

WSR 11-10-029
EMERGENCY RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES

(Medicaid Purchasing Administration)

[Filed April 27, 2011, 9:33 a.m., effective April 28, 2011]

Effective Date of Rule: April 28, 2011.

Purpose: Upon order of the governor, the medicaid purchasing administration (MPA) must reduce its budget expenditures for the current fiscal year ending June 30, 2011, by 6.3 percent. To achieve this expenditure reduction, MPA is eliminating optional medical services from program benefit packages for clients twenty-one years of age and older. These medical services include vision, hearing, and dental. Chapter 388-531 WAC is being amended to include medical services previously listed in the programs to be eliminated that are necessary to, and included within, appropriate mandatory medical services under federal statutes and rules.

Citation of Existing Rules Affected by this Order: Amending WAC 388-531-0100, 388-531-0150, 388-531-0200, 388-531-0250, 388-531-0400, 388-531-1000, and 388-531-1300.

Statutory Authority for Adoption: RCW 74.08.090.

Other Authority: Section 209(1), chapter 37, Laws of 2010 (ESSB 6444).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; and that in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this Finding: Governor Gregoire issued Executive Order 10-04 on September 13, 2010, under the authority of RCW 43.88.110(7). In the executive order, the governor required DSHS and all other state agencies to reduce their expenditures in state fiscal year 2011 by approximately 6.3 percent. As a consequence of the executive order, funding is no longer available as of January 1, 2011, for the benefits that are being eliminated as part of these regulatory amendments. Delaying the adoption of these cuts to optional services could jeopardize the state's ability to maintain the mandatory medicaid services for the majority of DSHS clients. This emergency rule is necessary to continue the current emergency rule adopted under WSR 11-02-027 while the permanent rule-making process is completed. MPA has filed a CR-101 under WSR 10-20-160 to begin the permanent rule-making process and anticipates filing the CR-102 in May 2011.

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

Recently Enacted State Statutes: New 0, Amended 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 2, Amended 7, 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 2, Amended 7, Repealed 0.

Date Adopted: April 19, 2011.

Katherine I. Vasquez

Rules Coordinator

AMENDATORY SECTION (Amending WSR 08-12-030, filed 5/29/08, effective 7/1/08)

WAC 388-531-0100 Scope of coverage for physician-related and healthcare professional services—General and administrative. (1) The department covers healthcare services, equipment, and supplies listed in this chapter, according to department rules and subject to the limitations and requirements in this chapter, when they are:

(a) Within the scope of an eligible client's medical assistance program. Refer to WAC 388-501-0060 and 388-501-0065; and

(b) Medically necessary as defined in WAC 388-500-0005.

(2) The department evaluates a request for a service that is in a covered category under the provisions of WAC 388-501-0165.

(3) The department evaluates requests for covered services that are subject to limitations or other restrictions and approves such services beyond those limitations or restrictions as described in WAC 388-501-0169.

(4) The department covers the following physician-related services and healthcare professional services, subject to the conditions in subsections (1), (2), and (3) of this section:

(a) Allergen immunotherapy services;

(b) Anesthesia services;

(c) Dialysis and end stage renal disease services (refer to chapter 388-540 WAC);

(d) Emergency physician services;

(e) ENT (ear, nose, and throat) related services;

(f) Early and periodic screening, diagnosis, and treatment (EPSDT) services (refer to WAC 388-534-0100);

(g) (~~Family planning~~) Reproductive health services (refer to chapter 388-532 WAC);

(h) Hospital inpatient services (refer to chapter 388-550 WAC);

(i) Maternity care, delivery, and newborn care services (refer to chapter 388-533 WAC);

(j) Office visits;

(k) Vision-related services~~(s)~~ (refer to chapter 388-544 WAC for vision hardware for clients twenty years of age and younger);

