting period multiplied by ninety cents.

(c) **What if the seller fails to collect the fee or does not pay the fee on time?** The seller is personally liable for payment of the fee, whether or not the fee is collected from the buyer. Any seller who appropriates or converts the fee collected to his or her own use or to any use other than the payment of the fee by the due date, minus the ten percent retained, is guilty of a gross misdemeanor. Interest and penalties apply to late payments. ((~~Refer to WAC 458-20-228 (Returns, payments, penalties, extensions, interest, stay of collection) for more information.~~))

(d) **What happens if a buyer fails to pay the fee?** The tire fee, until paid by the buyer to the seller or the department, is considered a debt from the buyer to the seller. Any buyer who refuses to pay the fee is guilty of a misdemeanor.

(e) **Is sales tax imposed on the tire fee?** No. The measure of the sales tax does not include the tire fee. See RCW 82.08.036.

(f) **Is the ten percent amount retained by the seller ((~~taxed~~)) subject to B&O tax?** Yes. The seller must report the retained amount as gross income under the service and other activities tax classification on the excise tax return.

(g) **What tires are subject to the tire fee?** All new replacement vehicle tires are subject to the tire fee. Refer to RCW 70.95.030 for the definition of "vehicle."

(i) Examples of vehicles for which new replacement tires are subject to the fee include:

(A) Automobiles;

(B) Trucks;

(C) Recreational vehicles;

(D) Trailers;

(E) All-terrain vehicles (ATVs);

(F) Agricultural vehicles, such as tractors or combines;

(G) Industrial vehicles, such as forklifts;

(H) Construction vehicles, such as loaders or graders; and

(I) Golf carts.

(ii) Bicycles, wheelbarrows, and hand trucks are examples of devices to which the new replacement tire fee does not apply.

(iii) The tire fee does not apply to the sale of retreaded vehicle tires. Nor does it apply to tires provided free of charge under the terms of a recall or warranty.

(h) **May I refund the fee if a tire is returned?** If a customer returns the purchased new tire and the entire selling price is refunded to the customer, the one-dollar tire fee is likewise refundable. The refunded amount may be claimed on the excise tax return in the same manner as refunded sales tax. If the seller does not refund the full sales price to the customer, the one-dollar fee is not refundable. ((~~Refer to WAC 458-20-108 (Returned goods, allowances, cash discounts) for more information.~~))

(i) **Does the tire fee apply on sales to the federal government or Indians and Indian tribes?** The tire fee is not imposed on sales to the federal government and need not be collected by the seller. The tire fee does not apply to sales of tires delivered to enrolled members or tribes in "Indian country." ((~~Refer to~~)) For information on sales to the federal government, see WAC 458-20-190, and for sales to Indians and Indian tribes, see WAC 458-20-192 ((~~for more information~~)).

(j) **If the sale is exempt from sales tax, is the tire fee due?** Statutory exemptions from sales tax do not apply to the tire fee. The tire fee is due on every retail sale of a new replacement tire whether or not sales tax is due.

(3) **Studded tire fee.**

(a) **What is the studded tire fee?** The studded tire fee is a five dollar fee imposed on the retail sale of each new tire sold, on or after July 1, 2016, that contains studs. The seller will collect the fee from the buyer. For the purpose of this subsection, "new tire sold that contains studs" means a tire that is manufactured for vehicle purposes and contains metal studs, and does not include bicycle tires or retreaded vehicle tires.

(b) **Who remits the studded tire fee to the department?** The seller collects the five dollar fee from the buyer and holds it in trust until paid to the department; however, the seller may retain ten percent of the fee collected.

(c) **What if the seller fails to collect the fee or does not pay the fee on time?** Interest and penalties, as described in subsection (2)(c) of this rule also apply to the studded tire fee.

(d) **What happens if a buyer fails to pay the fee?** As with the tire fee, a buyer who refuses to pay the fee is guilty of a misdemeanor. See subsection (2)(d) of this rule.

(e) **Is sales tax imposed on the tire fee?** No. The seller is collecting the fee as an agent for the state and thus the measure of sales tax does not include the studded tire fee. For additional information on taxpayers acting as collecting agents, see WAC 458-20-195.

(f) **Is the ten percent amount retained by the seller subject to B&O tax?** Yes. As with the tire fee, the seller must report the retained amount as gross income under the service and other activities tax classification on the excise tax return.

(g) **Is the studded tire fee refundable if the tire is returned?** If a new studded tire is returned, the studded tire fee is handled the same as the tire fee as described in subsection (2)(h) of this rule.

(h) **Does the studded tire fee apply to tires sold to the federal government or Indians and Indian tribes?** With respect to these sales, the studded tire fee is handled the same as the tire fee described in subsection (2)(i) of this rule.

(i) **If the sale is exempt from sales tax, is the studded tire fee due?** As with the tire fee described in subsection (2)(j) of this rule, statutory exemptions from sales tax do not apply to the studded tire fee.

(4) **Core deposits or credits - Battery core charges.**

(a) **Definitions.** For purposes of this ((~~section~~)) rule, the following definitions apply:

(i) **Core deposits or credits.** "Core deposits or credits" means the amount representing the value of returnable products such as batteries, starters, brakes, and other products with returnable value added for purposes of recycling or remanufacturing.

(ii) **Battery core charge.** "Battery core charge" refers to a core deposit, not less than five dollars, ((~~which must~~)) that a seller by law ((~~be retained by the seller~~)) must retain when a retail purchaser has no used battery to exchange or trade in. A buyer may return within thirty days of the purchase with a used battery of equivalent size and claim the core charge amount. See RCW 70.95.630 and 70.95.640.

(b) **How is tax calculated when the buyer receives a core deposit or credit?** Retail sales and use taxes do not apply to consideration received in the form of core deposits or credits when a purchaser exchanges or trades in a core for recycling or remanufacturing. Therefore, the measure of the sales or use tax may be reduced by the amount of the core deposit or credit. See RCW 82.08.036 and 82.12.038. The core deposit and credit exemptions apply only to the retail sales and use taxes. There is no equivalent exemption or deduction for B&O tax purposes. Therefore, the amount reported under the appropriate B&O tax classification must include the value of core deposits or credits.

(c) **Examples.** ((~~This subsection provides examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.~~))

(i) **Example 1.** A customer purchases at retail a new replacement battery and reconditioned starter, providing the seller with a battery core and a starter core in exchange. The selling price of the new battery, including the battery core charge, is $60.00. The customer is allowed a $5.00 credit because a battery core is exchanged, meaning the cost of the battery to the customer, excluding sales tax, is $55.00. The selling price of the starter is $50.00. The seller allows a $3.00 credit for the starter core, meaning the cost to the customer, excluding sales tax, is $47.00. Retailing B&O tax is due upon the total value of cash plus core value, in this case $110.00, or $60.00 plus $50.00. However, the $8.00 of core deposits or credits may be deducted from the measure of the retail sales tax under RCW 82.08.036. Thus, retail sales tax is due on $102.00, or $55.00 plus $47.00.

(ii) **Example 2.** The seller delivers the starter and battery cores accepted in the exchange to wholesalers. A starter wholesaler issues a refund and a battery wholesaler issues a credit memorandum to be applied against future wholesale battery purchases. The return of the used products by the auto parts store for recycling or remanufacturing and subsequent receipt of a refund or credit for the core deposit or credit is not considered taxable consideration for purposes of the B&O tax.

WSR 16-07-061
PERMANENT RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Behavioral Health Administration)

[Filed March 15, 2016, 11:55 a.m., effective April 15, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: To comply with 2E2SSB 5177 (chapter 7, Laws of 2015 1st sp. sess.) which requires, in part, the department to develop alternative locations and increased access to competency evaluation and restoration treatment services under chapter 10.77 RCW, and to meet the requirements of the court decision in *Trueblood v. DSHS*.

Statutory Authority for Adoption: RCW 10.77.290 and 71.24.035.

Other Authority: Chapter 10.77 RCW; 2E2SSB 5177 (chapter 7, Laws of 2015 1st sp. sess.); *Trueblood et. al. v. DSHS et. al.*, Case No. C14-1178 MJP, U.S. District Court, Western District of Washington of Seattle.

Adopted under notice filed as WSR 16-01-124 on December 18, 2015.

Changes Other than Editing from Proposed to Adopted Version: The department made the following changes and additions. New language is underlined and deleted language is lined through:

WAC 388-865-0950 (1)(b) A copy of the discovery ~~packet~~ materials, including, at a minimum, a statement of the individual's criminal history.

WAC 388-865-0950(6) If a state hospital transfers an individual to an agency for competency restoration treatment, the agency must review the individual's completed admission assessment from the state hospital to assure it meets the requirements of subsection (3) of this section for initial assessments. The agency must update the assessment as needed. If the state hospital has not completed or has only partially completed an assessment for the individual, the agency must complete the assessment according to the requirements in subsections (2) and (3) of this section.

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 8, Amended 0, Repealed 0.

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

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

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

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

Date Adopted: March 15, 2016.

Patricia K. Lashway
Acting Secretary

NEW SECTION

WAC 388-865-0900 Competency evaluation and restoration treatment services—General. (1) WAC 388-865-0900 through 388-865-0970 contains rules for agencies to gain and maintain certification to provide competency evaluation and restoration treatment services. When used in these rules, "agency" means:

(a) A residential treatment facility (RTF);

(b) A general hospital;

(c) A private psychiatric hospital; or

(d) An inpatient evaluation and treatment facility.

(2) Competency evaluation and restoration treatment services may be provided to an individual by an agency when the agency meets:

(a) The certification and fee requirements in WAC 388-865-0910;

(b) The administrative policy and procedure requirements in WAC 388-865-0920;

(c) The agency staff requirements in WAC 388-865-0930;

(d) The individual participant rights requirements in WAC 388-865-0940;

(e) The admission and initial assessment requirements in WAC 388-865-0950;

(f) The individual service plan requirements in WAC 388-865-0960;

(g) The seclusion and restraint requirements in WAC 388-865-0970;

(h) The agency is willing and able to provide treatment to the individual; and

(i) All applicable federal, state, tribal, and local codes and ordinances.

(3) WAC 388-865-0900 through 388-865-0970 does not apply to state psychiatric hospitals as defined in chapter 72.23 RCW, facilities owned or operated by the department of veterans affairs, or United States government agencies.

NEW SECTION

WAC 388-865-0910 Competency evaluation and restoration treatment services—Certification and fee requirements. (1) An agency described in WAC 388-865-0900(1) may provide competency evaluation and restoration treatment services to individuals under chapter 10.77 RCW when the department's division of behavioral health and recovery (DBHR) certifies the services. To obtain certification for these services, the agency must:

(a) Be licensed by the department of health as:

(i) A residential treatment facility consistent with chapter 246-337 WAC;

(ii) A general hospital consistent with chapter 246-320 WAC;

(iii) A private psychiatric hospital consistent with chapter 246-322 WAC; or

(iv) An inpatient evaluation and treatment facility as provided in WAC 388-865-0511(1) and consistent with chapter 246-337 WAC.

(b) Demonstrate to DBHR that the minimum requirements in WAC 388-865-0900 through 388-865-0970 have been met;

(c) Successfully complete a provisional and annual onsite review conducted by DBHR staff that determines the agency is in compliance with the minimum standards of WAC 388-865-0900 through 388-865-0970 and chapter 10.77 RCW; and

(d) Pay the required certification fees:

(i) Ninety dollars, per bed, due at the time of initial application; and

(ii) Ninety dollars, per bed, due twelve months after the date of the initial application approval and annually from that date forward.

(2) The agency must include the fees specified in subsection (1)(d) of this section with the initial application or a twelve month renewal application, as applicable.

(3) Payment of fees must be made by check, bank draft, electronic transfer, or money order, payable to the department of social and health services, and mailed to the department at the address listed on the applicable application packet or form.

(4) The department may refund one-half of the initial application fee or renewal application fee if an application is withdrawn before certification.

(5) The department will not refund fees when certification is denied, revoked, or suspended.

(6) For behavioral health agency licensure fees, program-specific certification fees, and other fees charged by the department, see WAC 388-877-0365.

NEW SECTION

WAC 388-865-0920 Competency evaluation and restoration treatment services—Administrative policies and procedures. (1) In order to provide competency evaluation and restoration treatment services, an agency described in WAC 388-865-0900(1) must develop, implement, and maintain administrative policies and procedures that:

(a) Are in accordance with chapter 10.77 RCW;

(b) Meet any applicable court orders; and

(c) Meet the minimum requirements of WAC 388-865-0900 through 388-865-0970.

(2) The administrative policies and procedures must include at a minimum all of the following:

(a) A description of the competency evaluation and restoration treatment services to be provided, ages of individuals to be served, and length of stay criteria;

(b) An organizational structure that includes clear lines of authority for management and clinical supervision;

(c) Designation of a psychiatrist as the professional person in charge of clinical services at the agency;

(d) A quality management plan to monitor, collect data, and develop improvements to meet the requirements of WAC 388-865-0900 through 388-865-0970; and

(e) A policy management structure that establishes:

(i) Procedures for maintaining and protecting an individual's clinical record consistent with chapter 70.02 RCW and the Health Insurance Portability and Accountability Act (HIPAA);

(ii) Procedures for maintaining adequate fiscal accounting records consistent with generally accepted accounting principles (GAAP);

(iii) Procedures for management of human resources to assure that an individual receives individualized treatment or care by an adequate number of staff members who are qualified and competent to carry out their assigned responsibilities;

(iv) Procedures for admitting an individual needing competency evaluation and restoration treatment services, seven days a week, three hundred sixty-five days a year;

(v) Procedures to assure access to necessary medical treatment, emergency life-sustaining treatment, and medication;

(vi) Procedures to assure the protection of individual participant rights as described in WAC 388-865-0940;

(vii) Procedures to inventory and safeguard the personal property of the individual;

(viii) Procedures to assure that a mental health professional and licensed physician are available for consultation and communication with the direct patient care staff twenty-four hours a day, seven days a week;

(ix) Procedures to assure that seclusion and restraint are used only to the extent necessary to ensure the safety of an individual, and in accordance with WAC 388-865-0970;

(x) Procedures to provide warning to an identified person and law enforcement when an adult has made a threat against an identified victim;

(xi) Procedures to provide notification to the appropriate prosecutor and law enforcement in the event of unauthorized leave; and

(xii) Procedures to assure the rights of each individual to make mental health advance directives, and agency protocols for responding to individual and agent requests consistent with RCW 71.32.150.

NEW SECTION

WAC 388-865-0930 Competency evaluation and restoration treatment services—Agency staff requirements. (1) In order to provide competency evaluation and restoration treatment services, an agency described in WAC 388-865-0900(1) must ensure the clinical supervisor and other staff members employed by the agency are qualified for the position they hold and have the education, experience, and skills to perform the job requirements. Each staff member providing services must:

(a) Have a current job description;

(b) Have a current credential issued by the department of health for their scope of practice;

(c) Pass a Washington state patrol background check consistent with RCW 43.43.830 if the position requires contact with individuals receiving competency evaluation and restoration treatment services;

(d) Have an annual performance evaluation; and

(e) Have an individualized annual training plan that includes at a minimum:

(i) The skills needed for the job description and the population served;

(ii) Methods of resident care;

(iii) Management of assaultive and self-destructive behaviors, including proper and safe use of either seclusion or restraint procedures, or both; and

(iv) Meeting the protocols developed by the department in WAC 388-865-0900 through 388-865-0970 and other applicable requirements in state and federal law.

(2) If the agency contracts a staff member to provide direct competency evaluation and restoration treatment services to individuals, the agency and the contracted staff member must meet all the conditions in subsection (1) of this section.

NEW SECTION

WAC 388-865-0940 Competency evaluation and restoration treatment services—Individual participant rights. (1) An agency described in WAC 388-865-0900(1) that meets the department's requirements to provide competency evaluation and restoration treatment services must develop a statement of individual participant rights to ensure an individual's rights are protected. The statement must incorporate at a minimum the following. You have the right to:

(a) Receive services without regard to race, creed, national origin, religion, gender, sexual orientation, age or disability;

(b) Practice the religion of choice as long as the practice does not infringe on the rights and treatment of others or the treatment services and, as an individual participant, the right to refuse participation in any religious practice;

(c) Reasonable accommodation in case of sensory or physical disability, limited ability to communicate, limited English proficiency, or cultural differences;

(d) Respect, dignity and privacy, except that agency staff members may conduct reasonable searches to detect and prevent possession or use of contraband on the premises;

(e) Be free of sexual harassment;

(f) Be free of exploitation, including physical and financial exploitation;

(g) Have all clinical and personal information treated in accord with state and federal confidentiality rules and laws;

(h) Review your clinical record in the presence of the administrator or the administrator's designee and the opportunity to request amendments or corrections;

(i) Receive a copy of the agency complaint and grievance procedures upon request and to lodge a complaint or grievance with the agency if you believe your rights have been violated; and

(j) File a complaint with the department when you believe the agency has violated a Washington Administrative Code (WAC) requirement that regulates facilities.

(2) Each agency must ensure the applicable individual participant rights described in subsection (1) of this section are:

(a) Provided in writing to each individual on or before admission;

(b) Posted in public areas;

(c) Available in alternative formats for an individual who is blind;

(d) Translated to a primary or preferred language identified by an individual who does not speak English as the primary language, and who has a limited ability to read, speak, write, or understand English; and

(e) Available to any individual upon request.

(3) Each agency must ensure all research concerning an individual whose cost of care is publicly funded is done in accordance with chapter 388-04 WAC, the protection of human research subjects, and other applicable state and federal rules and laws.

(4) In addition to the requirements in this section, each agency enrolled as a medicare and/or medicaid provider must ensure an individual seeking or participating in competency evaluation and/or restoration treatment services, or the person legally responsible for the individual is informed of the medicaid rights at time of admission in a manner that is understandable to the individual or legally responsible person.

NEW SECTION

WAC 388-865-0950 Competency evaluation and restoration treatment services—Admission and initial assessment. (1) In order to provide competency evaluation and restoration treatment services, an agency described in WAC 388-865-0900(1) must ensure that for each individual admitted for treatment, the agency obtains and includes in the individual's clinical record:

(a) A copy of the court order and charging documents. If the order is for competency restoration treatment and the competency evaluation was provided by a qualified expert or professional person who was not designated by the secretary, a copy of all previous court orders related to competency or criminal insanity provided by the state and a copy of any evaluation reports must be included;

(b) A copy of the discovery materials, including, at a minimum, a statement of the individual's criminal history; and

(c) A copy of the individual's medical clearance information.

(2) The agency is responsible for the individual's initial assessment. The initial assessment must be:

(a) Conducted in person; and

(b) Completed by a professional appropriately credentialed or qualified to provide mental health services as determined by state law.

(3) The initial assessment must include and document:

(a) The individual's:

(i) Identifying information;

(ii) Specific barriers to competence;

(iii) Medical provider's name or medical providers' names;

(iv) Medical concerns;

(v) Medications currently taken;

(vi) Brief mental health history; and

(vii) Brief substance use history, including tobacco use;

(b) The identification of any risk of harm to self and others, including suicide and homicide; and

(c) Treatment recommendations or recommendations for additional program-specific assessment.

(4) To determine the nature of the disorder and the treatment necessary, the agency must ensure that the individual receives the following assessments and document in the client's record the date provided:

(a) A health assessment of the individual's physical condition to determine if the individual needs to be transferred to an appropriate hospital for treatment;

(b) An examination and medical evaluation within twenty-four hours by a physician, advanced registered nurse practitioner, or physician assistant;

(c) A psychosocial evaluation by a mental health professional; and

(d) A competency to stand trial evaluation conducted by a licensed psychologist, or a copy of a competency to stand trial evaluation using the most recent competency evaluation, if an evaluation has already been conducted.

(5) The agency must also ensure the development of an individual service plan as described in WAC 388-865-0960.

(6) If a state hospital transfers an individual to an agency for competency restoration treatment, the agency must review the individual's completed admission assessment from the state hospital to assure it meets the requirements of subsection (3) of this section for initial assessments. The agency must update the assessment as needed. If the state hospital has not completed or has only partially completed an assessment for the individual, the agency must complete the assessment according to the requirements in subsections (2) and (3) of this section.

NEW SECTION

WAC 388-865-0960 Competency evaluation and restoration treatment services—Individual service plan. (1) An agency described in WAC 388-865-0900(1) that meets the department's requirements to provide competency evaluation and restoration treatment services must ensure each individual admitted to the agency for restoration treatment services has an individual service plan:

(a) Completed within seven days of admission; and

(b) Updated every ninety days.

(2) The individual's clinical record must contain copies of or documentation of the following:

(a) All diagnostic and therapeutic services prescribed by the attending clinical staff members;

(b) The individualized treatment plan that identifies specific targets and strategies for restoring competency to include periodic assessments of gains on these targets; and

(c) Participation of a multidisciplinary team that includes at a minimum:

(i) A physician, advanced registered nurse practitioner (ARNP), or physician assistant certified (PA-C);

(ii) A nurse, if the person in (i) of this subsection is not an ARNP; and

(iii) A mental health professional.

(3) Participation of other multidisciplinary team members, which may include a psychologist and chemical dependency professional.

NEW SECTION

WAC 388-865-0970 Competency evaluation and restoration treatment services—Seclusion and restraint. (1) An individual receiving either competency evaluation or restoration treatment services, or both, from an agency described in WAC 388-865-0900(1) has the right to be free from seclusion and restraint, including chemical restraint except as otherwise provided in this section or otherwise provided by law. The agency must:

(a) Develop, implement, and maintain policies and procedures to ensure that seclusion and restraint procedures are used only to the extent necessary to ensure the safety of an individual and in accordance with WAC 246-322-180 or 246-337-110, whichever is applicable.

(b) Ensure that the use of seclusion or restraint occurs only when there is imminent danger to self or others and less restrictive measures have been determined to be ineffective to protect the individual or other from harm and the reasons for the determination are clearly documented in the individual's clinical record.

(c) Ensure staff members notify and receive authorization by a physician or advanced registered nurse practitioner

(ARNP) within one hour of initiating an individual's seclusion or restraint.

(d) Ensure the individual is informed of the reasons for use of seclusion or restraint and the specific behaviors which must be exhibited in order to gain release from a seclusion or restraint procedure.

(e) Ensure that an appropriate clinical staff member observes the individual at least every fifteen minutes and the observation is recorded in the individual's clinical record.

(f) If the use of seclusion or restraint exceeds twenty-four hours, ensure that a physician has assessed the individual and has written a new order if the intervention will be continued. This procedure must be repeated for each twenty-four hour period that seclusion or restraint is used.

(2) The agency must ensure all assessments and justification for the use of either seclusion or restraint, or both, are documented in the individual's clinical record.

WSR 16-07-084
PERMANENT RULES
DEPARTMENT OF HEALTH
(Dental Quality Assurance Commission)

[Filed March 17, 2016, 2:52 p.m., effective April 17, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amending WAC 246-817-310 Maintenance and retention of records and new WAC 246-817-304, 246-817-305, and 246-817-315 for dental treatment record content, retention, accessibility, and business record accessibility. The rules move business record requirements and more thoroughly detail the information that must be included in patient records. It also extends the length of time patient records must be retained, from five years to six years for all patients.

Citation of Existing Rules Affected by this Order: Amending WAC 246-817-310.

Statutory Authority for Adoption: RCW 18.32.0365 and 18.32.655.

Other Authority: RCW 18.32.002.

Adopted under notice filed as WSR 15-24-118 on December 1, 2015.

Changes Other than Editing from Proposed to Adopted Version: WAC 246-817-304, editing changes; WAC 246-817-305, editing changes and deletion of the word "treatment" in subsection (4); WAC 246-817-310, added "from a patient" in subsection (2); and WAC 246-817-315, changed first sentence to read "If requested as part of an investigation authorized by the secretary" and changed "relating" to "governing" in subsection (2).

A final cost-benefit analysis is available by contacting Jennifer Santiago, P.O. Box 47852, Olympia, WA 98504, phone (360) 236-4893, fax (360) 236-2901, e-mail jennifer.santiago@doh.wa.gov.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 3, Amended 1, Repealed 0.

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 3, Amended 1, Repealed 0.

Date Adopted: January 22, 2016.

Charles Hall, DDS, Chair
Dental Quality Assurance Commission

NEW SECTION

WAC 246-817-304 Definitions. The following definitions apply to WAC 246-817-304 through 246-817-315 unless the context requires otherwise:

(1) "**Clinical record**" is the portion of the record that contains information regarding the patient exam, diagnosis, treatment discussion, treatment performed, patient progress, progress notes, referrals, studies, tests, imaging of any type and any other information related to the diagnosis or treatment of the patient.

(2) "**Financial record**" is the portion of the record that contains information regarding the financial aspects of a patient's treatment including, but not limited to, billing, treatment plan costs, payment agreements, payments, insurance information or payment discussions held with a patient, insurance company or person responsible for account payments.

(3) "**Notation**" is a condensed or summarized written record/note.

(4) "**Patient record**" is the entire record of the patient maintained by a practitioner that includes all information related to the patient.

NEW SECTION

WAC 246-817-305 Patient record content. (1) A licensed dentist who treats patients shall maintain legible, complete, and accurate patient records.

(2) The patient record must contain the clinical records and the financial records.

(3) The clinical record must include at least the following information:

(a) For each clinical record entry note, the signature, initials, or electronic verification of the individual making the entry note;

(b) For each clinical record entry note, identify who provided treatment if treatment was provided;

(c) The date of each patient record entry, document, radiograph or model;

(d) The physical examination findings documented by subjective complaints, objective findings, an assessment or diagnosis of the patient's condition, and plan;

(e) A treatment plan based on the assessment or diagnosis of the patient's condition;

(f) Up-to-date dental and medical history that may affect dental treatment;

(g) Any diagnostic aid used including, but not limited to, images, radiographs, and test results. Retention of molds or study models is at the discretion of the practitioner, except for molds or study models for orthodontia or full mouth reconstruction which shall be retained as listed in WAC 246-817-310;

(h) A complete description of all treatment/procedures administered at each visit;

(i) An accurate record of any medication(s) administered, prescribed or dispensed including:

(i) The date prescribed or the date dispensed;

(ii) The name of the patient prescribed or dispensed to;

(iii) The name of the medication; and

(iv) The dosage and amount of the medication prescribed or dispensed, including refills.

(j) Referrals and any communication to and from any health care provider;

(k) Notation of communication to or from the patient or patient's parent or guardian, including:

(i) Notation of the informed consent discussion. This is a discussion of potential risk(s) and benefit(s) of proposed treatment, recommended tests, and alternatives to treatment, including no treatment or tests;

(ii) Notation of posttreatment instructions or reference to an instruction pamphlet given to the patient;

(iii) Notation regarding patient complaints or concerns associated with treatment, this includes complaints or concerns obtained in person, by phone call, e-mail, mail, or text; and

(iv) Termination of doctor-patient relationship; and

(l) A copy of each laboratory referral retained for three years as required in RCW 18.32.655.

(4) Clinical record entries must not be erased or deleted from the record.

(a) Mistaken handwritten entries must be corrected with a single line drawn through the incorrect information. New or corrected information must be initialed and dated.

(b) If the record is an electronic record then a record audit trail must be maintained with the record that includes a time and date history of deletions, edits and/or corrections to electronically signed records.

AMENDATORY SECTION (Amending WSR 95-21-041, filed 10/10/95, effective 11/10/95)

WAC 246-817-310 ((~~Maintenance and~~)) Patient record retention ((~~of records~~)) and accessibility requirements. ((~~Any dentist who treats patients in the state of Washington shall maintain complete treatment records regarding patients treated. These records shall include, but shall not be limited to X rays, treatment plans, patient charts, patient histories, correspondence, financial data and billing. These records shall be retained by the dentist for five years in an orderly, accessible file and shall be readily available for inspection by the DQAC or its authorized representative: X rays or copies of records may be forwarded to a second party upon the patient's or authorized agent's written request. Also, office records shall state the date on which the records were released, method forwarded and to whom, and the reason for the release. A reasonable fee may be charged the patient to cover mailing and clerical costs.~~

~~Every dentist who operates a dental office in the state of Washington must maintain a comprehensive written and dated record of all services rendered to his/her patients. In offices where more than one dentist is performing the services the records must specify the dentist who performed the services. Whenever requested to do so, by the secretary or his/her authorized representative, the dentist shall supply documentary proof:~~

~~(1) That he/she is the owner or purchaser of the dental equipment and/or the office he occupies.~~

~~(2) That he/she is the lessee of the office and/or dental equipment.~~

~~(3) That he/she is, or is not, associated with other persons in the practice of dentistry, including prosthetic dentistry, and who, if any, the associates are.~~

~~(4) That he/she operates his office during specific hours per day and days per week, stipulating such hours and days.~~)) (1) A licensed dentist shall keep readily accessible patient records for at least six years from the date of the last treatment.

(2) A licensed dentist shall respond to a written request from a patient to examine or copy a patient's record within fifteen working days after receipt. A licensed dentist shall comply with chapter 70.02 RCW for all patient record requests.

(3) A licensed dentist shall comply with chapter 70.02 RCW and the Health Insurance Portability and Accountability Act, 45 C.F.R. destruction and privacy regulations.

NEW SECTION

WAC 246-817-315 Business records accessibility. If requested as part of an investigation authorized by the secretary, a licensed dentist who operates a dental practice in the state of Washington shall provide to the secretary:

(1) Documentation that the licensed dentist is:

(a) The owner, purchaser, or lessee of the dental equipment;

(b) The owner, purchaser, or lessee of the office the dentist occupies; and

(c) Associated with other persons in the practice of dentistry, whether or not the associate is licensed to practice dentistry.

(2) All contracts or agreements governing the dental practice business relationships with co-owners, partners, and associates.

WSR 16-07-085
PERMANENT RULES
RECREATION AND CONSERVATION OFFICE
(Salmon Recovery Funding Board)

[Filed March 17, 2016, 3:08 p.m., effective April 17, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The purposes of the rule making are to: (1) Update definitions and add new definitions, (2) modify grant program requirements including applications, project agreements and long-term obligations, and (3) revise the public records procedures. The rule making also includes nonsubstantive changes to reorganize chapters and update references throughout.

Citation of Existing Rules Affected by this Order: Repealing WAC 420-04-040 and 420-04-050; and amending all other sections in chapters 420-04 and 420-12 WAC, except for WAC 420-12-090.

Statutory Authority for Adoption: RCW 77.85.120 (1)(d) and chapter 34.05 RCW.

Adopted under notice filed as WSR 16-04-117 on February 2, 2016.

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 19, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 18, Repealed 2.

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: March 16, 2016.

Leslie Connelly
Natural Resource
Policy Specialist
Rules Coordinator

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-04-010 Definitions. For purposes of Title 420 WAC, the definitions in RCW 77.85.010 apply. In addition, unless the context clearly indicates otherwise, the following definitions also apply:

"Acquisition project" means ((~~the gaining of rights of public ownership by~~)) a project that purchases((~~, negotiation, or other means,~~)) or receives a donation of fee or less than fee interests in real property((~~, and related interests such as water or mineral claims and use rights~~)). These interests include, but are not limited to, conservation easements, access or trail easements, covenants, water rights, leases, and mineral rights.

"Agreement" or "project agreement" means the accord accepted by the office and the sponsor for the project and includes any attachments, addendums, and amendments, and any intergovernmental agreements or other documents that are incorporated into the project agreement subject to any limitations on their effect.

"Applicant" means any ((~~agency, person or organization~~)) party that meets qualifying standards as described in RCW 77.85.010(6), including deadlines, for submission of an application soliciting a grant of funds from the board. ((~~Generally, eligible applicants for board funds include a state, local, tribal or special purpose government, a nonprofit organization, a combination of such governments, or a landowner for projects on its land.~~))

"Application" means the ((~~form(s) developed and implemented for use by applicants in soliciting project funds administered by the board~~)) documents and other materials that an applicant submits to the office to support the applicant's request for grant funds.

"Board" means the salmon recovery funding board ((~~created by chapter 13, Laws of 1999 1st sp. sess. (2E2SSB 5595), now codified~~)) as described in RCW 77.85.110.

"Capacity funding" is a grant to lead entities and regional organizations as described in RCW 77.85.130(4) to assist in carrying out functions to implement chapter 77.85 RCW.

"Chair" means the chair of the board described in RCW 77.85.110.

((~~"Development" means the construction or alteration of facilities, the placement or removal of materials, or other physical activity to restore or enhance salmon habitat resources.~~)) "Citizens committee" means a committee established by a lead entity that consists of representative interests of counties, cities, conservation districts, tribes, environmental groups, business interests, landowners, citizens, volunteer groups, regional fish enhancement groups, and other habitat interests as described in RCW 77.85.050.

"Director" means the director of the office or that person's designee, as described in RCW 79A.25.150((~~, responsible for implementation of board activities under chapter 77.85 RCW.~~

~~"Lead entity" means the local organization or group designated under RCW 77.85.050~~)).

"Enhancement project" or "hatchery and harvest enhancement project" means a project that supports hatchery reform to improve hatchery effectiveness to minimize impacts to wild fish populations, ensure compatibility between hatchery production and salmon recovery programs, or support sustainable fisheries.

"Habitat project list" means the list of projects as described in RCW 77.85.010(3) compiled by a citizens' committee and submitted by a lead entity to the board as described in RCW 77.85.050(3). The habitat project list shall establish priorities for individual projects and define the sequence for project implementation as described in RCW 77.85.050. The list of projects in the habitat project list must be within the lead entity area as described in RCW 77.85.050(2). The habitat project list includes the lead entity ranked project list.

"Lead entity" means a city, county, conservation district, special purposes district, tribal government, regional recovery organization or other entity that is designated jointly by any one or more of the counties, cities, and Native American tribes within the lead entity area as described in RCW 77.85.050.

"Lead entity area" means the geographic area designated jointly by any one or more of the counties, cities, and Native American tribes within that area, which is based, at a minimum, on a watershed resource inventory area, as described in

RCW 77.85.010(13), combination of water resource inventory areas, or any other area as described in RCW 77.85.-050(2).

"Lead entity ranked project list," also known as the "habitat work schedule," means those projects on the habitat project list that will be implemented in the current funding cycle per RCW 77.85.010(4) and as described in RCW 77.85.060.

"Manual(s)" means a compilation of state and federal laws; board rules, policies((,)) and procedures((, rules,)); and director procedures, forms, and instructions ((that have been)) assembled in manual form ((and which have been approved by the office)) for dissemination ((by paper, electronic or other formats to all who may wish)) to parties that participate in the board's or office's grant program(s).

"Match" or "matching share" means the portion of the total project cost in the project agreement provided by the project sponsor.

"Monitoring or research project" means a project that monitors the effectiveness of salmon recovery restoration actions, or provides data on salmon populations or their habitat conditions.

"Office" means the recreation and conservation office ((or the office of recreation and conservation)) as described in RCW 79A.25.010.

(("Preliminary expense" means project costs incurred prior to board approval, other than site preparation/development costs, necessary for the preparation of a development project.)) "Planning project" means a project that results in a study, assessment, project design, or inventory.

"Preagreement cost" means a project cost incurred before the period of performance identified in the project agreement.

"Project" means the undertaking which is, or may be, funded in whole or in part with funds administered by the office on behalf of the board.

(("Project agreement" means a project agreement, supplemental agreement, intergovernmental agreement, or project contract between the office acting on behalf of the board, and a project sponsor.

"Project"))

"Project area" means the area consistent with the geographic limits of the scope of work of the project. For restoration projects, the project area must include the physical limits of the project's final site plans or final design plans. For acquisition projects, the project area must include the area described by the legal description of the properties acquired in the project.

"Regional recovery organization" or "regional salmon recovery organization" means an organization described in RCW 77.85.010(7).

"Reimbursement" means the payment of funds from the office to the sponsor for eligible and allowable project costs that have already been paid by the sponsor per the terms of an agreement.

"Restoration project" means to bring a site back to its historic function as part of a natural ecosystem or improving or enhancing the ecological functionality of a site.

"Salmon recovery region" means a geographic area as described in RCW 77.85.010(10).

"Sponsor" means an eligible applicant under RCW 77.85.010(6) who has been awarded a grant of funds((, and has a signed)) and is bound by an executed project agreement; includes its officers, employees, agents, and successors.

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-04-015 Address. All communications with the board, office, director and staff shall be directed to the recreation and conservation office at the Natural Resources Building, 1111 Washington Street S.E., P.O. Box 40917, Olympia, Washington 98504-0917. Telephone 360-902-3000, fax 360-902-3026, web site www.rco.wa.gov.

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-04-020 ((Organization and operations.)) Duties of the board. ((The board:

(1) Is an unsalaried body of ten members. Five members are citizens appointed by the governor from the public-at-large, with the consent of the senate, for a term of three years each. The other members are the:

(a) Commissioner of public lands;

(b) Director of the department of fish and wildlife;

(c) Director of the state conservation commission;

(d) Director of the department of ecology; and

(e) Secretary of transportation (or the designees of these individuals).

The five citizen members, including the chair, are voting members. The chair of the board is appointed by the governor from among the five citizen members.

(2) Is authorized and obligated to administer grant programs for salmon recovery, and related programs and policies.

(3) Performs and accomplishes work by a staff)) (1) The board was created by the legislature in the Salmon Recovery Funding Act of 1999 (section 3, chapter 13, Laws of 1999 special session) codified in RCW 77.85.110.

(2) Membership of the board is defined in RCW 77.85.110.

(3) The board is authorized to:

(a) Allocate and administer funds for salmon habitat projects and salmon recovery activities from amounts appropriated by the legislature as described in RCW 77.85.120;

(b) Develop procedures and criteria for allocation of funds for salmon habitat projects and salmon recovery activities on a statewide basis to address the highest priorities for salmon habitat protection and restoration as described in RCW 77.85.130(1);

(c) Adopt an annual allocation of funding as described in RCW 77.85.130(1);

(d) Establish a maximum amount of funding available for any individual project as described in RCW 77.85.130(1);

(e) Establish criteria for determining the award of grants for capacity funding as described in RCW 77.85.130(4);

(f) Give preference and consideration to projects as described in RCW 77.85.130(2);

(g) Require applicants to incorporate the environmental benefits of the project into their grant applications, and utilize the statement of environmental benefits in its prioritization and selection process as described in RCW 77.85.135;

(h) Adopt procedures for lead entities to submit habitat project lists as described in RCW 77.85.050, including establishing the submission deadlines;

(i) May reject, but not add, projects from a habitat project list submitted by a lead entity for funding as described in RCW 77.85.130(3);

(j) Develop appropriate outcome-focused performance measures to be used both for management and performance assessment of the grant program as described in RCW 77.85.135; and

(k) Provide the legislature with a list of the proposed projects and a list of the projects funded as described in RCW 77.85.140.

(4) The board does not own or operate any salmon recovery properties or facilities.

(5) The board is not a public hearings board and does not decide land use issues. To the extent possible, all project proposals should demonstrate adequate public notification and review and have the support of the public body applying for the grant or where the project is located.

(6) The office, under the supervision of the director appointed by the governor, performs and accomplishes work on behalf of the board.

((~~(4)~~)) (7) The board:

(a) Conducts regular meetings, pursuant to RCW 42.30.075, according to a schedule it adopts in an open public meeting((~~.~~));

(b) May conduct special meetings at any time, pursuant to RCW 42.30.080, if called by the chair((~~.~~));

(c) Maintains an official record of its meetings in a recorded audio format, unless written minutes are otherwise indicated for logistical reasons((~~.~~

~~(5)~~));

(d) Defines a quorum as three of its voting members, with a preference that at least two of the agency members shall also be present((~~.~~

~~(6)~~)); and

(e) Adopts parliamentary meeting procedure generally as described in *Robert's Rules of Order*. Only voting members may make motions or formal amendments, but agency members may request the chair for leave to present a proposal for board consideration.

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-04-030 ((~~Manuals and waivers—Guidance.~~)) Policies and procedures. (1) The board shall adopt ((~~one or more manuals that describe its general administrative policies, for use by grant applicants, potential applicants, project sponsors, and others. The board shall inform all applicants in any given grant cycle of the specific project application process and methods of review, including current evaluation tests and instruments, by explaining these items in the manuals or other publicly available formats. Manuals may be adopted for each grant cycle, or for a topical issue, and shall contain a clear statement of the applicability of the policies outlined. The board also instructs the director to use applicable office administrative manuals for general guidance in the implementation of board grant contracts. These include manuals regarding land acquisition, conservation easements, funded projects, and reimbursement procedures.~~

~~(2) Board policies, including those referenced in the manuals, shall be considered and approved by the board in an open public meeting. Notice of such considerations will be given by distribution of the agenda for the meeting, press releases, meeting notice in the *Washington State Register*, or other means.~~

~~(3) Project~~)) plans, policies, and procedures per the duties of the board as described in WAC 420-04-020. Board policies shall be considered and approved by the board in an open public meeting. Notice of such considerations will be given by distribution of the agenda for the meeting, press releases, formal meeting notice in the *Washington State Register*, or other such means as appropriate.

(2) The director shall approve procedures per the duties of the director in WAC 420-04-060 (1)(c).

(3) The office shall publish the policies and the procedures and make them available to applicants, sponsors, and other interested parties.

(4) Applicants, ((~~project~~)) sponsors, or other interested parties may petition the director for a waiver or waivers of those items ((~~within the manuals~~)) dealing with ((~~general~~)) administrative ((~~matters and~~)) procedures. The director may refer any petition on an administrative procedure to the board for determination. Determinations on petitions for such waivers made by the director are subject to review by the board at the request of the petitioner.

((~~(4)~~)) (5) Applicants, sponsors, or other interested parties may petition the board for a waiver or waivers of those items dealing with policy and procedures. Petitions for waivers of subjects regarding board policy((~~, and~~)) and procedures, those petitions ((~~that in the judgment of~~)) referred by the director ((~~require~~)) to the board ((~~review~~)), and determinations made in subsection (4) of this section at the request of a petitioner, shall be ((~~referred to~~)) considered by the board ((~~for deliberation. Policy waivers may be granted after consideration by the board~~)) at an open public meeting.

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-04-060 ((~~Delegated~~)) Director's authority. (1) Consistent with RCW 79A.25.240 and other applicable laws, the director is delegated the authority and responsibility to carry out policies and administrative functions of the board. This includes, but is not limited to, the authority to:

((~~(1) Administer board programs;~~

~~(2)~~)) (a) Provide staff support to the board as described in RCW 77.85.110;

(b) Provide all necessary grants and loans administration assistance to the board, and distribute funds as provided by the board in RCW 77.85.130 as described in RCW 77.85.120;

(c) Approve all procedures, except the procedures for lead entities to submit habitat project lists described in WAC

420-04-020 (3)(h), to implement the board's policies and general grant administration;

(d) Enter into contracts and agreements with applicants upon approval of the board;

(e) Administer all applicable rules, regulations and requirements established by the board or reflected in the laws of the state;

(((~~(3)~~))) (f) Implement board decisions; ((~~and~~

~~(4)~~)) (g) Approve certain waiver requests ((~~or other administrative matters~~)) as described in WAC 420-04-030 and certain amendments to project agreements as determined by board policy;

(h) Appoint such technical and other committees as may be necessary to carry out the purposes of this chapter; and

(i) Approve the contents, requirements and format for receiving grant applications.