- (l) Osteopathic treatment services;
- (m) Pathology and laboratory services;
- (n) Psychiatry and other rehabilitation services (refer to chapter 388-550 WAC);
- (o) Foot care and podiatry services (refer to WAC 388-531-1300);
- (p) Primary care services;
- (q) Psychiatric services, provided by a psychiatrist;
- (r) Psychotherapy services for children as provided in WAC 388-531-1400;
- (s) Pulmonary and respiratory services;
- (t) Radiology services;
- (u) Surgical services;
- (v) Cosmetic, reconstructive, or plastic surgery, and related services and supplies to correct physiological defects from birth, illness, or physical trauma, or for mastectomy reconstruction for post cancer treatment; ~~((and))~~

(w) Oral healthcare services for emergency conditions for clients twenty-one years of age and older, except for clients of the division of developmental disabilities (refer to WAC 388-531-1025); and

(x) Other outpatient physician services.

(5) The department covers physical examinations for medical assistance clients only when the physical examination is one or more of the following:

(a) A screening exam covered by the EPSDT program (see WAC 388-534-0100);

(b) An annual exam for clients of the division of developmental disabilities; or

(c) A screening pap smear, mammogram, or prostate exam.

(6) By providing covered services to a client eligible for a medical assistance program, a provider who has signed an agreement with the department accepts the department's rules and fees as outlined in the agreement, which includes federal and state law and regulations, billing instructions, and department issuances.

AMENDATORY SECTION (Amending WSR 10-19-057, filed 9/14/10, effective 10/15/10)

WAC 388-531-0150 Noncovered physician-related and healthcare professional services—General and administrative. (1) Except as provided in WAC 388-531-0100 and subsection (2) of this section, the department does not cover the following:

- (a) Acupuncture, massage, or massage therapy;
- (b) Any service specifically excluded by statute;
- (c) Care, testing, or treatment of infertility, frigidity, or impotency. This includes procedures for donor ovum, sperm, womb, and reversal of vasectomy or tubal ligation;
- (d) Cosmetic treatment or surgery, except for medically necessary reconstructive surgery to correct defects attributable to trauma, birth defect, or illness;
- (e) Experimental or investigational services, procedures, treatments, devices, drugs, or application of associated services, except when the individual factors of an individual client's condition justify a determination of medical necessity under WAC 388-501-0165;
- (f) Hair transplantation;

(g) Marital counseling or sex therapy;

(h) More costly services when the department determines that less costly, equally effective services are available;

(i) Vision-related services ((listed)) as ((~~noncovered in chapter 388-544 WAC;~~)) follows:

(i) Services for cosmetic purposes only;

(ii) Group vision screening for eyeglasses; and

(iii) Refractive surgery of any type that changes the eye's refractive error. The intent of the refractive surgery procedure is to reduce or eliminate the need for eyeglass or contact lens correction. This refractive surgery does not include intraocular lens implantation following cataract surgery.

(j) Payment for body parts, including organs, tissues, bones and blood, except as allowed in WAC 388-531-1750;

(k) Physician-supplied medication, except those drugs administered by the physician in the physician's office;

(l) Physical examinations or routine checkups, except as provided in WAC 388-531-0100;

(m) ~~((Routine foot care. This does not include clients who have a medical condition that affects the feet, such as diabetes or arteriosclerosis obliterans. Routine foot care includes, but is not limited to:~~

~~(i) Treatment of mycotic disease;~~

~~(ii) Removal of warts, corns, or calluses;~~

~~(iii) Trimming of nails and other hygiene care; or~~

~~(iv) Treatment of flat feet;~~

~~((n) Except as provided in WAC 388-531-1600, weight reduction and control services, procedures, treatments, devices, drugs, products, gym memberships, equipment for the purpose of weight reduction, or the application of associated services)) Foot care, unless the client meets criteria and conditions outlined in WAC 388-531-1300, as follows:~~

(i) Routine foot care, such as but not limited to:

(A) Treatment of tinea pedis;

(B) Cutting or removing warts, corns and calluses; and

(C) Trimming, cutting, clipping, or debriding of nails.