(2) The director may waive the board's administrative rules or policies only after the board has delegated such authority in an open public meeting.

(3) Consistent with chapter 77.85 RCW and other applicable laws, the director has authority and responsibility to carry out actions to support salmon recovery. This includes, but is not limited to, the authority to:

(a) Administer funding to support the functions of lead entities as described in RCW 77.85.050;

(b) Provide administrative support to the governor's salmon recovery office as described in RCW 77.85.030;

(c) Track all funds allocated for salmon habitat projects and salmon recovery activities on behalf of the board, including both funds allocated by the board and funds allocated by other state or federal agencies for salmon recovery or water quality improvement as described in RCW 77.85.140;

(d) Produce a biennial report on the statewide status of salmon recovery and watershed health, summarize projects and programs funded by the salmon recovery funding board, and summarize progress as measured by high-level indicators and state agency compliance with applicable protocols established by the forum for monitoring salmon recovery and watershed health as described in RCW 77.85.020; and

(e) Administer other programs related to salmon recovery as delegated by the legislature, governor, or through interagency agreements with other state agencies.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-070 Compliance with the State Environmental Policy Act ((~~guidelines~~)) and other laws. (1) The ((~~board finds that, pursuant to RCW 43.21C.0382, all of its~~)) board's and office's activities and programs are exempt from threshold determinations and environmental impact statement requirements under the provisions of WAC 197-11-875.

(2) To the extent applicable, it is the responsibility of ((~~applicants and project~~)) sponsors to comply with the provisions of chapter ((~~43.21C RCW~~)) 197-11 WAC, the State Environmental Policy Act rules((~~, the National Environmental Protection Act, and to obtain associated land use and regulatory permits and reviews~~)) and comply with all applicable federal, state, and local laws and regulations regardless of whether the sponsor is a public or private organization.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-080 Petitions for declaratory order((~~— Petition requisites — Consideration — Disposition~~)) of a rule, order, or statute. (1) Any person may submit a petition for a declaratory order pursuant to RCW 34.05.240 in any written form so long as it:

(a) Clearly states the question the declaratory order is to answer; and

(b) Provides a statement of the facts which raise the question.

(2) The director may conduct an independent investigation in order to fully develop the relevant facts.

(3) The director ((~~shall~~)) will present the petition to the board at the first meeting when it is practical to do so and will provide the petitioner with at least five days notice of the time and place of such meeting. Such notice may be waived by the petitioner.

(4) The petitioner may present additional material and/or argument at any time prior to the issuance of the declaratory order.

(5) ((~~The board may issue either a binding or a nonbinding order or decline to issue any order.~~

~~(6)~~)) The board may decide that a public hearing would assist its deliberations and decisions. If such a hearing is ordered, it will be placed on the agenda of a meeting and at least five days notice of such meeting shall be provided to the petitioner.

(((~~(7) If an order is to be issued, the petitioner shall be provided a copy of the proposed order and invited to comment.~~

~~(8) The declaratory order cannot be a substitute for a compliance action and is intended to be prospective in effect.~~

~~(9) The board will decline to consider a petition for a declaratory or to issue an order when:~~

~~(a) The petition requests advice regarding a factual situation which has actually taken place; or~~

~~(b) When a pending investigation or compliance action involves a similar factual situation.~~))

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-085 Petitions for ((~~rule making~~)) adoption, amendment, or repeal((~~— Form — Consideration — Disposition~~)) of a rule. Any person may submit a petition requesting the adoption, amendment or repeal of any rule by the board, pursuant to RCW 34.05.330 and the uniform rules adopted by the office of financial management that are set forth in chapter 82-05 WAC.

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-04-100 Public records ((~~access~~)). (1) The board is committed to public access to its public records. All public records of the board, as defined in RCW 42.56.070 as

now or hereafter amended, are available for public inspection and copying pursuant to this regulation, except as otherwise provided by law((,)) including, but not limited to, RCW 42.56.050 and 42.56.210.

(2) The board's public records shall be available through the public records officer designated by the director. All access to the board's records ((access for board records)) shall be conducted in the same manner as ((records access for office records, including office location, hours, copy fee and request forms. The board adopts by reference the records access procedures of the office and charges the director to administer for access purposes the board's records in the same manner as records of the office are administered, pursuant to)) in chapter 286-06 WAC.

(3) ((Any person who objects to the denial of a request for a public record of the board may petition the director for review by submitting a written request. The request shall specifically refer to the written statement which constituted or accompanied the denial.

(4) After receiving a written request for review of a decision denying inspection of a public record, the director, or designee, will either affirm or reverse the denial by the end of the second business day following receipt according to RCW 42.56.520. This shall constitute final board action. Whenever possible in such matters, the director or designee shall consult with the board's chair and members.)) The office will include language in the project agreement that requires sponsors that are not subject to public disclosure requirements under chapter 42.56 RCW to disclose any information in regards to funding as if the sponsor were subject to chapter 42.56 RCW (RCW 77.85.130(8)).

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 420-04-040	Project selection.
WAC 420-04-050	Final decision.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-010 Scope of chapter. (1) This chapter contains general rules for grant program eligibility, applications, and projects funded with money from or through the board.

(2) The director may apply the rules in this chapter to programs administered by the office but which are not subject to the board's approval.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-020 Application ((~~form~~)) requirements and the evaluation process. (1) The board shall adopt a technical review and evaluation process to guide it in allocating funds to and among applicants. The board's technical review and evaluation process for applications and habitat project lists shall:

(a) Be developed, to a reasonable extent, through the participation of interested parties and specialists, and include best available science;

(b) Consider regional recovery plans goals, objectives, and strategies;

(c) Be adopted by the board in open public meetings;

(d) Be made available in published form to interested parties;

(e) Be designed for use by an independent state technical review panel or team of evaluators with relevant expertise when selected for this purpose; and

(f) Be in accord with RCW 77.85.130, 77.85.135, and 77.85.240 and other applicable statutes.

(2) The office shall administer the technical review and evaluation process adopted by the board and prepare funding options or recommendations for the director to present for the board's consideration.

(3) The office shall inform all applicants of the application requirements and the technical review and evaluation process. All grant requests must be completed and submitted to the office in the format ((~~and manner~~)) prescribed by the ((~~board~~)) director.

(((~~(2)~~))) If the director determines that the applicant is eligible to apply for federal funds administered by the board, the applicant must execute any additional forms necessary for that purpose.

(4) All applications for funding submitted to the office that meet the application requirements will be referred to the director for review and recommendations. In reaching a recommendation, the director shall seek the advice and counsel of the office's staff and other recognized experts, including an independent state technical review panel or team of evaluators or from other parties with relevant experience.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-030 Grant program deadlines((~~— Applications and agreements~~)). (1) Applications((~~. To allow time for review, applications~~)) must be submitted by the ((~~announced~~)) due date approved by the board. Unless otherwise authorized by the board, the director and staff have no authority to extend the application filing deadlines. Excepted are applications for programs where the director specifically establishes another deadline to accomplish new or revised statutory direction, board direction, or to meet a federal grant application deadline.

(2) ((~~Project agreement.~~)) To prepare a project agreement, certain documents or materials in addition to the application may be required by the office. These documents or materials must be provided by the applicant to the office at least two calendar months after the date the board or director approves funding for the project or earlier to meet a federal grant program requirement. After this period, the board or director may rescind the offer of grant funds and reallocate the grant funds to another project(s).

(3) An applicant has three calendar months from the date ((~~of~~)) the ((~~board's mailing of~~)) office sends the project agreement ((~~document to execute~~)) to sign and return the agreement to the ((~~board's~~)) office. After this period, the board or

director may reject any agreement not ((~~completed,~~)) signed and returned, and ((~~may~~)) reallocate the grant funds to another project(s). ((~~The director may waive compliance with this deadline for good cause.~~))

(4) Compliance with the deadlines is required unless it is extended by the board or director. Such extensions are considered based on several factors which may vary with the type of extension requested, including any one or more of the following:

(a) Current status and progress made to meet the deadline;

(b) The reason the established deadline could not be met;

(c) When the deadline will be met;

(d) Impact on the board's evaluation process;

(e) Equity to other applicants; and

(f) Such other information as may be relevant.

AMENDATORY SECTION (Amending WSR 14-13-071, filed 6/13/14, effective 7/14/14)

WAC 420-12-040 Eligible matching resources. (1) Applicant resources used to match board funds ((~~may include: Cash, certain federal funds, the value of privately owned donated real estate, equipment, equipment use, materials, labor, or any combination thereof. The specific eligible matches for any given grant cycle shall be detailed in the published manual. The director shall require documentation of values.~~)) must be eligible in the grant program. Sources of matching resources include, but are not limited to, any one or more of the following:

(a) Appropriations and cash;

(b) Value of the applicant's expenses for labor, materials, and equipment;

(c) Value of donated real property, labor, services, materials, and equipment use; and

(d) Grant funds.

(2) Agencies and organizations may match board funds with other state funds, including recreation and conservation funding board funds, so long as the other state funds are not administered by the board and if otherwise allowed by state law. For the purposes of this subsection, grants issued by other agencies under the Jobs for Environment program and the Forests & Fish program are not considered to be administered by the board.

(3) ((~~Private donated real property, or the value of that property, must consist of real property (land and facilities) that would otherwise qualify for board grant funding.~~

~~(4)~~)) The eligibility of federal funds to be used as a match is governed by federal requirements and thus may vary with individual proposals and grant cycles.

NEW SECTION

WAC 420-12-045 Final decision. (1) The board shall review recommendations from the director for grant awards at regularly scheduled open public meetings.

(2) The board retains the authority and responsibility to accept or deviate from the director's recommendations and make the final decision concerning the funding of an application or change to a funded project. Unless otherwise required by law, the board's decision is the final decision.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-050 Project agreement. (1) For every funded project, an agreement shall be executed within the deadlines in WAC 420-12-030 and as provided in this section.

((~~(1)~~)) (2) The project agreement shall be prepared by the ((~~director~~)) office after approval of the project by the board at a public meeting. ((~~The director shall execute the agreement on behalf of the board and submit the document to the applicant. After the applicant signs the agreement, the applicant becomes and is referred to as the project sponsor.~~)) The project agreement is executed upon the signature of the office and the applicant and the parties are then bound by the agreement's terms. The applicant shall not proceed ((~~with~~)) until the project ((~~until the~~)) agreement has been ((~~signed and the project start date listed in the agreement has arrived~~)) executed, unless ((~~the applicant has received~~)) specific authorization pursuant to WAC 420-12-070 has been given by the director.

((~~(2)~~)) (3) If the project is approved by the board to receive a grant from federal funds, the director shall not execute an agreement or amendment with the applicant until federal funding has been authorized through execution of ((~~a concurrent project~~)) an agreement with the applicable federal agency((~~, if and as necessary~~)).

AMENDATORY SECTION (Amending WSR 02-05-050, filed 2/15/02, effective 3/18/02)

WAC 420-12-060 Disbursement of funds. (1) Except as otherwise provided in this ((~~rule~~)) chapter, the ((~~director~~)) office will authorize disbursement of project funds only on a reimbursable basis((~~,~~)) at the percentage identified in the project agreement after the ((~~project~~)) sponsor has ((~~spent its own funds and has~~)) presented ((~~a billing showing satisfactory evidence of property rights acquired and/or~~)) an invoice documenting costs incurred and compliance with ((~~partial or all~~)) the provisions of the project agreement.

(((~~(1) Reimbursement method. Reimbursement shall be requested on voucher forms authorized by the director. Requests must include all documentation as detailed in the manual in effect at the time reimbursement is requested.~~

~~(2) Reimbursement level.~~)) (2) The amount of reimbursement may never exceed the cash spent on the project by the sponsor.

(3) ((~~Partial payment. Partial reimbursements may be made during the course of a project on presentation of billings showing satisfactory evidence of partial acquisition or development by the project sponsor. The director may require written assurance that full project completion is scheduled by a specific date. In the event of appropriation reductions or terminations, the project agreement shall allow the board to suspend or terminate future obligations and payments.~~)) Reimbursement shall not be approved for any donations, including donated real property.

(4) ((~~Direct payment.~~)) Direct payment to an escrow account of the ((~~board's~~)) office's share of the approved cost of real property and related costs may be made following ((~~board~~)) office approval ((~~of an acquisition project~~)) when

the ((~~project~~)) sponsor indicates a temporary lack of funds to purchase the property on a reimbursement basis. Prior to release of the ((~~board's share of escrow funds, the project~~)) office's share into escrow, the sponsor must provide the ((~~director~~)) office with a copy of a binding ((~~sale~~)) agreement between the ((~~project~~)) sponsor and the seller, all required documentation, and evidence of deposit of the ((~~project~~)) sponsor's share ((~~(if any)~~)), identified in the project agreement, into an escrow account.

(5) Advance payments may be made in limited circumstances only, pursuant to the policy outlined in the adopted reimbursement manual.

(6) ((~~Payment deadline.~~)) As required by RCW 77.85.-140, sponsors who complete salmon habitat projects approved for funding from habitat project lists will be paid by the board within thirty days of project completion. This means the board will issue a reimbursement within thirty days of the sponsor's completion of the billing requirements described in the board's reimbursement policy manual.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-070 Retroactive ((~~expenses~~)), preagreement, and increased costs. ((~~The definitions in WAC 420-04-010 apply to this section.~~

~~(1) The board shall not reimburse expenses for activities undertaken, work performed or funds expended before the date on which the agreement was signed. This policy is referred to as the board's prohibition on retroactivity. The only exceptions are as outlined in the adopted reimbursement manual, for certain preliminary expenses.~~

~~(2) If such exceptions do not apply, a waiver may be issued to avoid the prohibition on retroactivity only under the following circumstances, for retroactive land acquisition cost reimbursements:~~)) (1) Unless otherwise provided in this chapter, the office shall not approve the disbursement of funds for costs incurred before execution of a project agreement.

(2) The office will only reimburse costs that occur within the period of performance in the project agreement.

(3) The director may grant a waiver of retroactivity ((~~when~~)) for acquiring real property whenever an applicant ((~~documents~~)) asserts, in writing, ((~~that a condition exists which may jeopardize the project~~)) the justification for the critical need to purchase the property in advance of the project agreement along with any documentation required by the director. When evidence warrants, the director may grant the applicant permission to proceed prior ((~~to the signing of an agreement~~)) by issuing ((~~the~~)) a written waiver. This waiver of retroactivity ((~~shall~~)) will not be construed as an approval of the proposed project. If the project is subsequently approved ((~~for board funding, the expenditures described in the waiver incurred shall be eligible for assistance if they otherwise satisfy the reimbursement requirements under WAC 420-12-060.~~

~~(3) Cost increases. The board shall reimburse only for allowable expenses under WAC 420-12-070. If costs increase after the agreement is signed, a project sponsor is solely responsible, unless the adopted manual for the relevant grant cycle specifically establishes a cost-increase method for that cycle.~~)), however, the costs incurred will be eligible for grant funding. If the project is to remain eligible for funding from federal funds, the director shall not authorize a waiver of retroactivity to the applicant until the federal agency administering the federal funds has issued its own waiver of retroactivity as provided under its rules and regulations. A waiver may be issued for more than one grant program.

(4) The only retroactive acquisition, development, and restoration costs eligible for grant funding are preagreement costs as defined by the board.

(5) Cost increases for approved projects may be granted by the board or director if financial resources are available.

(a) Each cost increase request will be considered on its merits.

(b) The director may approve a cost increase delegated by the board. The director's approval of an acquisition project cost increase is limited to a parcel-by-parcel appraised and reviewed value.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-075 Nonconformance and repayment. ((~~In the event any project sponsor's expenditure of board grant moneys is determined~~)) Any project cost deemed by the board or director to conflict with applicable statutes, rules and/or related manuals, or the project agreement, ((~~the board reserves the right to demand repayment~~)) must be repaid, upon written request by the director, to the appropriate state account((~~, by written notice from the director to the project sponsor~~)) per the terms of the project agreement. Such repayment requests may be made ((~~following~~)) in consideration of an applicable report from the state auditor's office.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-080 Acquisition project((~~s—Deed of right, conversions, leases and easements~~)) long-term obligations. (1) Without prior approval of the board, the project area of a facility or property acquired with money granted by the board shall not be converted to a use other than that for which funds were originally approved. The board shall only approve such a conversion under conditions which assure the substitution of other land that is eligible for grant funding and of at least equal fair market value at the time of conversion, and of as nearly feasible equivalent usefulness and location.

(2) For acquisition projects of perpetual interest in real property, sponsors must execute a binding instrument(s) ((~~or instruments~~)) which contains((~~:~~

~~(1) For fee, less-than-fee, and easement acquisition projects~~)) the following provisions:

(a) A legal description of the property acquired with grant funds which defines the project area;

(b) A conveyance to the state of Washington of the right to use the described real property forever for the designated salmon habitat protection purposes; and

(c) A restriction on conversion of use of the land.

((~~Without prior approval of the board, a facility or property acquired with money granted by the board shall not be~~

~~converted to a use other than that for which funds were originally approved. The board shall only approve such a conversion under conditions which assure the substitution of other land of at least equal fair market value at the time of conversion, and of as nearly feasible equivalent usefulness and location.~~

~~(2) For lease acquisition projects,~~)) (3) For acquisition of nonperpetual interests in real property, except for leases, sponsors must execute a binding instrument(s) which contains the following provisions:

(a) A legal description of the property acquired which defines the project area;

(b) A conveyance to the state of Washington of the right to use the described real property for the term of the nonperpetual interest for the designated salmon habitat protection purposes; and

(c) A restriction on conversion of use of the land.

(4) For acquisition of lease interests, sponsors must execute a binding ((~~agreement~~)) instrument(s) which contains a legal description of the ((~~property~~)) project area and rights acquired ((~~and~~)) which ((~~meets the following criteria. The interest~~)):

(a) Must be for at least fifty years unless precluded by state law;

(b) May not be revocable at will;

(c) Must have a value supported through standard appraisal techniques;

(d) Must be paid for in lump sum at initiation; and

(e) May not be converted, during the lease period, to a use other than that for which funds were originally approved, without prior approval of the board.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-085 ((~~Development~~)) Restoration projects—Conversion to other uses. (1) Without prior approval of the board, a facility or ((~~site aided or developed~~)) project area restored with money granted by the board, shall not be converted to a use other than that for which funds were originally approved.

(2) The board shall only approve such a conversion under conditions which assure that:

(a) All practical alternatives to the conversion have been evaluated and rejected on a sound basis;

(b) A new restoration project or facility will be provided to serve as a replacement which:

(i) Is of reasonably equivalent habitat utility and location;

(ii) Will be administered under similar stewardship methods as the converted development;

(iii) Will satisfy need(s) identified in the project sponsor's watershed strategy or plan; and

(iv) Includes only elements eligible under the board's program from which funds were originally allocated.

(3) The board may condition any conversion approval as needed to protect the public habit investment.

WSR 16-07-086
PERMANENT RULES
DEPARTMENT OF HEALTH

[Filed March 17, 2016, 4:04 p.m., effective March 18, 2016]

Effective Date of Rule: March 18, 2016.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: Immediate adoption is necessary to meet the intent of several sections of 2SSB 5052 (chapter 70, Laws of 2015). Beginning July 1, 2016, 2SSB 5052 requires medical marijuana patients to purchase products only from licensed retail stores with a medical endorsement. Those stores are required to employ at least one medical marijuana consultant. Only consultants can enter patients into the patient authorization database created by 2SSB 5052. Consultant applicants must complete approved training and apply to the department for certification. Delaying implementation of these rules will result in insufficient time for applicants to complete approved training, and apply for and receive certification before July 1, 2016.

Purpose: Chapter 246-72 WAC, the department is adopting new rules to establish requirements for a certificate for medical marijuana consultants as required by RCW 69.51A.290. The rules create standards for people that can work in medically endorsed marijuana retail stores to provide assistance to patients with selecting products to best meet their needs. The rules include establishing fees, training, renewals, and other requirements for this certificate.

Statutory Authority for Adoption: RCW 69.51A.290.

Adopted under notice filed as WSR 16-01-149 on December 21, 2015.

Changes Other than Editing from Proposed to Adopted Version: Language was added to: (1) Allow nurses with a bachelor's degree in nursing and a Washington state registered nurse license to be a medical marijuana consultant program instructor, (2) clarify that instructors have demonstrated knowledge of the subject matter they teach, and (3) adjust hours of instruction required for specific topic areas while keeping the total required hours at ten.

A final cost-benefit analysis is available by contacting Cathie Tedrick, P.O. Box 47852, Olympia, WA 98504-7852, phone (360) 236-4819, fax (360) 236-2901, e-mail medicalmarijuana@doh.wa.gov.

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 15, Amended 0, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 15, Amended 0, Repealed 0.

Date Adopted: March 17, 2016.

John Wiesman, DrPH, MPH
Secretary

Chapter 246-72 WAC

MEDICAL MARIJUANA CONSULTANT CERTIFICATE

NEW SECTION

WAC 246-72-010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Approved training program" means a school, college, or program approved by the secretary that meets the requirements of this chapter.

(2) "Certificate holder" means a person holding a valid medical marijuana consultant certificate issued by the secretary.

(3) "Customer" means any patron of a retail outlet licensed under RCW 69.50.354 and holding a medical endorsement under RCW 69.50.375.

(4) "Department" means the Washington state department of health.

(5) "Marijuana product" means marijuana, marijuana concentrates, usable marijuana, and marijuana-infused products as defined in RCW 69.50.101.

(6) "Secretary" means the secretary of the department of health or the secretary's designee.

NEW SECTION

WAC 246-72-020 Certificate requirements. An applicant for a medical marijuana consultant certificate must submit to the department:

(1) An initial application on forms provided by the department;

(2) Fees required under WAC 246-72-110;

(3) Proof of successful completion of an approved training program;

(4) Proof of being age twenty-one or older. Acceptable forms of proof are a copy of the applicant's valid driver's license or other government-issued identification card, United States passport, or certified birth certificate;

(5) Proof of current CPR certification; and

(6) Any other documentation required by the secretary.

NEW SECTION

WAC 246-72-030 Practice parameters. (1) A certificate holder may only provide services when acting in the capacity of an owner, employee, or volunteer of a retail outlet licensed under RCW 69.50.354 and holding a medical endorsement under RCW 69.50.375.

(2) A certificate holder may:

(a) Assist a customer with the selection of marijuana products and other items sold at the retail outlet that may benefit the customer's medical condition;

(b) Describe the risks and benefits of marijuana products and other items sold at the retail outlet;

(c) Describe the risks and benefits of methods of administration of marijuana products sold at the retail outlet. Whenever practicable, a certificate holder shall encourage methods of administration other than smoking;

(d) Advise a customer about the safe handling and storage of marijuana products, including strategies to reduce access by minors; and

(e) Provide instruction and demonstration to a customer about proper use and application of marijuana products. However, nothing in this section allows a certificate holder to:

(i) Provide free samples of a marijuana product to a customer except pursuant to RCW 69.50.375;

(ii) Open or allow a customer to open a marijuana product on the premises; or

(iii) Consume or allow a customer to consume a marijuana product on the premises.

(3) When discussing a marijuana product with a customer, a certificate holder shall refer to the product using the cannabinoid profile labeling required by the Washington state liquor and cannabis board in addition to the represented strain name.

(4) A certificate holder shall not:

(a) Offer or undertake to diagnose or cure any human or animal disease, ailment, injury, infirmity, deformity, pain, or other condition, physical or mental, real or imaginary, by use of marijuana products or any other means or instrumentality;

(b) Recommend or suggest modification or elimination of any course of treatment that does not involve the medical use of marijuana products;

(c) Solicit or accept any form of remuneration directly or indirectly, overtly or covertly, in cash or any other form in return for recommending a certain product, producer, processor, clinic, or health care practitioner;

(d) Provide medical marijuana consultant services in any capacity other than as an owner, employee, or volunteer of retail outlets licensed under RCW 69.50.354 and holding a medical endorsement under RCW 69.50.375; or

(e) Provide medical marijuana consultant services at any location other than at retail outlets licensed under RCW 69.50.354 and holding a medical endorsement under RCW 69.50.375 for which the certificate holder serves as an owner, employee, or volunteer.

NEW SECTION

WAC 246-72-040 Display of certificate. (1) A certificate holder shall conspicuously display his or her certificate in his or her principal place of business.

(2) A certificate holder who owns, is employed by, or volunteers at more than one business location shall conspicuously display a duplicate certificate or an unaltered photocopy of his or her certificate in each business location.

NEW SECTION

WAC 246-72-050 Cooperation with investigation. (1) The secretary will notify an applicant or credential holder upon receipt of a complaint, except when the notification

would impede an effective investigation. Upon request by the secretary, the applicant or credential holder shall submit a written statement about that complaint.

(2) An applicant or certificate holder must produce documents, records, or other items that are within his or her possession or control within twenty-one calendar days of service of a request by the secretary. If the twenty-one calendar day limit results in a hardship upon the applicant or credential holder, he or she may request, for good cause, an extension not to exceed thirty additional calendar days.

(3) Failure to submit a full and complete written statement explaining the matter contained in a complaint pursuant to subsection (1) of this section or to comply with a request made pursuant to subsection (2) of this section may result in action by the secretary to refuse the application or revoke or suspend the certificate.

NEW SECTION

WAC 246-72-060 Denial, suspension, and revocation of certificate. The secretary has the power to deny, suspend, or revoke a certificate upon proof that:

(1) The certificate was procured through fraud, misrepresentation, or deceit.

(2) The applicant or certificate holder has violated or has permitted any employee or volunteer to violate any of the laws or rules of this state relating to drugs or controlled substances or has been convicted of a felony.

(3) The applicant or certificate holder has violated or has permitted any employee or volunteer to violate any part of chapters 69.50, 69.51A RCW, and 314-55 WAC, or this chapter.

NEW SECTION

WAC 246-72-070 Denial, suspension, and revocation of certificate—Procedure. (1) The secretary will give written notice of the secretary's denial, suspension, or revocation of a certificate in accordance with RCW 43.70.115, chapters 34.05 RCW and 246-10 WAC.

(2) In any case of denial, suspension, or revocation of a certificate under the provisions of this chapter, the applicant or certificate holder has the right to an adjudicative proceeding and may file a request for an adjudicative proceeding consistent with chapter 246-10 WAC.

(3) A request for an adjudicative proceeding must be in writing, state the basis for contesting the adverse action, include a copy of the adverse notice and be served on and received by the department within twenty-eight days of the applicant's or certificate holder's receipt of the adverse notice. If a request for adjudicative proceeding is not received by the department within twenty-eight days of the date of the applicant's or certificate holder's receipt of the adverse notice, the secretary's decision is final.

NEW SECTION

WAC 246-72-080 Renewals and updating license information. (1) Certificates must be renewed every year on the certificate holder's birthday. Initial certificates issued within ninety days of the certificate holder's birthday do not expire until the person's next birthday.

(2) Renewals:

(a) Prior to the certificate expiration date, courtesy renewal notices are mailed to the address on file. Certificate holders must return the renewal notice when renewing their credential. Failure to receive a courtesy renewal notice does not relieve or exempt the renewal requirement.

(b) The certificate holder must attest to completion of annual certification requirements.

(c) Renewal fees are accepted by the department no sooner than ninety days prior to the expiration date.

(3) Duplicate certificate: A certificate holder may obtain a duplicate certificate by submitting a written request to the department and paying the fee as required in WAC 246-72-990.

(4) Name changes: It is the responsibility of each certificate holder to maintain his or her correct name on file with the department. Requests for name changes must be submitted in writing to the department along with documentation showing the name was legally changed.

(5) Address changes: It is the responsibility of each certificate holder to maintain his or her current address on file with the department. Requests for address changes may be made either by telephone or in writing. The mailing address on file with the department will be used for mailing of all official matters to the certificate holder.

NEW SECTION

WAC 246-72-090 Expired certificate. (1) A certificate holder may not practice at any time while his or her certificate is expired. The certificate is expired if the certificate holder does not renew on or before the expiration date. Any renewal that is postmarked or presented to the department after midnight on the expiration date is expired and is subject to a late renewal penalty fee.

(2) If the certificate has been expired for more than three months and less than three years, the certificate holder must:

(a) Complete a late renewal application form;

(b) Pay the renewal fee;

(c) Pay the late renewal penalty fee;

(d) Provide proof of successful completion of required continuing education under WAC 246-72-100;

(e) Provide proof of current CPR certification; and

(f) Provide any other documentation required by the secretary.

(3) If the certificate has been expired for three years or more, the certificate holder must:

(a) Complete a new application form;

(b) Pay the current application fee;

(c) Retake and provide proof of successful completion of an approved training program within the prior six months;

(d) Provide proof of current CPR certification; and

(e) Provide any other documentation required by the secretary.

NEW SECTION

WAC 246-72-100 Continuing education. (1) Certificate holders must complete a minimum of ten hours of continuing education each year in order to renew the certificate.

(2) Continuing education hours may be earned through seminars, lectures, workshops, and professional conferences. Continuing education credits may be earned through in-person or distance learning. Distance learning includes correspondence courses, webinars, audio/video broadcasting, audio/video teleconferencing e-learning, or web casts. Acceptable topics are:

(a) Washington state laws and rules relating to marijuana;

(b) Science-based information about marijuana;

(c) Addiction and substance abuse;

(d) Communication skills;

(e) Professional ethics and values.

(3) Continuing education topics may not include:

(a) Business and management courses;

(b) Health care training unrelated to marijuana; or

(c) Any topic unrelated to the practice parameters of a medical marijuana consultant.

(4) Continuing education hours will not be carried over from one reporting period to another.

(5) A certificate holder must provide acceptable documentation of completion of continuing education hours upon request of the secretary or an audit. Acceptable forms of documentation are:

(a) Transcripts;

(b) Certificate of completion; or

(c) Other formal documentation which includes:

(i) Participant's name;

(ii) Course title;

(iii) Course content;

(iv) Date(s) of course;

(v) Provider's name(s); and

(vi) Signature of the program sponsor or course instructor. Distance learning courses are exempt from the signature requirement.

(6) A certificate holder must verify compliance by submitting a signed declaration of compliance.

(7) Up to twenty-five percent of certificate holders are randomly audited for continuing education compliance after the credential is renewed. It is the certificate holder's responsibility to submit documentation of completed continuing education activities at the time of the audit. Failure to comply with the audit documentation request or failure to supply acceptable documentation within sixty days may result in suspension or revocation of the certificate.

(8) A certificate holder must maintain records of continuing education completion for at least four years.

NEW SECTION

WAC 246-72-110 Training program requirements. (1) Training programs must include:

(a) A minimum of twenty total instruction hours in the following subjects:

(i) Five hours about Washington state laws and rules relating to marijuana;

(ii) Two hours about qualifying conditions and the common symptoms of each;

(iii) Two hours about the short- and long-term positive and negative effects of cannabinoids;

(iv) Five hours about products that may benefit qualifying patients based on the patient's condition, any potential contraindications and the risks and benefits of various routes of administration;

(v) Two hours about safe handling of marijuana products, including strategies to reduce access by minors;

(vi) Two hours about ethics and customer privacy and rights; and

(vii) Two hours about the risks and warning signs of overuse, abuse and addiction.

(b) An examination comprised of at least five questions for each hour of instruction must be given for each subject. The applicant must pass the examination for each subject with a minimum score of seventy percent. Questions must be randomly selected from a sufficient supply of questions to ensure the validity of the examination. The secretary reserves the right to approve or deny individual questions and answers.

(2) Training may be provided in-person or electronically. If the training is provided electronically, students must have real-time access to the instructor during at least half of the instruction hours for each subject.

(3) Instructors must have demonstrated knowledge and experience related to marijuana and to the subject matter, and hold:

(a) An active license to practice as a health care professional as defined in RCW 69.51A.010(5);

(b) An active license to practice law in the state of Washington;

(c) A bachelor's degree or higher from an accredited college or university in agriculture, botany, or horticulture; or

(d) A bachelor's degree or higher in nursing and an active license to practice as a registered nurse under chapter 18.79 RCW.

NEW SECTION

WAC 246-72-120 Approval of training program. The secretary will consider for approval any training program which meets the requirements as outlined in this chapter.

(1) The authorized representative of the training program shall request approval on a form provided by the department.

(2) The application for approval of a training program must include, but is not limited to, documentation required by the secretary pertaining to:

(a) Syllabus;

(b) Identification and qualifications of instructors;

(c) Training locations and facilities;

(d) Outline of curriculum plan specifying all subjects, and the length in hours each subject is taught;

(e) Class objectives;

(f) Whether the training will be provided in-person or electronically;

(g) Methods of evaluating the course and instructors by the training program and training participants; and

(h) Policies and procedures for maintaining training and testing records.

(3) Any training program that is required to be licensed by private vocational education under chapter 28C.10 RCW or Title 28B RCW, or any other statute, must complete these requirements before being considered by the secretary for approval.

(4) The secretary will evaluate the application and may conduct a site inspection of the training program prior to granting approval.

(5) Upon the evaluation of a complete application, the secretary will grant or deny approval.

(6) If the secretary notifies the training program of the secretary's intent to deny an application, the training program, through its authorized representative, may request an adjudicative proceeding. A request for an adjudicative proceeding must be in writing, state the basis for contesting the adverse action, include a copy of the adverse notice and be served on and received by the department within twenty-eight days of the applicant's receipt of the adverse notice. The authorized representative of the training program may submit a new application for the secretary's consideration.

(7) Training and testing records must be kept for a minimum of three years. The secretary may audit the records at any time.

(8) The authorized representative of an approved training program shall notify the secretary in writing of all changes with respect to information provided in the application, including changes in instructors, within thirty days of such changes.

(9) The secretary may inspect or review an approved training program at reasonable intervals for compliance or to investigate a complaint. The secretary may withdraw approval if the secretary finds failure to comply with the requirements of statute, administrative rules, or representations in the application.

(10) If the secretary notifies an approved training program of the secretary's intent to revoke approval, the training program, through its authorized representative, may request an adjudicative proceeding. A request for an adjudicative proceeding must be in writing, state the basis for contesting the adverse action, include a copy of the adverse notice and be served on and received by the department within twenty-eight days of the applicant's or license holder's receipt of the adverse notice. If a request for adjudicative proceeding is not received by the department within twenty-eight days of the date of the training program's receipt of the adverse notice, the secretary's decision is final. The authorized representative of the training program must provide proof that the deficiencies which resulted in withdrawal of the secretary's approval have been corrected before requesting reapproval. Training programs seeking reapproval shall follow the requirements outlined in this section.

NEW SECTION

WAC 246-72-130 Renewal of training program. Training programs approved under this chapter must:

(1) Participate in the renewal process established by the department every two years. Failure to renew will result in automatic withdrawal of approval of the program; and

(2) Comply with any changes to this chapter or training standards and guidelines in order to maintain an approved status.

NEW SECTION

WAC 246-72-140 Closure of an approved training program. When a training program approved under this chapter closes, it shall notify the department in writing, stating the reason and the date of intended closing.

NEW SECTION

WAC 246-72-990 Certificate fees. (1) The following nonrefundable fees will be charged for certificates:

Title of Fee	Fee
Application for certificate	$95.00
Renewal of certificate	$90.00
Late renewal penalty	$50.00
Expired certificate reissuance	$50.00
Duplicate certificate	$10.00
Verification of credential	$15.00

(2) Refund of fees: Fees submitted with applications for initial certificates, renewal, and other fees are nonrefundable.

WSR 16-07-087
PERMANENT RULES
DEPARTMENT OF HEALTH

[Filed March 17, 2016, 4:37 p.m., effective July 1, 2016]

Effective Date of Rule: July 1, 2016.

Purpose: WAC 246-828-990 Hearing aid specialist, audiologist, speech-language pathologist, and speech-language pathology assistant fees and renewal cycle, the adopted rule reduces application, active license renewal, and active license late renewal penalties. It also makes formatting changes to make it easier for licensees to identify which fees they will be required to pay.

Citation of Existing Rules Affected by this Order: Amending WAC 246-828-990.

Statutory Authority for Adoption: RCW 43.70.250 and 43.70.280.

Adopted under notice filed as WSR 16-01-146 on December 21, 2015.

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 1, Repealed 0.

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

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

Date Adopted: February 15, 2016.

Dennis E. Worsham
Deputy Secretary
for John Wiesman, DrPH, MPH
Secretary

AMENDATORY SECTION (Amending WSR 15-16-020, filed 7/24/15, effective 8/24/15)

WAC 246-828-990 Hearing aid specialist, audiologist, speech-language pathologist, and speech-language pathology assistant fees and renewal cycle. (1) Credentials must be renewed every year on the practitioner's birthday as provided in chapter 246-12 WAC, Part 2.

(2) Practitioners must pay the following nonrefundable fees:

Audiologist or Speech-Language Pathologist

Fee Type:	Fee
Interim permit	
Application	$165.00
Permit	140.00
Initial license	
Application	((~~165.00~~)) 110.00
License	((~~140.00~~)) 95.00
HEAL-WA* surcharge	16.00
((~~Renewal~~	~~110.00~~
~~HEAL-WA* surcharge~~	~~16.00~~
~~Inactive license~~	~~60.00~~
~~Late renewal penalty~~	~~90.00~~
~~Expired license reissuance~~	~~140.00~~
~~Expired inactive license reissuance~~	~~90.00~~
~~Certification of license~~	~~30.00~~
~~Duplicate license~~	~~30.00~~))
Active license renewal	
Renewal	75.00
Late renewal penalty	50.00
HEAL-WA* surcharge	16.00
Expired license reissuance	140.00

Audiologist or Speech-Language Pathologist

Fee Type:	Fee
Inactive license	
Renewal	60.00
Expired license reissuance	90.00
Verification of license	30.00
Duplicate license	30.00

* Surcharge applies to speech-language pathologists only. HEAL-WA is the health resources for Washington online library. See RCW 43.70.110.

Hearing Aid Specialist

Fee Type:	Fee
((~~License application~~	~~$165.00~~
~~Initial license~~	~~140.00~~
~~Renewal~~	~~110.00~~
~~Inactive license~~	~~56.00~~
~~Late renewal penalty~~	~~90.00~~
~~Expired license reissuance~~	~~136.00~~
~~Expired inactive license reissuance~~	~~86.00~~
~~Certification of license~~	~~30.00~~
~~Duplicate license~~	~~30.00~~))
Initial license	
Application	$110.00
License	95.00
Active license renewal	
Renewal	75.00
Late renewal penalty	50.00
Expired license reissuance	136.00
Inactive license renewal	
Renewal	56.00
Expired license reissuance	86.00
Verification of license	30.00
Duplicate license	30.00

Speech-Language Pathology Assistant

Fee Type:	Fee
((~~Application~~	~~$125.00~~
~~Renewal~~	~~70.00~~
~~Inactive credential~~	~~50.00~~
~~Late renewal penalty~~	~~50.00~~
~~Expired credential reissuance~~	~~50.00~~
~~Expired inactive credential reissuance~~	~~50.00~~
~~Certification of credential~~	~~15.00~~
~~Duplicate credential~~	~~15.00~~))

Speech-Language Pathology Assistant	
Fee Type:	**Fee**
Initial credential	
Application	$85.00
Active credential renewal	
Renewal	45.00
Late renewal penalty	45.00
Expired credential reissuance	50.00
Inactive credential renewal	
Renewal	50.00
Expired credential reissuance	50.00
Verification of credential	15.00
Duplicate credential	15.00

WSR 16-07-094
PERMANENT RULES
DEPARTMENT OF HEALTH

[Filed March 18, 2016, 10:10 a.m., effective April 18, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The purpose of the rule making is to equitably assess the costs of commercial geoduck paralytic shellfish poison (PSP) testing. The cost assessment will follow the annual redistribution formula which is based on the number of tests done in the previous year. The testing is essential to public health as it is the only way to determine if dangerous levels of PSP exist in commercial geoduck and ensure toxic shellfish do not reach consumers.

Citation of Existing Rules Affected by this Order: Amending WAC 246-282-990.

Statutory Authority for Adoption: RCW 43.70.250.

Other Authority: RCW 60.30.005.

Adopted under notice filed as WSR 16-04-041 on January 27, 2016.

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 1, Repealed 0.

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

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

Date Adopted: March 9, 2016.

Clark Halvorson
Assistant Secretary

AMENDATORY SECTION (Amending WSR 16-01-041, filed 12/9/15, effective 1/9/16)

WAC 246-282-990 Fees. (1) The required annual shellfish operation license fees for shellstock shippers and shucker-packers due October 1, 2011, shall be reduced by twenty-five percent of the annual shellfish operation license fees in subsection (2) of this section. Beginning July 1, 2012, and for every subsequent year, the full annual shellfish operation license fees in subsection (2) of this section shall be assessed.

(2) Annual shellfish operation license fees are:

Type of Operation	Annual Fee
Harvester	$263
Shellstock Shipper	
0 - 49 Acres	$297
50 or greater Acres	$476
Scallop Shellstock Shipper	$297
Shucker-Packer	
Plants with floor space < 2000 sq. ft.	$542
Plants with floor space 2000 sq. ft. to 5000 sq. ft.	$656
Plants with floor space > 5000 sq. ft.	$1,210

(3) The fee for each export certificate is $55.00.

(4) Annual biotoxin testing fees for companies harvesting species other than geoduck intertidally (between the extremes of high and low tide) are as follows:

Fee Category Type of Operation	Number of Harvest Sites	Fee
Harvester	≤ 2	$353
Harvester	3 or more	$535
Shellstock Shipper Wholesale Company		$198
Shellstock Shipper 0 - 49 acres	≤ 2	$393
Shellstock Shipper 0 - 49 acres	3 or more	$610
Shellstock Shipper 50 or greater acres	N/A	$961
Shucker-Packer (plants < 2000 ft²)	≤ 2	$752
Shucker-Packer (plants < 2000 ft²)	3 or more	$1,076
Shucker-Packer (plants 2000 - 5000 ft²)	≤ 2	$882

Fee Category

Type of Operation	Number of Harvest Sites	Fee
Shucker-Packer (plants 2000 - 5000 ft²)	3 or more	$1,297
Shucker-Packer (plants > 5000 ft²)	N/A	$2,412

(a) The number of harvest sites will be the total number of harvest sites on the licensed company's harvest site certificate:

(i) At the time of first licensure; or

(ii) January 1st of each year for companies licensed as harvesters; or

(iii) July 1st of each year for companies licensed as shellstock shippers and shucker packers.

(b) Two or more contiguous parcels with a total acreage of one acre or less is considered one harvest site.