(ii) Nonroutine foot care, such as, but not limited to treatment of:

(A) Flat feet;

(B) High arches (cavus foot);

(C) Onychomycosis;

(D) Bunions and tailor's bunion (hallux valgus);

(E) Hallux malleus;

(F) Equinus deformity of foot, acquired;

(G) Cavovarus deformity, acquired;

(H) Adult acquired flatfoot (metatarsus adductus or pes planus);

(I) Hallux limitus.

(iii) Any other service performed in the absence of localized illness, injury, or symptoms involving the foot.

~~((+)) (n) Nonmedical equipment; ~~((and))~~~~

~~((+)) (o) Nonemergent admissions and associated services to out-of-state hospitals or noncontracted hospitals in contract areas;~~

(p) Bilateral cochlear implantation; and

(q) Routine or nonemergency medical and surgical dental services provided by a doctor of dental medicine or dental surgery for clients twenty one years of age and older, except for clients of the division of developmental disabilities.

(2) The department covers excluded services listed in (1) of this subsection if those services are mandated under and provided to a client who is eligible for one of the following:

- (a) The EPSDT program;
- (b) A medicaid program for qualified **medicare** beneficiaries (QMBs); or
- (c) A waiver program.

AMENDATORY SECTION (Amending WSR 10-19-057, filed 9/14/10, effective 10/15/10)

WAC 388-531-0200 Physician-related and health-care professional services requiring prior authorization.

(1) The department requires **prior authorization** for certain services. Prior authorization includes **expedited prior authorization (EPA)** and **limitation extension (LE)**. See WAC 388-501-0165.

(2) The EPA process is designed to eliminate the need for telephone prior authorization for selected admissions and procedures.

(a) The provider must create an authorization number using the process explained in the department's physician-related billing instructions.

(b) Upon request, the provider must provide supporting clinical documentation to the department showing how the authorization number was created.

(c) Selected (~~(nonemergent)~~) nonemergency admissions to contract hospitals require EPA. These are identified in the department billing instructions.

(d) Procedures (~~(requiring)~~) allowing expedited prior authorization include, but are not limited to, the following:

- (i) (~~Bladder repair;~~
- (ii) Hysterectomy for clients age forty five and younger, except with a diagnosis of cancer(s) of the female reproductive system;
- (iii) Outpatient magnetic resonance imaging (MRI) and magnetic resonance angiography (MRA);
- (iv) Reduction mammoplasties/mastectomy for (~~gynecomastia~~) gynecomastia; (~~and~~)
- (v) Strabismus surgery for clients eighteen years of age and older;
- (vi) Meningococcal vaccine;
- (vii) Placement of drug eluting stent and device;
- (viii) Cochlear implants for clients twenty years of age and younger;
- (ix) Hyperbaric oxygen therapy;
- (x) Visual exam/refraction for clients twenty-one years of age and older;
- (xi) Blepharoplasties; and
- (xii) Neuropsychological testing for clients sixteen years of age and older.

(3) The department evaluates new technologies under the procedures in WAC 388-531-0550. These require prior authorization.

(4) Prior authorization is required for the following:

- (a) Abdominoplasty;
- (b) All inpatient hospital stays for **acute physical medicine and rehabilitation (PM&R)**;
- (c) Unilateral cochlear implants(~~, which also:~~

~~(i) For coverage, must be performed in an ambulatory surgery center (ASC) or an inpatient or outpatient hospital facility; and~~

~~(ii) For reimbursement, must have the invoice attached to the claim)) for clients twenty years of age and younger (refer to WAC 388-531-0375);~~

(d) Diagnosis and treatment of eating disorders for clients twenty-one years of age and older;

(e) Osteopathic manipulative therapy in excess of the department's published limits;

(f) Panniculectomy;

(g) Bariatric surgery (see WAC 388-531-1600); and

(h) Vagus nerve stimulator insertion, which also:

(i) For coverage, must be performed in an inpatient or outpatient hospital facility; and

(ii) For reimbursement, must have the invoice attached to the claim.

(i) Osseointegrated/bone anchored hearing aids (BAHA) for clients twenty years of age and younger;

(j) Removal or repair of previously implanted BAHA or cochlear device for clients twenty one years of age and older when medically necessary.