(5) Annual PSP testing fees for companies harvesting geoduck are as follows:

Harvester	Fee
Baywater, Inc.	$655
Department of natural resources (quota tracts harvested by DNR contract holders)	$((~~10,670~~)) 11,305
Discovery Bay Shellfish	$((~~1,135~~)) 492
Jamestown S'Klallam Tribe	$((~~1,589~~)) 1,802
Lower Elwha Klallam Tribe	$((~~2,384~~)) 3,932
Lummi Nation	$((~~227~~)) 492
Nisqually Tribe	$((~~5,902~~)) 328
Port Gamble S'Klallam Tribe	$((~~1,362~~)) 1,802
Puyallup Tribe of Indians	$((~~8,286~~)) 7,537
Skokomish Indian Tribe	$((~~114~~)) 2,294
Squaxin Island Tribe	$((~~3,292~~)) 328
Suquamish Tribe	$((~~15,093~~)) 20,644
Swinomish Tribe	$((~~1,022~~)) 819
Tulalip Tribe	$((~~6,924~~)) 5,571

(6) Fees must be paid in full to department of health before a commercial shellfish license is issued or renewed.

(7) Refunds for fees will be given only if the applicant withdraws a new or renewal license application prior to the effective date of the new or renewed license.

WSR 16-07-095
PERMANENT RULES
PROFESSIONAL EDUCATOR STANDARDS BOARD

[Filed March 18, 2016, 10:20 a.m., effective April 18, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amends WAC 181-85-075, criteria for continuing and professional certificate renewal requirements related to TPEP training per RCW 28A.410.278.

Citation of Existing Rules Affected by this Order: Amending WAC 181-85-075.

Statutory Authority for Adoption: Chapter 28A.410 RCW, RCW 28A.410.278.

Adopted under notice filed as WSR 16-02-071 on January 4, 2016.

A final cost-benefit analysis is available by contacting David Brenna, 600 Washington Street South, Room 400, Olympia, WA 98504-7236, phone (360) 725-6238, fax (360) 586-4548, e-mail david.brenna@k12.wa.us.

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 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: March 17, 2016.

David Brenna
Senior Policy Analyst

AMENDATORY SECTION (Amending WSR 14-24-060, filed 11/25/14, effective 12/26/14)

WAC 181-85-075 Continuing education requirement. Continuing education requirements are as follows:

(1) Each holder of a continuing certificate affected by this chapter shall be required to complete during a five-year period one hundred fifty continuing education credit hours, as defined in WAC 181-85-025 and 181-85-030, prior to the lapse date of the first issue of the continuing certificate and during each five-year period between subsequent lapse dates as calculated in WAC 181-85-100.

(2) Individuals holding a valid continuing certificate in subsection (1) of this section may choose to renew the certif-

icate via annual professional growth plans developed since the certificate was issued. Completion of four annual professional growth plans during each five-year period between subsequent lapse dates meets the requirement for renewal. Individuals completing fewer than four annual professional growth plans must complete the necessary continuing education credit hours needed to be the equivalent of one hundred fifty hours to meet the requirements of subsection (1) of this section. The professional growth plans must document formalized learning opportunities and professional development activities that relate to the standards and "career level" benchmarks defined in WAC 181-79A-207 for teachers, WAC 181-78A-540(1) for administrators, or WAC 181-78A-540(2) for educational staff associates. For educators holding multiple certificates in chapter 181-85 WAC or WAC 181-79A-251, a professional growth plan for teacher, administrator, or educational staff associate shall meet the requirement for all certificates held by an individual which is affected by this section. Each completed annual professional growth plan shall receive the equivalent of thirty continuing education credit hours.

Individuals may apply their focused evaluation professional growth activities of the evaluation system toward the professional growth plan for certificate renewal.

(3) Provided, That each holder of a continuing or a standard certificate affected by this chapter may present a copy of a valid certificate issued by the National Board for Professional Teaching Standards in lieu of the completion of the continuing education credit hours required by this chapter.

(4) Each holder of a continuing school psychologist certificate affected by this chapter may present a copy of a valid National Certified School Psychologist certificate issued by the National Association of School Psychologists in lieu of the completion of the continuing education credit hours required by this chapter.

(5) Beginning September 1, 2014, continuing education or professional growth plans for teachers at the elementary and secondary levels in STEM-related subjects must include a specific focus on the integration of science, mathematics, technology, and/or engineering instruction as per RCW 28A.410.2212. This renewal requirement applies to the following endorsement areas: Elementary education; early childhood education; middle level mathematics and science; secondary mathematics; secondary science; the designated sciences; and career and technical education. Certificates ((~~being renewed starting in 2019~~)) with a renewal date of June 30, 2019, and beyond must demonstrate completion of at least fifteen continuing education credit hours, or at least one goal from an annual professional growth plan with an emphasis on the integration of science, technology, engineering, and mathematics.

(6) Provided, as per RCW 28A.410.278(2) beginning September 1, 2016, in-service training, continuing education, or professional growth plans shall incorporate professional development on the revised teacher and principal evaluation systems under RCW 28A.405.100 as a requirement for renewal of continuing or professional level certificates. Certificates with a renewal date of June 30, 2019, and beyond for all teachers, principals, program administrators, and superintendents with continuing certificates must document completion of at least fifteen clock hours, or at least one goal from an annual professional growth plan, related to knowledge and competency of the teacher and principal evaluation criteria or system.

WSR 16-07-096
PERMANENT RULES
PROFESSIONAL EDUCATOR STANDARDS BOARD

[Filed March 18, 2016, 10:31 a.m., effective April 18, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amends WAC 181-77-031 and 181-77-041, to clarify science, technology, engineering, and mathematics renewal requirement language found in other WAC certification rules into specific career and technical education certificates.

Citation of Existing Rules Affected by this Order: Amending WAC 181-77-041.

Statutory Authority for Adoption: RCW 28A.410.210.

Adopted under notice filed as WSR 16-02-064 on January 4, 2016.

A final cost-benefit analysis is available by contacting David Brenna, 600 Washington Street South, Room 400, Olympia, WA 98504-7236, phone (360) 725-6238, fax (360) 586-4548, e-mail david.brenna@k12.wa.us.

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 1, Repealed 1.

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

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

Date Adopted: March 17, 2016.

David Brenna
Senior Policy Analyst

AMENDATORY SECTION (Amending WSR 08-16-004, filed 7/23/08, effective 8/23/08)

WAC 181-77-031 Requirements for candidates seeking career and technical education certification who have completed approved college/university programs in a career and technical education endorsement area. Candidates shall complete the following requirements in addition to those set forth in WAC 181-79A-150, 181-79A-155, 181-82-322, and chapter 181-78A WAC.

(1) Initial.

(a) Candidates for the initial certificate shall hold a baccalaureate degree from a regionally accredited college or university which includes a minimum of forty-five quarter hours of study in the specific career and technical education subject area for which certification is sought.

(b) Candidates for the initial certificate shall demonstrate competency in one or more of the specific endorsement areas of WAC 181-82-322.

(c) Candidates for the initial certificate shall complete a state approved career and technical education teacher training program through a regionally accredited college or university which shall include completion of student teaching in the relevant career and technical education subject area.

(d) Candidates for the initial certificate shall provide documentation of one year of paid occupational experience (two thousand hours) in the specific career and technical education field for which certification is sought. If all or part of the two thousand hours is more than six years old, candidates must complete an additional three hundred hours of recent (occurring in the last two years) occupational experience.

(e) In addition, candidates for initial certification in career choices or coordinator of worksite learning shall demonstrate competency in knowledge and skills described in WAC 181-77A-180.

(2) Initial renewal. Candidates for renewal of the initial certificate must complete three quarter hours of credit or thirty clock hours of career and technical education educator training in the subject area certified to teach since the initial certificate was issued or renewed.

(3) Continuing.

(a) Candidates for the continuing certificate shall have in addition to the requirements for the initial certificate at least nine quarter hours or ninety clock hours of career and technical education educator training in the career and technical education subject area to be certified completed subsequent to the conferral of the baccalaureate degree.

(b) Candidates for the continuing certificate shall provide as a condition for the issuance of a continuing certificate documentation of two years of teaching/coordination in the career and technical education subject area certified to teach with an authorized employer—i.e., school district(s) or skills center(s).

(4) Continuing certificate renewal. (((~~(a)~~))) Candidates for renewal of the continuing certificate shall complete since the previous continuing certificate was issued one of the following:

(((~~(i)~~))) (a) Six quarter hours or sixty clock hours of career and technical education educator training;

(((~~(ii)~~))) (b) Three quarter hours or thirty clock hours of career and technical education educator training and three quarter hours or thirty clock hours of technical education/upgrading;

(((~~(iii)~~))) (c) Three quarter hours or thirty clock hours of career and technical education educator training and three hundred hours of occupational experience;

(d) Provided, beginning September 1, 2014, continuing education or professional growth plans for teachers at the elementary and secondary levels in STEM-related subjects must include a specific focus on the integration of science, mathematics, technology, and engineering instruction as per RCW 28A.410.2212. This renewal requirement applies to career and technical education endorsements. Certificates with a renewal date of June 30, 2019, and beyond must demonstrate completion of at least fifteen continuing education credit hours, or at least one goal from an annual professional growth plan, with an emphasis on the integration of science, technology, engineering and mathematics.

AMENDATORY SECTION (Amending WSR 15-12-023, filed 5/26/15, effective 6/26/15)

WAC 181-77-041 Requirements for candidates seeking career and technical education certification on the basis of business and industry work experience. Candidates for certification who have not completed approved programs set forth in WAC 181-82-322 shall complete the following requirements in addition to those set forth in WAC 181-79A-150 (1) and (2) and 181-79A-155 (1) and (2).

(1) Initial.

(a) Candidates for the initial certificate shall provide documentation of paid occupational experience in the specific career and technical education subcategory for which certification is sought: Provided, That individuals seeking the initial certification for the sole purpose of instruction of American sign language who are deaf, hard of hearing per RCW 43.20A.720, or who's primary method of communication is American sign language, may have the requirements for interpreter experience waived by the certification office of the superintendent of public instruction.

(i) Three years (six thousand hours) is required.

(ii) One year (two thousand hours) must be within the past six years.

(iii) If all or part of the two thousand hours is more than six years old, an additional three hundred hours of recent (occurring in the last two years) occupational experience is required.

(iv) Individuals seeking this certification solely for teaching American sign language must also hold or earn the national interpreter certification, certified deaf interpreter certificate, the American sign language teachers association certificate, or meet the standard required of interpreters for the deaf per RCW 28A.410.271.

(b) Candidates for the initial certificate shall complete a professional educator standards board approved program under WAC 181-77A-029 in which they demonstrate competence in the general standards for all career and technical education teacher certificate candidates pursuant to WAC 181-77A-165, which include but are not limited to knowledge and skills in the following areas:

(i) General and specific safety;

(ii) Career and technical education teaching methods;

(iii) Occupational analysis;

(iv) Course organization and curriculum design;

(v) Philosophy of vocational education;

(vi) Personal student development and leadership techniques.

(c) Candidates for the initial certificate shall also demonstrate knowledge and skills in the following areas:

(i) School law;

(ii) Issues related to abuse as specified in WAC 181-77A-165(7).

(d) In addition, candidates for initial certification in career choices or coordinator of worksite learning shall demonstrate competency in knowledge and skills described in WAC 181-77A-180.

(2) Initial renewal. Candidates for renewal of the initial certificate must complete three quarter hours of credit or thirty clock hours of career and technical education educator training in the subject matter certified to teach since the initial certificate was issued or renewed.

(3) Continuing.

(a) Candidates for the continuing certificate shall have in addition to the requirements for the initial certificate at least nine quarter hours or ninety clock hours of career and technical education educator training in the career and technical education subject matter to be certified completed subsequent to the issuance of the initial certificate.

(b) Candidates for the continuing certificate shall provide as a condition for the issuance of a continuing certificate documentation of two years of teaching/coordination in the career and technical education subject matter certified to teach with an authorized employer-i.e., school district(s) or skills center(s).

(4) Continuing certificate renewal.

(a) Candidates for renewal of the continuing certificate shall complete since the previous continuing certificate was issued one of the following:

(i) Six quarter hours or sixty clock hours of career and technical education educator training;

(ii) Three quarter hours or thirty clock hours of career and technical education educator training and three quarter hours or thirty clock hours of technical education/upgrading;

(iii) Three quarter hours or thirty clock hours of career and technical education educator training and three hundred hours of occupational experience;

(iv) Provided, beginning September 1, 2014, continuing education or professional growth plans for teachers at the elementary and secondary levels in STEM-related subjects must include a specific focus on the integration of science, mathematics, technology, and engineering instruction as per RCW 28A.410.2212. This renewal requirement applies to career and technical education endorsements. Certificates with a renewal date of June 30, 2019, and beyond must demonstrate completion of at least fifteen continuing education credit hours, or at least one goal from an annual professional growth plan, with an emphasis on the integration of science, technology, engineering and mathematics.

(b) Beginning January 2018, renewal of continuing certificates under this section specifically for teaching American sign language will require the national interpreter certification, certified deaf interpreter certificate, the American sign language teachers association certificate, or meet the standard required of interpreters of the deaf per RCW 28A.410.-271.

WSR 16-07-103
PERMANENT RULES
PROFESSIONAL EDUCATOR STANDARDS BOARD

[Filed March 18, 2016, 12:13 p.m., effective April 18, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amends WAC 181-79A-251 and 181-79A-2510, criteria for continuing and professional certificate renewal requirements related to teacher principal evaluation program training per RCW 28A.410.278.

Citation of Existing Rules Affected by this Order: Amending WAC 181-79A-251 and 181-79A-2510.

Statutory Authority for Adoption: RCW 28A.410.210.

Adopted under notice filed as WSR 16-04-123 on February 2, 2016.

A final cost-benefit analysis is available by contacting David Brenna, 600 Washington Street South, Room 252, Olympia, WA 98504-7236, phone (360) 725-6238, fax (360) 586-4548, e-mail david.brenna@k12.wa.us.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 2, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 2, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: March 17, 2016.

David Brenna
Senior Policy Analyst

AMENDATORY SECTION (Amending WSR 15-20-059, filed 10/1/15, effective 11/1/15)

WAC 181-79A-251 Teacher residency and professional certification—Renewal and reinstatement. (1) Residency certificates shall be renewed under one of the following options:

(a) Individuals who hold, or have held, residency certificates have the following options for renewal past the first three-year certificate:

(i) Individuals who have attempted and failed the professional certificate assessment are eligible for a two-year renewal;

(ii) Individuals who have not been employed or employed less than full-time as a teacher during the dated, three-year residency certificate may receive a two-year renewal by submitting an affidavit to the certification office confirming that they will register and submit a uniform assessment portfolio or they will complete assessment for National Board for Professional Teaching Standards. Individ-

uals not employed as a teacher may permit their certificate to lapse until such time they register for the professional certificate assessment, or the National Board Certification;

(iii) Individuals whose three-year residency certificate has lapsed may receive a two-year renewal by submitting an affidavit to the certification office confirming that they will register and submit a uniform assessment portfolio for the professional certificate assessment or assessment for National Board for Professional Teaching Standards: Provided, That teachers holding certificates expiring in 2014, 2015, or 2016 who have completed the available sections for the National Board Teacher Certificate may receive an additional two-year renewal in 2016 or 2017 to complete the assessment.

(b) A residency certificate expires after the first renewal if the candidate has not registered for and submitted a portfolio assessment prior to June 30th of the expiration year, to achieve the professional certificate, Provided: When the first two-year renewal on residency certificates expires, teachers have three renewal options:

(i) Individuals who were employed but failed the professional certification assessment, may receive a second two-year renewal;

(ii) Individuals who were unemployed or employed less than full-time as a teacher during the first two-year renewal may permit their certificate to lapse. Upon contracting to return to a teacher role, individuals may apply for a final, second two-year renewal by submitting an affidavit to the certification office confirming that they will register and submit a uniform assessment portfolio for the professional certification assessment.

(iii) An individual who completes a National Board Certification assessment but does not earn National Board Certification, may use that completed assessment to apply for a final, second two-year renewal by submitting an affidavit to the certification office confirming that they will complete and submit their scores from the assessment for National Board for Professional Teaching Standards or register and submit the Washington uniform assessment portfolio as per this section, WAC 181-79A-251.

(c) Individuals who hold expired residency certificates may be reinstated by having a district request, under WAC 181-79A-231, a transitional certification not less than ((~~five~~)) one year((~~s~~)) following the final residency expiration: Provided, That the teacher registers and passes the Washington uniform assessment portfolio as per this section, WAC 181-79A-206 or assessment for National Board for Professional Teaching Standards within two years of issuance of the transitional certificate.

(d) Individuals who hold a dated residency certificate prior to September 2011 that have expiration dates past September 2011 are subject to the same renewal options as described in (a)(ii) and (iii) of this subsection.

(2) Teacher professional certificate.

(a) A valid professional teacher certificate issued prior to September 1, 2014, may be renewed for additional five-year periods by the completion of one hundred fifty continuing education credit hours as defined in chapter 181-85 WAC or by completing four professional growth plans as defined in WAC 181-79A-030.

(b) Beginning September 1, 2014, four professional growth plans developed annually during the period in which the certificate is valid in collaboration with the professional growth team as defined in WAC 181-79A-030 are required for renewal.

(c) Renewal of the professional certificate.

(i) Individuals may apply their focused evaluation professional growth activities of the evaluation system toward the professional growth plan for certificate renewal.

(ii) Individuals who complete the requirements of the annual professional growth plan to renew their professional certificate shall receive the equivalent of thirty hours of continuing education credit hours.

(iii) The professional growth plans must document formalized learning opportunities and professional development activities that relate to the standards and "career level" benchmarks defined in WAC 181-79A-207.

(iv) Beginning September 1, 2014, continuing education or professional growth plans for teachers at the elementary and secondary levels in STEM-related subjects must include a specific focus on the integration of science, technology, engineering, and mathematics instruction as per RCW 28A.410.2212. This renewal requirement applies to the following endorsement areas: Elementary education; early childhood education; middle level mathematics and science; secondary mathematics and science; the designated secondary sciences; technology; and career and technical education endorsements. Certificates ((~~being renewed starting in 2019~~)) with a renewal date of June 30, 2019, and beyond must demonstrate completion of at least fifteen continuing education credit hours, or at least one goal from an annual professional growth plan, with an emphasis on the integration of science, technology, engineering and mathematics. This requirement is for all professional teacher certificate holders regardless of date of issuance of the first professional certificate.

(v) Provided, That a professional certificate may be renewed based on the possession of a valid teaching certificate issued by the National Board for Professional Teaching Standards at the time of application for the renewal of the professional certificate. Such renewal shall be valid for five years or until the expiration of the National Board Certificate, whichever is greater.

(vi) Provided, any educator holding a professional certificate which requires completion of four PGPs in five years, may renew the professional certificate for one time only by completing one hundred fifty continuing education credit hours as defined in chapter 181-85 WAC, or with completion of fifteen quarter credit hours related to job responsibilities, in lieu of completion of four professional growth plans as required by this section. Individuals with valid certificates must show completion of the hours as described in this section since the professional certificate was issued. Individuals with an expired professional certificate must complete the hours as described in this section within the five years prior to the date of the renewal application. Provided, That this section is no longer in effect after June 30, 2020.

(vii) For educators holding multiple certificates in WAC 181-79A-251, 181-79A-2510, 181-79A-2511, or 181-79A-2512, or in chapter 181-85 WAC, a professional growth plan

for teacher, administrator, or education staff associate shall meet the requirement for all certificates held by an individual which is affected by this section.

(viii) The one-time renewal option of using clock hours or credits in lieu of professional growth plans as required applies to any/all professional certificates an educator may hold, and is only available to the individual one time. This section is no longer in effect after June 30, 2020.

(ix) Provided, as per RCW 28A.410.278(2) beginning September 1, 2016, in-service training, continuing education, or professional growth plans shall incorporate professional development on the revised teacher and principal evaluation systems under RCW 28A.405.100 as a requirement for renewal of continuing or professional level certificates. Certificates with a renewal date of June 30, 2019, and beyond for all teachers must document completion of at least fifteen clock hours, or at least one goal from an annual professional growth plan, related to knowledge and competency of the teacher and principal evaluation criteria or system.

(d) An expired professional certificate issued under rules in effect prior to September 1, 2014, may be renewed for an additional five-year period by presenting evidence to the superintendent of public instruction of completing the continuing education credit hour requirement within the five years prior to the date of the renewal application. All continuing education credit hours shall relate to one of the three standards: Effective instruction, professional contributions or professional development.

(e) Individuals not in the role of a teacher in a public school or approved private school holding a professional teaching certificate may have their professional certificate renewed for a five-year period by the completion of:

(i) Fifteen quarter credits (ten semester credits) of college credit course work directly related to the current performance-based standards as defined in WAC 181-79A-207; or

(ii) One hundred fifty continuing education credit hours as defined in chapter 181-85 WAC since the certificate was issued and which relate to the current performance-based standards as defined in WAC 181-79A-207; or

(iii) Beginning September 1, 2014, four professional growth plans developed annually during the period in which the certificate is valid in collaboration with the professional growth team as defined in WAC 181-79A-030 are required for renewal.

AMENDATORY SECTION (Amending WSR 15-20-059, filed 10/1/15, effective 11/1/15)

WAC 181-79A-2510 Principal and program administrator residency and professional certification—Renewal and reinstatement. (1) Principals/program administrators may renew their residency certificate in one of the following ways:

(a) Individuals who hold, or have held, a residency certificate and who qualify for enrollment in a professional educator standards board approved professional certificate program pursuant to WAC 181-78A-507 and 181-79A-145 may have the certificate renewed for one additional two-year period upon verification by the professional certificate program administrator that the candidate is enrolled in a state approved professional certificate program.

(b) Individuals who hold, or have held, residency certificates who are not in the role of principal or program administrator may have their residency certificates renewed for an additional five-year period by the completion of fifteen quarter credits (ten semester credits) of college credit course work from a regionally accredited institution of higher education or completion of one hundred fifty continuing education credit hours, directly related to the current performance-based leadership standards as defined in WAC 181-78A-270 (2)(b) from a regionally accredited institution of higher education taken since the issuance of the residency certificate.

(2) Professional certificate. A professional certificate may be renewed for additional five-year periods for individuals in the role as a principal, assistant principal, or program administrator in a public school or approved private school by completion of four professional growth plans developed annually since the certificate was issued, in collaboration with the professional growth team as defined in WAC 181-79A-030.

(a) Individuals may apply their focused evaluation professional growth activities of the evaluation system toward the professional growth plan for certificate renewal.

(b) Individuals who complete the requirements of the annual professional growth plan to renew their professional certificate shall receive the equivalent of thirty hours of continuing education credit hours.

(c) The professional growth plans must document formalized learning opportunities and professional development activities that relate to the standards and "career level" benchmarks defined in WAC 181-78A-540(1).

(d) ((~~As per RCW 28A.405.278 beginning September 1, 2016, all professional administrator certificates must complete continuing education on the revised teacher and principal evaluation systems under RCW 28A.405.100 as a requirement for renewal of professional administrator certificates including requiring knowledge and competencies in teacher and principal evaluation systems as an aspect of professional growth plans (PGPs) used for certificate renewal.~~)) Provided, as per RCW 28A.410.278(2) beginning September 1, 2016, in-service training, continuing education, or professional growth plans shall incorporate professional development on the revised teacher and principal evaluation systems under RCW 28A.405.100 as a requirement for renewal of continuing or professional level certificates. Certificates with a renewal date of June 30, 2019, and beyond for all principals and program administrators must document completion of at least fifteen clock hours, or at least one goal from an annual professional growth plan, related to knowledge and competency of the teacher and principal evaluation criteria or system.

(e) Provided, any educator holding a professional certificate which requires completion of four PGPs in five years, may renew the professional certificate for one time only by completing one hundred fifty continuing education credit hours as defined in chapter 181-85 WAC, or with completion of fifteen quarter credit hours related to job responsibilities, in lieu of completion of four professional growth plans. Individuals with valid certificates must show completion of the

hours as described in this section since the professional certificate was issued. Individuals with an expired professional certificate must complete the hours as described in this section within the five years prior to the date of the renewal application: Provided, That this section is no longer in effect after June 30, 2020.

(f) For educators holding multiple certificates as described in WAC 181-79A-251, 181-79A-2510, 181-79A-2511, or 181-79A-2512 of this chapter, or in chapter 181-85 WAC, a professional growth plan for teacher, administrator, or education staff associate shall meet the requirement for all certificates held by an individual which is affected by this section.

(g) The one-time renewal option of using clock hours or credits in lieu of professional growth plans as required applies to any/all professional certificates an educator may hold, and is only available to the individual one time. This section is no longer in effect after June 30, 2020.

WSR 16-07-140
PERMANENT RULES
DEPARTMENT OF FISH AND WILDLIFE

[Filed March 22, 2016, 4:23 p.m., effective April 22, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: A 60,000 pound quota was imposed on the commercial smelt fishery by the fish and wildlife commission in July 2014. This "quick reporting" requirement is required for other species in WAC 220-69-240. Under temporary rule quick reporting occurred during the 2014 and 2015 seasons, and this rule action makes this requirement permanent.

Citation of Existing Rules Affected by this Order: Amending WAC 220-49-005.

Statutory Authority for Adoption: RCW 77.04.012, 77.04.013, 77.04.055, and 77.12.047.

Adopted under notice filed as WSR 16-03-046 on January 14, 2016.

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 1, Repealed 0.

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

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

Date Adopted: March 4, 2016.

Brad Smith, Chair
Fish and Wildlife Commission

AMENDATORY SECTION (Amending WSR 14-15-006, filed 7/2/14, effective 8/2/14)

WAC 220-49-005 Puget Sound forage fish commercial fisheries—General provisions. (1) It is unlawful to fish for or possess Puget Sound forage fish taken for commercial purposes except at the times, during the seasons and using the gear provided for in this chapter.

(2) It is unlawful to fish for or possess candlefish taken for commercial purposes. A violation of this subsection is punishable under RCW 77.15.550, Violation of commercial fishing area or time—Penalty.

(3) The total annual quota for the Puget Sound smelt commercial fishery may not exceed sixty thousand pounds.

(4) It is unlawful for vessel operators engaged in the commercial harvest of smelt from Puget Sound to fail to report their daily catch to the department by 2:00 p.m. the day following the harvest of smelt.

(a) Catch reports may be submitted to the department as follows:

(i) By e-mailing the catch report or a picture of the fish receiving ticket to smeltreport@dfw.wa.gov; or

(ii) By phone at 1-844-611-3822.

(b) Catch reports must include the following information as it is recorded on the fish receiving ticket:

(i) Fisher name;

(ii) Wholesale fish dealer name;

(iii) Pounds of smelt landed;

(iv) Marine fish/shellfish catch area, as described in WAC 220-22-400;

(v) Date of harvest;

(vi) Date of sale;

(vii) Complete fish ticket serial number, including the first alphanumeric letter; and

(viii) If a picture of the fish receiving ticket is e-mailed as the daily harvest report, the date of harvest must be recorded on the bottom half of the ticket.

WSR 16-07-141
PERMANENT RULES
HEALTH CARE AUTHORITY
(Washington Apple Health)

[Filed March 23, 2016, 8:15 a.m., effective April 23, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The agency amended this chapter to allow coverage for individuals covered under IDEA Part C, allow the use of electronic signatures, and to clarify language.

Citation of Existing Rules Affected by this Order: Amending WAC 182-537-0100, 182-537-0200, 182-537-0300, 182-537-0350, 182-537-0400, 182-537-0500, 182-537-0600, 182-537-0700, and 182-537-0800.

Statutory Authority for Adoption: RCW 41.05.021, 41.05.160.

Adopted under notice filed as WSR 16-04-028 on January 25, 2016.

Changes Other than Editing from Proposed to Adopted Version: The agency added the following definition:

"**Early intervention services**" - services designed to meet the developmental needs of an infant or toddler with a disability and the needs of the family to assist appropriately in the infant's or toddler's development, as identified in the infant or toddler's individualized family service plan (IFSP), in any one or more of the following areas, including:

- Physical development;
- Cognitive development;
- Communication development;
- Social or emotional development; or
- Adaptive development.

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 9, 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 9, Repealed 0.

Date Adopted: March 23, 2016.

Wendy Barcus
Rules Coordinator

Chapter 182-537 WAC

SCHOOL-BASED HEALTH CARE SERVICES

AMENDATORY SECTION (Amending WSR 13-05-017, filed 2/7/13, effective 3/10/13)

WAC 182-537-0100 ((~~School-based health care services for children in special education—~~))Purpose. The medicaid agency pays school districts for school-based health care services provided to medicaid-eligible children ((~~in~~)) who require special education services consistent with Sections ((~~1905(c)~~)) 1903(c) and 1905(a) of the Social Security Act. Covered services must:

(1) Identify, treat, and manage the education-related disabilities (i.e., mental, emotional, and physical) of a child ((~~in~~)) who requires special education services;

(2) Be prescribed or recommended by licensed physicians or other licensed health care providers within their scope of practice under state law;

(3) Be medically necessary;

(4) Be diagnostic, evaluative, habilitative, or rehabilitative in nature; ((~~and~~))

(5) Be included in the child's current individualized education program (IEP) or individualized family service plan (IFSP); and

(6) Be provided in a school setting.

AMENDATORY SECTION (Amending WSR 13-21-079, filed 10/17/13, effective 11/17/13)

WAC 182-537-0200 ((~~School-based health care services for children in special education—~~))Definitions. The following definitions and those found in chapter 182-500 WAC apply to this chapter:

"Agency" - See WAC 182-500-0010.

((~~**"Amount, duration, and scope"** - A written statement within the individualized education program (IEP) that addresses sufficiency of services to achieve a particular goal (a treatment plan for *how much* of a health care related service will be provided, *how long* a service will be provided, and *what* the service is).~~))

"Assessment" - For purposes of this chapter an assessment is made-up of medically necessary tests given to an individual child by a licensed professional to evaluate whether a child is determined to be a child with a disability, and in need of special education and related services. Assessments are a part of the evaluation and re-evaluation processes and must accompany the individualized education program (IEP) or individualized family service plan (IFSP).

"Child with a disability" - For purposes of this chapter, a child with a disability is a child evaluated and determined to need special education and related services because of a disability in one or more of the following eligibility categories:

- Autism;
- ((~~Deaf/blindness~~)) Deaf-blindness;
- Developmental delay for children ages three through nine, with an adverse educational impact, the results of which require special education and related direct services;
- Hearing loss (including deafness);
- Intellectual disability;
- Multiple disabilities;
- Orthopedic impairment;
- Other health impairment;
- Serious emotional disturbance (emotional behavioral disturbance);
- Specific learning disability;
- Speech or language impairment;
- Traumatic brain injury; and
- Visual impairment (including blindness).

((~~**"Core provider agreement"** - The basic contract the agency holds with providers serving medical assistance clients.~~

~~**"Direct health care related services"** - Services provided directly to a child either one-on-one or in a group setting. This does not include special education.~~)) **"Early intervention services"** - Services designed to meet the developmental needs of an infant or toddler with a disability and the needs of the family to assist appropriately in the infant's or toddler's development, as identified in the infant or toddler's individualized family service plan (IFSP), in any one or more of the following areas, including:

- Physical development;
- Cognitive development;
- Communication development;
- Social or emotional development; or
- Adaptive development.

"Electronic signature" - A signature in electronic form attached to or associated with an electronic record including, but not limited to, a digital signature.

"Evaluation" - Procedures used to determine whether a child has a disability, and the nature and extent of the special education and related services ((~~are~~)) needed. (See WAC ((~~392-172A-03005 through 392-172A-03080~~)) 392-172A-01070.)

((**~~"Face-to-face supervision"~~** or **~~"direct supervision"~~** ~~- Supervision that is conducted on-site, in-view, by an experienced licensed health care professional to assist the supervisee to develop the knowledge and skills to practice effectively, including administering the treatment plan.~~)) **"Evaluation report"** - See WAC 392-172A-03035.

"Fee-for-service" - See WAC 182-500-0035.

"Handwritten signature" - A scripted name or legal mark of an individual on a document to signify knowledge, approval, acceptance, or responsibility of the document.

"Health care-related services" - Developmental, corrective, and other supportive services required to assist an eligible child to benefit from special education. For the purposes of the school-based health care services program, related services include:

- Audiology;
- Counseling;
- Nursing;
- Occupational therapy;
- Physical therapy;
- Psychological assessments; and
- Speech-language therapy.

"Individualized education program (IEP)" - A written ((~~statement of an~~)) educational program for a child who is age three through twenty and eligible for special education. (((~~See~~)) An IEP is developed, reviewed and revised under WAC 392-172A-03090 through 392-172A-03135.((~~)~~))

"Individualized family service plan (IFSP)" - A plan for providing early intervention services to a child birth through age two, with a disability or developmental delay and the child's family. The IFSP:

- Is based on the evaluation and assessment described in 34 C.F.R. Sec. 303.321;
- Includes the content specified in 34 C.F.R. Sec. 303.344;
- Is implemented as soon as possible after parental consent is obtained for the early intervention services in the IFSP (consistent with 34 C.F.R. Sec. 303.420); and
- Is developed under the IFSP procedures in 34 C.F.R. Secs. 303.342, 303.343, and 303.345.

"Medically necessary" - See WAC 182-500-0070.

"National provider identifier (NPI)" - See WAC 182-500-0075.

((**~~"Plan of care"~~** or **~~"treatment plan"~~** ~~- A written document that outlines the health care related needs of a child in special education. The plan is based on input from the health care professional and written approval from the parent or guardian.~~

~~"Provider"~~ ~~- See WAC 182-500-0085.~~))

"Qualified health care provider" - See WAC 182-537-0350.

"Reevaluation" - Procedures used to determine whether a child continues to be in need of special education and related services. (See WAC 392-172A-03015.)

((**~~"Regular consultation"~~** ~~- Face-to-face contact between the supervisor and supervisee that occurs no less than once per month.~~

~~"Revised Code of Washington (RCW)"~~ ~~- Washington state law.~~))

"School-based health care services program" or **"((~~SBS~~)) SBHS"** - School-based health care services for infants and toddlers receiving early intervention services and children ((~~in~~)) who require special education ((~~that~~)) services, which are diagnostic, evaluative, habilitative, and rehabilitative in nature; are based on the child's medical needs; and are included in the child's ((~~individualized education plan (~~))IEP((~~)~~)) or IFSP. The agency pays school districts for school-based health care services delivered to medicaid-eligible children ((~~in~~)) who require special education services under Section 1903(c) of the Social Security Act, and to ((~~individuals~~)) people under the Individuals with Disabilities Education Act (IDEA) Part B and Part C.

((**~~"School-based health care services program specialist"~~** or **~~"SBHS specialist"~~** ~~- An individual identified in the interagency agreement school district reimbursement contract.~~)) **"Signature log"** - A typed list that verifies a licensed provider's identity by associating each provider's signature with their name, handwritten initials, credentials, license and national provider identification (NPI) numbers.

"Special education" - Specially designed instruction, at no cost to the parents, to meet the unique needs of a student eligible for special education, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. Refer to WAC 392-172A-01175.

((**~~"Washington Administrative Code (WAC)"~~** ~~- Codified rules of the state of Washington.~~)) **"Supervision"** - Supervision that is provided by a licensed health care provider either directly or indirectly in order to assist the supervisee in the administration of health care-related services outlined in the IEP or IFSP.

"Telemedicine" - See WAC 182-531-1730.

AMENDATORY SECTION (Amending WSR 14-07-042, filed 3/12/14, effective 4/12/14)

WAC 182-537-0300 ((~~School-based health care services for children in special education~~))Client eligibility. Children ((~~in~~)) who require special education services must be receiving Title XIX Medicaid under a Washington apple health (WAH) categorically needy program (CNP) or WAH medically needy program (MNP) to be eligible for school-based health care services. Eligible children enrolled in a managed care organization (MCO) receive school-based health care services on a fee-for-service basis.

AMENDATORY SECTION (Amending WSR 13-21-079, filed 10/17/13, effective 11/17/13)

WAC 182-537-0350 ((~~School-based health care services for children in special education~~))Provider qualifications. ((~~The medicaid agency pays school districts to pro-~~

~~vide certain health care-related services (see WAC 182-537-0400). These~~)) (1) School-based health care services (SBHS) must be delivered by qualified health care providers who are enrolled with the medicaid agency and ((~~hold a current professional license:~~

~~(1) Audiology services must be delivered by a licensed audiologist.~~

~~(2) Counseling services must be delivered by:~~

~~(a) A licensed independent social worker (LiCSW);~~

~~(b) A licensed advanced social worker (LiACSW);~~

~~(c) A licensed mental health counselor (LMHC); or~~

~~(d) A licensed mental health counselor associate (LMHCA) under the supervision of a department of health-approved licensed supervisor.~~

~~(3) Nursing services must be delivered by:~~

~~(a) A licensed registered nurse (RN);~~

~~(b) A licensed practical nurse (LPN) who is supervised by an RN; or~~

~~(c) A noncredentialed school employee who is delegated certain limited health care tasks by an RN and is supervised according to professional practice standards (see RCW 18.79.260).~~

~~(4) Occupational therapy services must be delivered by:~~

~~(a) A licensed occupational therapist (OT); or~~

~~(b) A licensed occupational therapist assistant (OTA) who is supervised by a licensed occupational therapist.~~

~~(5) Physical therapy services must be delivered by:~~

~~(a) A licensed physical therapist (PT); or~~

~~(b) A licensed physical therapist assistant (PTA) who is supervised by a licensed physical therapist.~~

~~(6) Psychological services must be delivered by a licensed psychologist.~~

~~(7) Speech therapy services must be delivered by:~~

~~(a) A licensed speech-language pathologist (SLP); or~~

~~(b) A speech-language pathology assistant (SLPA) who:~~

~~(i) Has graduated from a speech-language pathology assistant program at a board-approved institution; and~~

~~(ii) Is directly supervised by a speech-language pathologist with a current certificate of clinical competence (CCC).~~

~~(8)~~)) who meet state licensure and certification requirements. The following people may provide SBHS:

(a) Audiologists who meet requirements of chapters 246-828 WAC and 18.35 RCW;

(b) Licensed advanced social workers (LiACSW) who meet requirements of chapters 246-809 WAC and 18.225 RCW;

(c) Licensed independent clinical social workers (LiCSW);

(d) Licensed mental health counselors (LMHC) who meet requirements of chapters 246-809 WAC and 18.225 RCW;

(e) Licensed mental health counselor associates (LMHCA) who meet requirements of chapters 246-809 WAC and 18.225 RCW and are under the direction and supervision of a qualified LiACSW, LiCSW, or LMHC;

(f) Licensed registered nurses (RN) who meet requirements of chapters 246-840 WAC and 18.79 RCW;

(g) Licensed practical nurses (LPN) who meet requirements of chapters 246-840 WAC and 18.79 RCW and are under the direction and supervision of a qualified RN;

(h) Noncredentialed school employees who are delegated certain limited health care tasks by an RN and are supervised according to professional practice standards in RCW 18.79.260;

(i) Licensed occupational therapists (OT) who meet requirements of chapters 246-847 WAC and 18.59 RCW;

(j) Licensed occupational therapist assistants (OTA) who meet requirements of chapters 246-847 WAC and 18.59 RCW and are under the direction and supervision of a qualified OT;

(k) Licensed physical therapists (PT) who meet requirements of chapters 246-924 WAC and 18.83 RCW;

(l) Licensed physical therapist assistants (PTA) who meet requirements of chapters 246-915 WAC and 18.74 RCW and are under the direction and supervision of a licensed PT;

(m) Licensed psychologists who meet requirements of chapters 246-924 WAC and 18.83 RCW;

(n) Licensed speech-language pathologists (SLP) who meet requirements of chapters 246-828 WAC and 18.35 RCW; and

(o) Speech-language pathology assistants (SLPA) who meet requirements of chapters 246-828 WAC and 18.35 RCW.

(2) For services provided under the supervision of a ((~~physical therapist, occupational therapist or speech-language pathologist, nurse, or counselor/social worker, the following requirements apply:~~

~~(a) The nature, frequency, and length of the supervision must be provided in accordance with professional practice standards, and be sufficient to ensure a~~)) PT, OT, SLP, nurse, counselor, or social worker, the supervising provider must:

(a) Ensure the child receives quality therapy services by providing supervision in accordance with professional practice standards;

(b) ((~~The supervising therapist must~~)) See the child face-to-face ((~~at the beginning of~~)) when services begin and at least once more during the school year;

(c) ((~~At a minimum, supervision must be face-to-face communication between the supervisor and the supervisee once per month. Supervisors are responsible for approving and cosigning~~)) Approve and cosign all treatment notes written by the supervisee before submitting claims for payment; and

(d) ((~~Documentation of~~)) Record supervisory activities ((~~must be recorded~~)) and ((~~available~~)) provide the documents to the agency or its designee upon request.

(((~~(9)~~))) (3) The school district must ((~~assure~~)) ensure providers meet the professional licensing and certification requirements.

(((~~(10)~~))) (4) The licensing exemptions found in the following regulations do not apply to federal medicaid reimbursement ((~~for the services indicated below~~)):

(a) Counseling ((~~as found in~~)) under RCW 18.225.030;

(b) Psychology ((~~as found in~~)) under RCW 18.83.200;

(c) Social work ((~~as found in~~)) under RCW 18.320.010; and

(d) Speech therapy ((~~as found in~~)) under RCW 18.35.-195.

AMENDATORY SECTION (Amending WSR 13-05-017, filed 2/7/13, effective 3/10/13)

WAC 182-537-0400 ((~~School-based health care services for children in special education—~~))Covered services. All services covered under this section may be provided through telemedicine as described in WAC 182-531-1730. Covered services include:

(1) Evaluations when the child is determined to have a disability, and is in need of special education and health care-related services that result in an IEP or IFSP;

(2) ((~~Direct health care~~)) Health care-related services including:

(a) Audiology;

(b) Counseling;

(c) Nursing;

(d) Occupational therapy;

(e) Physical therapy;

(f) Psychological assessments; and

(g) Speech-language therapy.

(3) Reevaluations, to determine whether a child continues to need special education and health care-related services.

AMENDATORY SECTION (Amending WSR 13-05-017, filed 2/7/13, effective 3/10/13)

WAC 182-537-0500 ((~~School-based health care services for children in special education—~~))Noncovered services. Noncovered services include, but are not limited to the following:

(1) Applied behavior analysis (ABA);

(2) Attending meetings;

(3) Charting;

(4) Equipment preparation;

(5) Evaluations that do not result in an IEP or IFSP;

(6) Instructional assistant contact;

(((~~6~~))) (7) Observation;

(8) Parent consultation;

(((~~7~~))) (9) Parent contact;

(((~~8~~))) (10) Planning;

(((~~9~~))) (11) Preparing and sending correspondence to parents or other professionals;

(((~~10~~))) (12) Professional consultation;

(((~~11~~))) (13) Report writing;

(((~~12~~))) (14) Review of records;

(((~~13~~))) (15) School district staff accompanying a child ((~~in~~)) who requires special education services to and from school on the bus;

(((~~(14) Set-up;~~

~~(15)~~))) (16) Teacher contact;

(((~~(16) Telehealth;~~)))

(17) Test interpretation; and

(18) Travel and transporting((~~; and~~

~~(19) Continuous observation of a child when direct school-based health care services are not actively provided. The agency pays for the act of watching carefully and attentively only if it involves actual interventions~~)).