(5) The department may require a second opinion and/or consultation before authorizing any elective surgical procedure.

(6) Children six (~~(year)~~) years of age and younger do not require authorization for hospitalization.

AMENDATORY SECTION (Amending WSR 08-12-030, filed 5/29/08, effective 7/1/08)

WAC 388-531-0250 Who can provide and bill for physician-related and healthcare professional services.

(1) The following enrolled providers are eligible to provide and bill for physician-related and healthcare professional services which they provide to eligible clients:

- (a) Advanced registered nurse practitioners (ARNP);
- (b) Federally qualified health centers (FQHCs);
- (c) Health departments;
- (d) Hospitals currently licensed by the department of health;
- (e) Independent (outside) laboratories **CLIA** certified to perform tests. See WAC 388-531-0800;
- (f) Licensed marriage and family therapists, only as provided in WAC 388-531-1400;
- (g) Licensed mental health counselors, only as provided in WAC 388-531-1400;
- (h) Licensed radiology facilities;
- (i) Licensed social workers, only as provided in WAC 388-531-1400 and 388-531-1600;
- (j) Medicare-certified ambulatory surgery centers;
- (k) Medicare-certified rural health clinics;
- (l) Providers who have a signed agreement with the department to provide screening services to eligible persons in the EPSDT program;
- (m) Registered nurse first assistants (RNFA); and
- (n) Persons currently licensed by the state of Washington department of health to practice any of the following:
 - (i) Dentistry (refer to chapter 388-535 WAC);
 - (ii) Medicine and osteopathy;

- (iii) Nursing;
 - (iv) Optometry; or
 - (v) Podiatry.
- (2) The department does not pay for services performed by any of the following practitioners:
- (a) Acupuncturists;
 - (b) Christian Science practitioners or theological healers;
 - (c) Counselors, except as provided in WAC 388-531-1400;
 - (d) Herbalists;
 - (e) Homeopaths;
 - (f) Massage therapists as licensed by the Washington state department of health;
 - (g) Naturopaths;
 - (h) Sanipractors;
 - (i) Social workers, except those who have a master's degree in social work (MSW), and:
 - (i) Are employed by an FQHC;
 - (ii) Who have prior authorization to evaluate a client for bariatric surgery; or
 - (iii) As provided in WAC 388-531-1400.
 - (j) Any other licensed or unlicensed practitioners not otherwise specifically provided for in WAC (~~388-502-0010~~) 388-502-0002; or
 - (k) Any other licensed practitioners providing services which the practitioner is not:
 - (i) Licensed to provide; and
 - (ii) Trained to provide.
- (3) The department pays practitioners listed in subsection (2) of this section for physician-related services if those services are mandated by, and provided to, clients who are eligible for one of the following:
- (a) The EPSDT program;
 - (b) A medicaid program for qualified medicare beneficiaries (QMB); or
 - (c) A waiver program.

NEW SECTION

- WAC 388-531-0375 Audiology services.** (1) The department covers, with prior authorization, the implantation of a unilateral cochlear device for clients twenty years of age and younger with the following limitations:
- (a) The client meets one of the following:
 - (i) Has a diagnosis of profound to severe bilateral, sensorineural hearing loss;
 - (ii) Has stimulable auditory nerves but has limited benefit from appropriately fitted hearing aids (e.g., fail to meet age-appropriate auditory milestones in the best-aided condition for young children, or score of less than ten or equal to forty percent correct in the best-aided condition on recorded open-set sentence recognition tests);
 - (iii) Has the cognitive ability to use auditory clues;
 - (iv) Is willing to undergo an extensive rehabilitation program;
 - (v) Has an accessible cochlear lumen that is structurally suitable for cochlear implantation;
 - (vi) Does not have lesions in the auditory nerve and/or acoustic areas of the central nervous system; or
 - (vii) Has no other contraindications to surgery; and

- (b) The procedure is performed in an inpatient hospital setting or outpatient hospital setting.
- (2) The department covers osseointegrated bone anchored hearing aids (BAHA) for clients twenty years of age and younger with prior authorization.
- (3) The department covers replacement parts for BAHA and cochlear devices for clients twenty years of age and younger only. See WAC 388-547-0800.
- (4) The department considers requests for removal or repair of previously implanted bone anchored hearing aids (BAHA) and cochlear devices for clients twenty one years of age and older only when medically necessary. Prior authorization from the department is required.
- (5) For audiology, the department limits:
- (a) Caloric vestibular testing to four units for each ear; and
 - (b) Sinusoidal vertical axis rotational testing to three units for each direction.