AMENDATORY SECTION (Amending WSR 13-21-079, filed 10/17/13, effective 11/17/13)

WAC 182-537-0600 ((~~School-based health care services for children in special education—~~))School district requirements for billing and payment. To receive payment from the medicaid agency for providing school-based health care services (SBHS) to eligible children, a school district must:

(1) Have a current, signed core provider agreement (CPA) with the agency. ((~~A copy of the CPA must be on-site within the school district.~~))

(2) Have a current, signed, and executed interagency agreement with the agency. ((~~A copy of the agreement must be on-site within the school district for review as requested.~~))

(3) Meet the applicable requirements in chapter 182-502 WAC.

(4) Comply with the agency's current, published ProviderOne billing and resource guide.

(5) Bill according to the agency's current((~~, published~~)) school-based health care services ((~~for children in special education medicaid~~)) provider guide, the school-based health care services fee schedule, and the intergovernmental transfer (IGT) process. After a school district((~~s~~)) receives ((~~their~~)) its invoice from the agency, ((~~they~~)) the district must provide ((~~their~~)) its local match to the agency within one hundred twenty days.

(6) ((~~Meet the applicable requirements in chapter 182-537 WAC.~~

~~(7)~~)) Provide only health care-related services identified through a current ((~~individualized education program (~~))IEP((~~)~~)) or IFSP.

(((~~(8)~~))) (7) Use only ((~~licensed~~)) health care professionals((~~, as described in~~)) qualified under WAC 182-537-0350 ((~~and the school-based care services for children in special education medicaid provider guide~~)).

(8) Enroll servicing providers under the school district's national provider identifier (NPI) number, and ensure providers have their own NPI number.

(9) Meet documentation requirements in WAC 182-537-0700.

AMENDATORY SECTION (Amending WSR 14-20-090, filed 9/29/14, effective 10/30/14)

WAC 182-537-0700 ((~~School-based health care services for children in special education—~~))School district documentation requirements. (1) Providers must document ((~~in writing~~)) all school-based health care ((~~related~~)) services ((~~in the manner set out~~)) (SBHS) as required in this section, WAC 182-502-0020, and the medicaid agency's ((~~program-specific~~)) school-based health care services provider guide.

(2) All required documentation must include the provider's printed name, handwritten or electronic signature, and title. Assistants practicing under WAC 182-537-0350 must have a licensed supervisor cosign all documents as required by this subsection.

(3) The following documentation must be maintained for each client for a minimum of six years:

(a) Professional assessment reports;

(b) Evaluation and reevaluation reports;

(c) ((~~Individualized education program (~~))IEP((~~)~~)) or IFSP; and

(d) Treatment notes ((~~for each date of service that give a clear, comprehensive picture of the care being provided, the response to each intervention, and that include the:~~

~~(i)~~)).

(4) Treatment notes must include the:

(a) Child's name;

(((~~ii~~))) (b) Child's ProviderOne client ID;

(((~~iii~~))) (c) Child's date of birth;

(((~~iv) Activity and intervention performed;~~

~~(v)~~)) (d) Date of service((~~;~~

~~(vi)~~)), and for each date of service:

(i) Time-in;

(((~~vii~~))) (ii) Time-out;

(((~~viii~~))) (iii) A procedure code for and description of each service provided;

(iv) The child's progress related to each service;

(v) Number of units billed for the service; and

(((~~ix~~))) (vi) Whether the treatment described in the note was individual or group therapy.

(((~~(3) All required documentation must include the provider's handwritten signature, title, and National Provider Identifier (NPI) number.~~

~~(a) Signature by stamp or electronic means is acceptable only if the provider is unable to sign by hand due to a physical disability.~~

~~(b) Assistants practicing under WAC 182-537-0350 must have a supervisor cosign all documents in the manner required by subsection (3) of this section.~~)) (5) The agency accepts electronic records and signatures. Maintaining the records in an electronic format is acceptable only if the original records are available to the agency for program integrity activities for up to six years after the date of service. Each school district is responsible for determining what standards are consistent with state and federal electronic record and signature requirements.

(6) For a signature to be valid, it must be handwritten or electronic. Signature by stamp is acceptable only if the provider is unable to sign by hand due to a physical disability.

(7) School districts must maintain a signature log to support the provider's signature identity.

(8) The signature log must include the provider's:

(a) Printed name;

(b) Handwritten signature;

(c) Initials;

(d) Credentials;

(e) License number; and

(f) National provider identifier (NPI) number.

(9) Each school district must establish policies and procedures to ensure complete, accurate, and authentic records. These policies and procedures must include:

(a) Security provisions to prevent the use of an electronic signature by anyone other than the licensed provider to which the electronic signature belongs;

(b) Procedures that correspond to recognized standards and laws and protect against modifications;

(c) Protection of the privacy and integrity of the documentation;

(d) A list of which documents will be maintained and signed electronically; and

(e) Verification of the signer's identity at the time the signature was generated.

AMENDATORY SECTION (Amending WSR 13-05-017, filed 2/7/13, effective 3/10/13)

WAC 182-537-0800 ((~~School-based health care services for children in special education~~))Program ((~~monitoring/audits~~)) integrity. (1) To ensure compliance with program rules, the medicaid agency conducts program integrity activities under chapter 182-502A WAC.

(2) School districts must participate in all ((~~monitoring and auditing~~)) program integrity activities.

(((~~(2)~~))) (3) School districts are responsible for the accuracy, compliance, ((~~truthfulness,~~)) and completeness of all claims submitted for medicaid reimbursement.

(((~~(3) The medicaid agency conducts monitoring activities annually according to chapter 182-502A WAC. The agency conducts a minimum of ten school-based medicaid program reviews annually. During this time frame, the agency:~~

~~(a) Completes a minimum of five record reviews as a desk review;~~

~~(b) Conducts a minimum of five record reviews on-site; and~~

~~(c) Bases the monitoring and auditing activities on usage and payment data from the previous school year.~~

~~(4) The agency conducts audits and recovers any overpayments if a school district is found not in compliance with agency requirements according to RCW 74.09.200, 74.09.220 and 74.09.290, which concern audits and investigations of providers.~~

~~(5) On or before October 31st of each year, school districts must submit to the school-based health care services program manager the following information:~~

~~(a) A provider update Form 12-325, to include all new health care professionals; and~~

~~(b) Copies of all new health care professionals' licenses issued by the Washington state department of health (DOH), and verification of the National provider identifier (NPI) number.~~))

WSR 16-07-144
PERMANENT RULES
OFFICE OF INSURANCE COMMISSIONER

[Insurance Commissioner Matter No. R 2016-01—Filed March 23, 2016, 8:36 a.m., effective April 23, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Move health care network and provider contracts and payment rules from chapter 284-43 WAC to chapter 284-170 WAC. This action is part of a realignment of rules within chapters 284-43 and 284-170 WAC. This will not change the existing rules or their application in any way other than their citation numbers.

Citation of Existing Rules Affected by this Order: Amending 27 (Note: The sole amendment of these sections was the chapter and section number change).

Statutory Authority for Adoption: RCW 48.02.060.

Adopted under notice filed as WSR 16-03-090 on January 20, 2016.

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 4, Amended 27, 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 4, Amended 27, Repealed 0.

Date Adopted: March 23, 2016.

Mike Kreidler
Insurance Commissioner

NEW SECTION

The following sections of the Washington Administrative Code are decodified and recodified as follows:

Old WAC Number	New WAC Number
SUBCHAPTER B	
Health Care Networks	
284-43-9970	284-170-200
284-43-9971	284-170-210
284-43-9972	284-170-230
284-43-9973	284-170-240
284-43-9974	284-170-260
284-43-9975	284-170-270
284-43-9976	284-170-280
284-43-9977	284-170-300
284-43-9978	284-170-310
284-43-9979	284-170-320
284-43-9980	284-170-330
284-43-9981	284-170-340
284-43-9982	284-170-350
284-43-9983	284-170-360
284-43-9984	284-170-370
284-43-9985	284-170-380
284-43-9986	284-170-390
SUBCHAPTER C	
Provider Contracts and Payment	
284-43-9990	284-170-401
284-43-9991	284-170-411
284-43-9992	284-170-421
284-43-9993	284-170-431
284-43-9994	284-170-440
284-43-9995	284-170-450
284-43-9996	284-170-460
284-43-9997	284-170-470
284-43-9998	284-170-480
284-43-9999	284-170-490

SUBCHAPTER A

GENERAL PROVISIONS

NEW SECTION

WAC 284-170-110 Purpose. The purpose of this chapter is to establish uniform regulatory standards for health carriers and to create minimum standards for health plans that ensure consumer access to the health care services promised in these health plans.

NEW SECTION

WAC 284-170-120 Applicability and scope. This chapter shall apply to all health plans and all health carriers subject to the jurisdiction of the state of Washington except as otherwise expressly provided in this chapter. Health carriers are responsible for compliance with the provisions of this chapter and are responsible for the compliance of any person or organization acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements concerning the coverage of, payment for, or provision of health care services. A carrier may not offer as a defense to a violation of any provision of this chapter that the violation arose from the act or omission of a participating provider or facility, network administrator, claims administrator, or other person acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements under a contract with the carrier rather than from the direct act or omission of the carrier. Nothing in this chapter shall be construed to permit the direct regulation of health care providers or facilities by the office of the insurance commissioner.

NEW SECTION

WAC 284-170-125 Compliance with state and federal laws. Health carriers shall comply with all Washington state and federal laws relating to the acts and practices of carriers and laws relating to health plan benefits.

NEW SECTION

WAC 284-170-130 Definitions. Except as defined in other subchapters and unless the context requires otherwise, the following definitions shall apply throughout this chapter.

(1) "Adverse determination" has the same meaning as the definition of adverse benefit determination in RCW 48.43.005, and includes:

(a) The determination includes any decision by a health carrier's designee utilization review organization that a request for a benefit under the health carrier's health benefit plan does not meet the health carrier's requirements for medical necessity, appropriateness, health care setting, level of care, or effectiveness or is determined to be experimental or investigational and the requested benefit is therefore denied, reduced, or terminated or payment is not provided or made, in whole or in part for the benefit;

(b) The denial, reduction, termination, or failure to provide or make payment, in whole or in part, for a benefit based on a determination by a health carrier or its designee utilization review organization of a covered person's eligibility to participate in the health carrier's health benefit plan;

(c) Any prospective review or retrospective review determination that denies, reduces, or terminates or fails to provide or make payment in whole or in part for a benefit;

(d) A rescission of coverage determination; or

(e) A carrier's denial of an application for coverage.

(2) "Authorization" or "certification" means a determination by the carrier that an admission, extension of stay, or other health care service has been reviewed and, based on the information provided, meets the clinical requirements for medical necessity, appropriateness, level of care, or effectiveness in relation to the applicable health plan.

(3) "Clinical review criteria" means the written screens, decision rules, medical protocols, or guidelines used by the carrier as an element in the evaluation of medical necessity and appropriateness of requested admissions, procedures, and services under the auspices of the applicable health plan.

(4) "Covered health condition" means any disease, illness, injury or condition of health risk covered according to the terms of any health plan.

(5) "Covered person" or "enrollee" means an individual covered by a health plan including a subscriber, policyholder, or beneficiary of a group plan.

(6) "Emergency medical condition" means the emergent and acute onset of a symptom or symptoms, including severe pain, that would lead a prudent layperson acting reasonably to believe that a health condition exists that requires immediate medical attention, if failure to provide medical attention would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part, or would place the person's health in serious jeopardy.

(7) "Emergency services" has the meaning set forth in RCW 48.43.005.

(8) "Enrollee point-of-service cost-sharing" or "cost-sharing" means amounts paid to health carriers directly providing services, health care providers, or health care facilities by enrollees and may include copayments, coinsurance, or deductibles.

(9) "Facility" means an institution providing health care services including, but not limited to, hospitals and other licensed inpatient centers, ambulatory surgical or treatment centers, skilled nursing centers, residential treatment centers, diagnostic, laboratory, and imaging centers, and rehabilitation and other therapeutic settings, and as defined in RCW 48.43.005.

(10) "Formulary" means a listing of drugs used within a health plan.

(11) "Grievance" has the meaning set forth in RCW 48.43.005.

(12) "Health care provider" or "provider" means:

(a) A person regulated under Title 18 RCW or chapter 70.127 RCW, to practice health or health-related services or otherwise practicing health care services in this state consistent with state law; or

(b) An employee or agent of a person described in (a) of this subsection, acting in the course and scope of his or her employment.

(13) "Health care service" or "health service" means that service offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(14) "Health carrier" or "carrier" means a disability insurance company regulated under chapter 48.20 or 48.21 RCW, a health care service contractor as defined in RCW 48.44.010, and a health maintenance organization as defined in RCW 48.46.020, and includes "issuers" as that term is used in The Patient Protection and Affordable Care Act (P.L. 111-148, as amended (2010)).

(15) "Health plan" or "plan" means any individual or group policy, contract, or agreement offered by a health carrier to provide, arrange, reimburse, or pay for health care service except the following:

(a) Long-term care insurance governed by chapter 48.84 RCW;

(b) Medicare supplemental health insurance governed by chapter 48.66 RCW;

(c) Limited health care service offered by limited health care service contractors in accordance with RCW 48.44.035;

(d) Disability income;

(e) Coverage incidental to a property/casualty liability insurance policy such as automobile personal injury protection coverage and homeowner guest medical;

(f) Workers' compensation coverage;

(g) Accident only coverage;

(h) Specified disease and hospital confinement indemnity when marketed solely as a supplement to a health plan;

(i) Employer-sponsored self-funded health plans;

(j) Dental only and vision only coverage; and

(k) Plans deemed by the insurance commissioner to have a short-term limited purpose or duration, or to be a student-only plan that is guaranteed renewable while the covered person is enrolled as a regular full-time undergraduate or graduate student at an accredited higher education institution, after a written request for such classification by the carrier and subsequent written approval by the insurance commissioner.

(16) "Indian health care provider" means:

(a) The Indian Health Service, an agency operated by the U.S. Department of Health and Human Services established by the Indian Health Care Improvement Act, Section 601, 25 U.S.C. Sec. 1661;

(b) An Indian tribe, as defined in the Indian Health Care Improvement Act, Section 4(14), 25 U.S.C. Sec. 1603(14), that operates a health program under a contract or compact to carry out programs of the Indian Health Service pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. Sec. 450 et seq.;

(c) A tribal organization, as defined in the Indian Health Care Improvement Act, Section 4(26), 25 U.S.C. Sec. 1603(26), that operates a health program under a contract or compact to carry out programs of the Indian Health Service pursuant to the ISDEAA, 25 U.S.C. Sec. 450 et seq.;

(d) An Indian tribe, as defined in the Indian Health Care Improvement Act, Section 4(14), 25 U.S.C. Sec. 1603(14), or tribal organization, as defined in the Indian Health Care Improvement Act, Section 4(26), 25 U.S.C. Sec. 1603(26), that operates a health program with funding provided in whole or part pursuant to 25 U.S.C. Sec. 47 (commonly known as the Buy Indian Act); or

(e) An urban Indian organization that operates a health program with funds in whole or part provided by Indian Health Service under a grant or contract awarded pursuant to Title V of the Indian Health Care Improvement Act, Section 4(29), 25 U.S.C. Sec. 1603(29).

(17) "Managed care plan" means a health plan that coordinates the provision of covered health care services to a covered person through the use of a primary care provider and a network.

(18) "Medically necessary" or "medical necessity" in regard to mental health services and pharmacy services is a carrier determination as to whether a health service is a covered benefit because the service is consistent with generally recognized standards within a relevant health profession.

(19) "Mental health provider" means a health care provider or a health care facility authorized by state law to provide mental health services.

(20) "Mental health services" means in-patient or out-patient treatment, partial hospitalization or out-patient treatment to manage or ameliorate the effects of a mental disorder listed in the Diagnostic and Statistical Manual (DSM) IV published by the American Psychiatric Association, excluding diagnoses and treatments for substance abuse, 291.0 through 292.9 and 303.0 through 305.9.

(21) "Network" means the group of participating providers and facilities providing health care services to a particular health plan or line of business (individual, small, or large group). A health plan network for issuers offering more than one health plan may be smaller in number than the total number of participating providers and facilities for all plans offered by the carrier.

(22) "Out-patient therapeutic visit" or "out-patient visit" means a clinical treatment session with a mental health provider of a duration consistent with relevant professional standards used by the carrier to determine medical necessity for the particular service being rendered, as defined in Physicians Current Procedural Terminology, published by the American Medical Association.

(23) "Participating provider" and "participating facility" mean a facility or provider who, under a contract with the health carrier or with the carrier's contractor or subcontractor, has agreed to provide health care services to covered persons with an expectation of receiving payment, other than coinsurance, copayments, or deductibles, from the health carrier rather than from the covered person.

(24) "Person" means an individual, a corporation, a partnership, an association, a joint venture, a joint stock company, a trust, an unincorporated organization, any similar entity, or any combination of the foregoing.

(25) "Pharmacy services" means the practice of pharmacy as defined in chapter 18.64 RCW and includes any drugs or devices as defined in chapter 18.64 RCW.

(26) "Primary care provider" means a participating provider who supervises, coordinates, or provides initial care or continuing care to a covered person, and who may be required by the health carrier to initiate a referral for specialty care and maintain supervision of health care services rendered to the covered person.

(27) "Preexisting condition" means any medical condition, illness, or injury that existed any time prior to the effective date of coverage.

(28) "Premium" means all sums charged, received, or deposited by a health carrier as consideration for a health plan or the continuance of a health plan. Any assessment or any "membership," "policy," "contract," "service," or similar fee or charge made by a health carrier in consideration for a health plan is deemed part of the premium. "Premium" shall not include amounts paid as enrollee point-of-service cost-sharing.

(29) "Service area" means the geographic area or areas where a specific product is issued, accepts members or enrollees, and covers provided services. A service area must be defined by the county or counties included unless, for good cause, the commissioner permits limitation of a service area by zip code. Good cause includes geographic barriers within a service area, or other conditions that make offering coverage throughout an entire county unreasonable.

(30) "Small group plan" means a health plan issued to a small employer as defined under RCW 48.43.005(33) comprising from one to fifty eligible employees.

(31) "Substitute drug" means a therapeutically equivalent substance as defined in chapter 69.41 RCW.

(32) "Supplementary pharmacy services" or "other pharmacy services" means pharmacy services involving the provision of drug therapy management and other services not required under state and federal law but that may be rendered in connection with dispensing, or that may be used in disease prevention or disease management.

WSR 16-07-149
PERMANENT RULES
DEPARTMENT OF REVENUE
[Filed March 23, 2016, 9:06 a.m., effective April 23, 2016]

Effective Date of Rule: Thirty-one days after filing.

Purpose: WAC 458-20-260 (Rule 260) Oil spill response and tax administration, explains the provisions of chapter 82.23B RCW which imposes an oil spill response tax and an oil spill administration tax. Rule 260 has been amended to include that the same taxes imposed on crude oil or petroleum products received at a marine terminal also apply, effective July 1, 2015, on the same type of products received at a bulk oil terminal. Definitions for "bulk oil terminal" and "tank car" have been added, and existing definitions have been updated based on chapter 274, Laws of 2015.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-260 Oil spill response and tax administration.

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

Adopted under notice filed as WSR 16-03-036 on January 13, 2016.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 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: March 23, 2016.

Kevin Dixon
Rules Coordinator

AMENDATORY SECTION (Amending WSR 02-16-016, filed 7/26/02, effective 8/26/02)

WAC 458-20-260 Oil spill response and administration tax. (1) **Introduction.** This rule explains the provisions of chapter 82.23B RCW which imposes an oil spill response tax and an oil spill administration tax. The taxes are imposed ((~~upon~~)) on the privilege of receiving crude oil or petroleum products at a marine terminal in this state from a waterborne vessel or barge operating on the navigable waters of this state. Effective July 1, 2015, both taxes are also imposed on the privilege of receiving crude oil or petroleum products at a bulk oil terminal within this state from a tank car, under chapter 274, Laws of 2015. RCW 82.23B.020.

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

(2) **Definitions.** For purposes of this rule, the following terms as found in RCW 82.23B.010 will apply.

(a) ((~~"Tax" means the oil spill response and oil spill administration taxes imposed by chapter 82.23B RCW.~~

~~(b)~~)) **Barrel.** "Barrel" means a unit of measurement of volume equal to forty-two United States gallons of crude oil or petroleum product.

(((~~c~~))) (b) **Bulk oil terminal.** "Bulk oil terminal" means a facility of any kind, other than a waterborne vessel, that is used for transferring crude oil or petroleum products from a tank car.

(c) **Crude oil.** "Crude oil" means any naturally occurring ((~~liquid~~)) hydrocarbons ((~~at atmospheric temperature and pressure coming from the earth, including condensate and natural gasoline~~)) coming from the earth that are liquid at twenty-five degrees Celsius and one atmosphere of pressure including, but not limited to, crude oil, bitumen and diluted bitumen, synthetic crude oil, and natural gas well condensate.

(d) **Department.** "Department" means the department of revenue.

(e) **Marine terminal.** "Marine terminal" means a facility of any kind, other than a waterborne vessel, that is used for transferring crude oil or petroleum products to or from a waterborne vessel or barge.

(f) **Navigable waters.** "Navigable waters" means those waters of the state and their adjoining shorelines((~~,~~)) that are subject to the ebb and flow of the tide, including the Columbia and Snake rivers.

(g) **Person.** "Person" ((~~has the meaning provided in RCW 82.04.030~~)) or "company," herein used interchangeably, means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof. RCW 82.04.030.

(h) **Petroleum product.** "Petroleum product" means any liquid hydrocarbons at atmospheric temperature and pressure that are the product of the fractionation, distillation, or other refining or processing of crude oil, and that are used as, useable as, or may be refined as fuel or fuel blendstock((~~,~~)) including, but not limited to, gasoline, diesel fuel, aviation fuel, bunker fuel, and fuels containing a blend of alcohol and petroleum.

(i) **Previously taxed product.** "Previously taxed product" means any crude oil or petroleum product which has been received in this state in a manner subject to the tax imposed by chapter 82.23B RCW and upon which such tax has been paid.

(j) **Tax.** "Tax" means the oil spill response and oil spill administration taxes imposed by chapter 82.23B RCW.

(k) **Taxpayer.** "Taxpayer" means the person owning crude oil or petroleum products immediately after receipt of the same into the storage tanks of a marine or bulk oil terminal in this state ((~~from a waterborne vessel or barge~~)) and who is liable for the tax.

(((~~(j)~~))) (l) **Tank car.** "Tank car" means a rail car, the body of which consists of a tank for transporting liquids.

(m) **Waterborne vessel or barge.** "Waterborne vessel or barge" means any ship, barge, or other watercraft capable of ((~~travelling~~)) traveling on the navigable waters of this state and capable of transporting any crude oil or petroleum product in quantities of ten thousand gallons or more for purposes other than providing fuel for its motor or engine.

(((~~(k) "Previously taxed product" means any crude oil or petroleum product which has been received in this state in a manner subject to the tax and upon which the tax has been paid.~~)))

(3) **Imposition, base, and reporting of tax.** The tax is imposed on the privilege of receiving: Crude oil or petroleum products at a marine terminal within this state from a water-

borne vessel or barge operating on the navigable waters of this state; or effective July 1, 2015, crude oil or petroleum products at a bulk oil terminal within this state from a tank car. The tax is levied upon the owner of the crude oil or petroleum products immediately after receipt of the same into the storage tanks of a marine or bulk oil terminal from a tank car or waterborne vessel or barge. RCW 82.23B.020.

(a) **Tax is due.** The tax is due for payment together with the timely filing of the return ((~~upon~~)) on which it is reported, on or before the twenty-fifth day of the month following the month in which the taxable receipt occurs. ((~~In case any~~)) If receipt commences on the last day of any month and extends past midnight, the receipt at the election of the marine or bulk oil terminal may be deemed to have occurred during the following month or may be deemed to have been completed at midnight ((~~and commenced at the instant after midnight~~)) on the last day of the month on which it was commenced.

(b) **Compute the number of net barrels.** The number of barrels received must be computed as the net barrels received by the marine or bulk oil terminal operator. Net barrels must be computed by using an industry standard adjustment to gross barrels received to account for variations in temperature and content of water or other nonpetroleum substances.

(4) **Tax collection by the marine or bulk oil terminal operator.** Unless the taxpayer has been issued a direct payment certificate as provided in subsection (5) of this rule, the operator of any marine or bulk oil terminal located in this state where crude oil or petroleum products are received and placed into storage tanks is responsible for the collection of the tax from the taxpayer.

(a) **Personally liable for the tax.** Failure to collect the tax from the taxpayer and remit it to the department will cause the marine or bulk oil terminal operator to become personally liable for the tax, unless the ((~~marine~~)) terminal operator has billed the taxpayer for the tax or notified the taxpayer in writing of the imposition of the tax.

(i) The tax has been billed to a taxpayer when an invoice, statement of account, or notice of imposition of the tax is mailed or delivered to the taxpayer by the marine or bulk oil terminal operator within the operator's normal billing cycle, and separately states the dates of receipt, rate of tax, number of barrels received and placed into storage tanks, and the amount of the tax required to be collected by the operator.

(ii) A taxpayer has been notified of the imposition of the tax when, within twenty days from the date of receipt, a notice is mailed or delivered to the taxpayer, or to an agent of the taxpayer authorized to accept notices of this type other than the marine or bulk oil terminal operator. This notice must separately state the dates of receipt, rate of tax, number of barrels received into storage tanks, and the amount of the tax required to be collected by the operator.

(iii) Marine and bulk oil terminal operators must maintain a record of the names and addresses of taxpayers billed for the tax, or in cases where taxpayers are sent written notification of the imposition of the tax, the names and addresses of the persons to whom notice is sent. Such records must indicate those persons billed or notified from whom the tax has been collected. ((~~Upon~~)) On request, the records ((~~shall~~)) must be made available for inspection by the department.

(b) **Tax must be held in trust.** The tax collected must be held in trust by the marine or bulk oil terminal operator until paid to the department. The tax is due from the ((~~marine terminal~~)) operator, along with reports and returns on forms prescribed by the department, within twenty-five days after the end of the month in which the tax is collected.

(c) ((~~A~~)) **Use of direct payment certificate.** A marine or bulk oil terminal operator who relies in good faith ((~~upon~~)) on a direct payment certificate (see subsection (5) of this rule) issued to a taxpayer is relieved from any liability for the collection of the tax from the taxpayer. A marine or bulk oil terminal operator is likewise relieved from liability for collection of the tax from a taxpayer if the ((~~marine~~)) terminal operator relies in good faith ((~~upon~~)) on a current roster of certificate holders published by the department ((~~which~~)) that bears the name of a taxpayer.

(5) **Direct payment to the department.** Any taxpayer may apply to the department in writing for permission to pay the tax directly to the department. ((~~Upon~~)) On approval of the department, any taxpayer making application for direct payment will be issued a direct payment certificate entitling the taxpayer to pay the tax directly to the department.

(a) ((~~In order~~)) **Qualifications for direct payments.** To qualify for direct payment, the taxpayer must meet the following requirements:

(i) The taxpayer must be registered with the department.

(ii) The taxpayer must file a bond with the department in an amount equal to two months estimated liability for the tax, but in no event less than ten thousand dollars. The bond must be executed by the taxpayer as principal, and by a corporation approved by the department and authorized to engage in business as a surety company in this state, as surety. Two months estimated tax liability shall be the total number of barrels received and placed into the storage tanks of a marine or bulk oil terminal in this state by the taxpayer during the two months in the immediately preceding twelve-month period with the highest number of barrels received multiplied by the total tax rate. If the department determines that the result of the foregoing calculation does not represent a fair estimate of the actual tax liability ((~~which~~)) that the taxpayer is expected to incur, it may set the bond requirement at such higher amount as the department determines in its judgment will secure the payment of the tax. The bond requirement may be waived ((~~upon~~)) with proof satisfactory to the department that the taxpayer has sufficient assets located in this state to ((~~insure~~)) ensure payment of the tax.

(iii) The taxpayer must be current in all of its tax obligations to the state having filed all returns as required by Title 82 RCW.

(b) **Review of bond amount.** The department may, from time to time, review the amount of any bond filed by a taxpayer possessing a direct payment certificate and may, ((~~upon~~)) with twenty days written notice to the taxpayer, require such higher bond as the department determines to be necessary to ((~~secure the~~)) ensure payment of the tax. The filing of a substitute bond in such higher amount is a condition to the continuation of the right to make direct payment under this ((~~section~~)) rule.

(c) **A direct payment certificate can be revoked.** The department may revoke a direct payment certificate issued

under this ((~~section may be revoked by the department~~)) rule if the taxpayer fails to maintain a current registration, fails to file a substitute bond within twenty days from a written request, or becomes delinquent in the payment of the tax.

(d) **Taxpayers holding a direct payment certificate.** The department maintains a current roster of all taxpayers who have a direct payment certificate. Copies of the roster are made available on a monthly basis to any interested person requesting to be placed on the roster subscription list. Requests to be placed on the roster subscription list should be mailed to ((~~the~~)) Taxpayer Services, Department of Revenue, ((~~Taxpayer Services, attn: Public Records,~~)) P.O. Box 47478, Olympia, WA 98504-7478.

(e) **Application for a direct payment certificate.** Applications for a direct payment certificate ((~~shall~~)) must be in writing and ((~~shall~~)) must include the name and address of the applicant, the applicant's registration number if currently registered, and the name and phone number of a contact person. The application ((~~shall~~)) must also contain a statement that if the application is approved, the taxpayer consents to the public disclosure that the taxpayer has been granted a direct payment certificate, or if the certificate is later revoked, the taxpayer consents to the public disclosure of the fact of revocation. Applications should be mailed to ((~~the~~)) Taxpayer Account Administration, Attn: Oil Spill Tax Unit, Department of Revenue, ((~~Taxpayer Account Administration,~~)) P.O. Box 47476, Olympia, WA 98504-7476.

(6) **Exemption - Previously taxed crude oil or petroleum products.** The tax applies only to the first receipt of crude oil or petroleum products at a marine or bulk oil terminal in this state. RCW 82.23B.030 provides an exemption for the subsequent receipt at a marine or bulk oil terminal in this state of previously taxed crude oil or petroleum products. This exemption applies even though the previously taxed crude oil or petroleum products are refined or processed prior to subsequent transportation and receipt.

(7) **Presumption.** Any receipt of crude oil or petroleum products at a marine terminal within this state from a waterborne vessel or barge operating on the navigable waters of this state, or effective July 1, 2015, receipt of crude oil or petroleum products at a bulk oil terminal within this state from a tank car, is presumed to be subject to the tax.

(a) **Certification of previous payment of the oil spill tax.** A person may rebut this presumption by documenting that the crude oil or petroleum products received were previously subject to the tax. The proof may be in the form of information on the invoice or a written certification from the seller at the time of shipment or exchange. The written certification must be in substantially the form below stating that all or a specific, stated portion of the crude oil or petroleum products were previously subject to the tax or, in the alternative, stating the amount of tax remitted or to be remitted to the state respective to the crude oil or petroleum products being sold.

Certification of Previous Payment of the Oil Spill Tax

I hereby certify that all or a portion of the crude oil or petroleum products specified herein were previously subject to the oil spill tax and that such tax was paid by the undersigned.

Identify product: _____

Amount of product in this shipment: _____

Percentage of product on which the tax has been paid: _____

OR

Amount of tax remitted or to be remitted to the state on product: _____

Name of recipient: _____

_____ _____

Authorized Signature of Seller Date

_____ _____

Firm Name UBI Number

(b) **Example 1.** Crude oil is received at a marine terminal in this state and the tax is remitted. The crude oil is then commingled with crude oil from a source not involving a receipt at a marine terminal such as a receipt from a pipeline or a tank car. The commingled crude oil is refined into two petroleum products such as jet kerosene and unleaded gasoline. The petroleum products are then placed on separate waterborne vessels or barges and are shipped to a second marine terminal in this state. The receipt of petroleum products at the second marine terminal is presumed to be subject to the tax. The presumption may be rebutted by proof of what portion of each product of the shipment was previously subject to tax. Proof may be made by means of information on the invoice or a written certification that substantially conforms with the requirements set forth in subsection (7)(a) of this rule.

(c) **Example 2.** Petroleum product is received at a marine terminal in this state and the tax is remitted. Substances that were not previously subject to the tax are added to the petroleum product resulting in an increase of the volume of the petroleum product. The petroleum product is then placed on a waterborne vessel or barge and received at a second marine terminal in this state. ((~~Upon~~)) At time of receipt at the second marine terminal, the tax is due on the incremental increase in volume of the petroleum product caused by the addition of the substances.

(8) **Export credit.** A credit is allowed against the tax for any crude oil or petroleum products exported from or sold for export from the state. RCW 82.23B.040.

(a) ((~~An export credit may be taken by~~)) **Credit for previously taxed product.** Any person who exports or sells for

export any previously taxed product may take an export credit. When the person taking the export credit is not the person who remitted the tax, the proof of payment of tax may be made by information on an invoice or written certification that substantially conforms to the requirements set forth in subsection (7)(a) of this rule.

(b) **When product is exported.** A person exports product when ((~~he or she~~)) the person actually transports the product beyond the borders of this state for purposes of sale, or delivers the product to a common carrier for delivery and subsequent sale or use at a point outside this state. Documentation of export is described in (d) of this subsection.

(c) **Sales of previously taxed product for export.** A person sells product for export when as a necessary incident to a contract of sale the seller agrees to, and does deliver previously taxed product:

(i) To the buyer at a destination outside this state;

(ii) To a carrier consigned to and for transportation to a destination outside this state;

(iii) To the buyer alongside or aboard a vessel or other vehicle of transportation under circumstances where it is clear that the process of ((~~exportation of~~)) exporting the product has begun; or

(iv) Into a pipeline for transportation to a destination outside this state.

In all circumstances, there must be a certainty of export evidenced by some overt step taken in the export process. A sale for export will not necessarily be deemed to have occurred if the product is merely in storage awaiting shipment, even though there is reasonable certainty that the product will be exported. The intention to export, as evidenced for example, by financial and contractual relationships, does not indicate certainty of export if the product has not commenced its journey outside this state. The product must actually enter the export stream. Sales of petroleum products by delivery into the fuel tank of a vessel or other vehicle in quantities greater than one hundred gallons will be considered placed into the export stream, provided the vessel or vehicle is immediately destined for a point outside this state and the seller obtains and keeps the documentary evidence ((~~provided~~)) discussed in (d) of this subsection.

(d) **Certificate of export.** A person who takes the credit for export must show that the previously taxed product was exported or sold for export. An export or a sale for export may be shown by obtaining and keeping any of the following documentary evidence:

(i) A bona fide bill of lading in which the seller is the shipper/consignor and by which the carrier agrees to transport the product to the buyer at a destination outside this state; or

(ii) A written certification in substantially the following form:

Certificate of Export

I hereby certify that the crude oil or petroleum products specified herein, purchased by or transferred to the undersigned from (seller or transferor), have been received into the export stream and are for export for sale or use outside Washington state. I will become liable for any tax credit granted (seller or transferor) pertaining to any crude oil or petroleum products which are not so exported outside Washington state. This certificate is given with full knowledge of, and subject to the legally prescribed penalties for fraud.

Registration No. . . . . Type of Business . . . . . (If applicable)

Firm Name . . . . . Registered Name . . . . . (If different)

Authorized Signature . . . . . .

Title . . . . . .

Identity of Product . . . . . (Kind and amount by volume)

Date . . . . . ; or

(iii) Documents consisting of:

(A) Purchase orders or contracts of sale which show that the seller is required to place the product into the export stream, e.g., "f.a.s. vessel"; and

(B) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting how and when the product was delivered into the export stream; and

(C) When available, records showing that the products were packaged, numbered, or otherwise handled in a way which is exclusively attributable to products sold for export.

(e) **Circumstances when credit is not available.** Only the export or sale for export of crude oil or petroleum products will qualify for the export credit. Crude oil or petroleum products ((~~will~~)) are not ((~~be~~)) eligible for the export credit if, prior to export, they are subject to further processing or used as ingredients in other compounds unless the resulting products are themselves crude oil or petroleum products.

(f) **Location exchange agreement.** Crude oil or petroleum products delivered to purchasers in other states pursuant to location exchange agreements ((~~will~~)) do not qualify for the export credit unless the crude oil or petroleum products were previously subject to the tax and credit has not yet been taken. A location exchange agreement is any arrangement where crude oil or petroleum products located in this state are exchanged through an accounts crediting system, or any other method, for like substances located in other states. Any person acquiring previously taxed product in this state for which no credit has been taken may claim a credit on any such product subsequently exported or sold for export, provided all of the requirements set forth in subsections (8) and (9) of this rule have been met.

(g) **Maintenance of records.** Persons claiming ((~~this~~)) the export credit must maintain records necessary to verify that the ((~~credit taking~~)) qualifications for taking the credit have been met. For this purpose any person claiming a credit who maintains those records required by WAC 458-20-19301 (Multiple activities tax credit), subsection (9), will be considered to have satisfied the requirements of this subsection.

(9) **Amount of credit.** The amount of the credit ((~~will be~~)) is equal to the tax previously paid on the crude oil or petroleum product exported or sold for export and for which credit has not already been taken. In no event will a credit be allowed in excess of the tax paid on the product exported or sold for export.

(a) ((~~In the case of a~~)) **Credit for amount billed or written on certification.** If the person claiming the credit ((~~who~~)) is not the taxpayer, the credit will be equal to that portion of the tax billed on an invoice or shown on a written certification that substantially conforms with the requirements set forth in subsection (7)(a) of this rule which relates to the particular product exported or sold for export.

((~~In order~~)) To determine the amount of tax reflected on an invoice which relates to a particular product exported or sold for export, it may be necessary to convert the tax paid from a rate per barrel to a rate per gallon or some other unit of measurement. This conversion is computed by taking the total amount of tax paid on an invoice for a particular product and dividing that figure by the total quantity of the product expressed in terms of the unit of measurement used for export. The credit is then computed by multiplying the converted rate times the quantity of product exported or sold for export.

(b) **Accounting methods for determining credit for commingled products.** When the product exported is previously taxed product commingled with untaxed product a person claiming the export credit may compute the amount of previously taxed product using one of the following methods:

(i) First-in, first-out method. Under this method the export credit is computed by treating existing inventory as sold before later acquired inventory.

(ii) Average of tax paid method. Under this method, the export credit is determined by calculating the average rate of tax paid on all inventory. This method requires computing the tax by making adjustments in the rate of tax paid on all products on hand as ((~~it is~~)) they are removed from or added to storage.

(iii) Any other method approved by the department.

(c) **Use of selected method.** The use of one of the methods set forth in this subsection (9) to account for tax paid on commingled crude oil or petroleum products constitutes an election to continue using the method selected. Once selected, no change in accounting method is permitted without the prior consent of the department.

(d) **Examples.** The following ((~~are~~)) examples ((~~of the way in which~~)) show how to compute the credit ((~~is to be computed:~~)).

(i) **Example 3.** A petroleum products distributor purchases 100 barrels each of premium unleaded gasoline and regular unleaded gasoline. The invoice from the refiner separately states that the invoice includes $5.00 of tax for each of the two types of products. The distributor pays the invoiced amount and later sells 2,000 gallons of the premium unleaded and 4,000 gallons of the regular unleaded to a retailer located outside Washington. ((~~In order~~)) To compute the amount of credit on the export sales the distributor must convert the tax paid from barrels to gallons. Since there are 42 US gallons in a barrel and 200 barrels purchased, the number of gallons equals 8400 (42 × 200). The per gallon tax paid on both products is equal to .119 cents per gallon ($10.00 ÷ 8400). The distributor would be eligible for credit equal to $2.38 for the premium unleaded (2,000 × $.00119) and $4.76 for the regular unleaded (4,000 × $.00119).

(ii) **Example 4.** A petroleum products distributor purchases 100 barrels of unleaded gasoline on which the tax has been remitted for a portion. The invoice for the unleaded separately states that the total price includes $4.00 of tax. This previously taxed product is commingled with 30 barrels of gasoline received through a pipeline, that is, product that is not subject to tax. The distributor sells 2,940 gallons of commingled product to a retailer for sale outside Washington. The tax paid on the previously taxed product is equal to .095 cents per gallon ($4.00 ÷ 4200). Since the exported product has been blended with product that has not been taxed, only 76.9% of the exported product is eligible for credit (100 ÷ 130). The credit is $2.15 (2,940 × .769 × $.00095).

(iii) **Example 5.** A petroleum distributor purchases 100 barrels of gasoline and receives from the seller an invoice that states that the tax has been paid on 90% of the shipped product. The distributor exports the 100 barrels. The petroleum distributor may claim an export credit of $4.50. (90% of 100 barrels equals 90 barrels times the tax rate of $.05 equals $4.50.)

(iv) **Example 6.** A petroleum distributor purchases 100 barrels of unleaded gasoline from refinery A and later purchases 100 barrels from refinery B. The distributor stores all of its unleaded gasoline in a single storage tank. The invoice from refinery A separately states the amount of tax on the gasoline as $5.00 and the refinery B invoice states the tax as $4.00. The distributor pays the two invoiced amounts and sells 2,100 gallons of the commingled unleaded to a retailer located outside Washington. The distributor then purchases 100 more barrels of unleaded gasoline from distributor C. Distributor C's invoice separately states the tax as $3.00. Following payment of the invoice, the distributor exports an additional 2,100 gallons of unleaded. The distributor could choose to calculate the tax using one of the methods of accounting described in (b) of this subsection.

(A) Under the first-in, first-out method the distributor would treat all 4,200 gallons sold as if it was the unleaded gasoline purchased from refinery A. Under this method, the credit would be equal to .119 cents per gallon ($5.00 ÷ 4,200) or $5.00 total ($.00119 × 4,200).

(B) Under the average of tax paid method the distributor would recompute the tax paid on average for the entire commingled amount making adjustments as gasoline is sold or gasoline is added. Prior to the addition of the purchases from refinery B or distributor C, the rate would be .119 cents per gallon ($5.00 ÷ 4,200). Following the addition of the 100 barrels from refinery B the tank contains 8,400 gallons. The rate of tax would now be .107 cents per gallon (($5.00 + $4.00) ÷ 8,400). Out of this amount 2,100 gallons is exported in the first sale. The credit for this sale would be equal to $2.25 ($.00107 × 2,100).

(10) **Credit for use of petroleum products.** ((~~Effective March 26, 1992, any~~)) A person having paid the tax imposed by ((~~this~~)) chapter 82.23B RCW may claim a refund or credit for the following:

(a) The use of petroleum products as a consumer for a purpose other than as a fuel. For this purpose, the term consumer shall be defined as provided in RCW 82.04.190; or

(b) The use of petroleum products as a component or ingredient in the manufacture of an item which is not a fuel.

(c) The amount of refund or credit claimed may not exceed the amount of tax paid by the person making such claim on the petroleum products so consumed or used.