AMENDATORY SECTION (Amending WSR 01-01-012, filed 12/6/00, effective 1/6/01)

WAC 388-531-0400 Client responsibility for reimbursement for physician-related services. Clients may be responsible to reimburse the provider, as described under WAC 388-501-0100, for noncovered services (~~(that are not covered under the client's medical care program)~~) as defined in WAC 388-501-0050 or for services excluded from the client's benefits package as defined under WAC 388-501-0060. Clients whose care is provided under CHIP may be responsible for copayments as outlined in chapter 388-542 WAC. Also, see WAC 388-502-0160, Billing the client.

AMENDATORY SECTION (Amending WSR 01-01-012, filed 12/6/00, effective 1/6/01)

WAC 388-531-1000 Ophthalmic (~~physician-related~~) services. Refer to chapter 388-544 WAC for (~~ophthalmic and~~) vision-related ((services)) hardware coverage for clients twenty years of age and younger.

(1) The department covers, without prior authorization, eye examinations, refraction and fitting services with the following limitations:

- (a) Once every twenty four months for asymptomatic clients twenty one years of age and older;
- (b) Once every twelve months for asymptomatic clients twenty years of age and younger; or
- (c) Once every twelve months, regardless of age, for asymptomatic clients of the division of developmental disabilities.

(2) The department covers additional examinations and refraction services outside the limitations described in subsection (1) of this section when:

- (a) The provider is diagnosing or treating the client for a medical condition that has symptoms of vision problems or disease;
- (b) The client is on medication that affects vision; or
- (c) The service is necessary due to lost or broken eye-glasses/contacts. In this case:

(i) No type of authorization is required for clients twenty years of age or younger or for clients of the division of developmental disabilities, regardless of age.

(ii) Providers must follow the department's expedited prior authorization process to receive payment for clients twenty one years of age or older. Providers must also document the following in the client's file:

(A) The eyeglasses or contacts are lost or broken; and

(B) The last examination was at least eighteen months ago.

(3) The department covers visual field exams for the diagnosis and treatment of abnormal signs, symptoms, or injuries. Providers must document all of the following in the client's record:

(a) The extent of the testing;

(b) Why the testing was reasonable and necessary for the client; and

(c) The medical basis for the frequency of testing.

(4) The department covers orthoptics and vision training therapy. Providers must obtain prior authorization from the department.

(5) The department covers ocular prosthetics for clients when provided by any of the following:

(a) An ophthalmologist;

(b) An ocularist; or

(c) An optometrist who specializes in prosthetics.

(6) The department covers cataract surgery, without prior authorization when the following clinical criteria are met:

(a) Correctable visual acuity in the affected eye at 20/50 or worse, as measured on the Snellen test chart; or

(b) One or more of the following conditions:

(i) Dislocated or subluxated lens;

(ii) Intraocular foreign body;

(iii) Ocular trauma;

(iv) Phacogenic glaucoma;

(v) Phacogenic uveitis;

(vi) Phacoanaphylactic endophthalmitis; or

(vii) Increased ocular pressure in a person who is blind and is experiencing ocular pain.

(7) The department covers strabismus surgery as follows:

(a) For clients seventeen years of age and younger. The provider must clearly document the need in the client's record. The department does not require authorization for clients seventeen years of age and younger; and

(b) For clients eighteen years of age and older, when the clinical criteria are met. To receive payment, providers must follow the expedited prior authorization process. The clinical criteria are:

(i) The client has double vision; and

(ii) The surgery is not being performed for cosmetic reasons.

(8) The department covers blepharoplasty or blepharoptosis surgery for clients when all of the clinical criteria are met. To receive payment, providers must follow the department's expedited prior authorization process. The clinical criteria are:

(a) The client's excess upper eyelid skin is blocking the superior visual field; and

(b) The blocked vision is within ten degrees of central fixation using a central visual field test.

NEW SECTION

WAC 388-531-1025 Oral healthcare services provided by dentists for clients age twenty-one and older—General. This section does not apply to clients of the division of developmental disabilities. Refer to WAC 388-535-1099.

(1) Clients age twenty-one and older are eligible for the oral healthcare services listed in this section, subject to coverage limitations. The department pays for oral healthcare services provided by a dentist to clients age twenty-one and older when the services provided:

(a) Are within the scope of the eligible client's medical care program;

(b) Are medically necessary as defined in WAC 388-500-0005;

(c) Are emergency services and meet the criteria of coverage for emergency oral healthcare benefit listed in subsection (7) of this section;

(d) Are documented in the client's record in accordance with chapter 388-502 WAC;

(e) Meet the department's prior authorization requirements, if there are any;

(f) Are within prevailing standard of care accepted practice standards;

(g) Are consistent with a diagnosis of teeth, mouth and jaw disease or condition;

(h) Are reasonable in amount and duration of care, treatment, or service;

(i) Are billed using only the allowed procedure codes listed in the department's published billing instructions and fee schedules; and

(j) Are documented with a comprehensive description of the client's presenting symptoms, diagnosis and services provided, in the client's record, including the following, if applicable:

(i) Client's blood pressure, when appropriate;

(ii) A surgical narrative;

(iii) A copy of the post-operative instructions; and

(iv) A copy of all pre- and post-operative prescriptions.

(2) An appropriate consent form, if required, signed and dated by the client or the client's legal representative must be in the client's record.

(3) An anesthesiologist providing oral healthcare under this section must have a current provider's permit on file with the department.

(4) A healthcare provider providing oral or parenteral conscious sedation, or general anesthesia, must meet:

(a) The provider's professional organization guidelines;

(b) The department of health (DOH) requirements in chapter 246-817 WAC; and

(c) Any applicable DOH medical, dental, and nursing anesthesia regulations.

(5) Department-enrolled dental providers who are not specialized to perform oral and maxillofacial surgery (see WAC 388-535-1070(3)) must use only the current dental terminology (CDT) codes to bill claims for services that are listed in this section.

(6) Oral healthcare services must be provided in a clinic setting, with the exception of trauma related services.

(7) Emergency oral healthcare benefit.

(a) Medical and surgical services provided by a doctor of dental medicine or dental surgery, which, if provided by a physician, are considered a physician service, are included in the emergency oral healthcare benefit when the services are done on an emergency basis. All services are subject to prior authorization when indicated.

(b) The following set of services are covered under the emergency oral healthcare benefit when provided by a dentist to assess and treat pain, infection or trauma of the mouth, jaw, or teeth, including treatment of post-surgical complications, such as dry socket and services that are part of a cancer treatment regimen or part of a pre-transplant protocol:

(i) One emergency examination, per presenting problem, performed as a limited oral evaluation to:

(A) Evaluate the client's symptom of pain;

(B) Make a diagnosis; and

(C) Develop or implement a treatment plan, including a referral to another healthcare professional, such as an oral surgeon; or

(D) A second evaluation if the treatment initiated is conservative, such as prescribed antibiotics, and a subsequent visit is necessary for definitive treatment, such as tooth extraction. The treatment plan must be documented in the client's record.

(ii) Diagnostic radiographs (x-rays).

(A) Radiographs include:

(I) Periapical; and

(II) Panoramic films, limited to one every three years.

(B) Radiographs must:

(I) Be required to make the diagnosis;

(II) Support medical necessity;

(III) Be of diagnostic quality, dated and labeled with the client's name;

(IV) Be retained by the provider as part of the client's record. The retained radiograph must be the original.

(C) Duplicate radiographs must be submitted with prior authorization requests or when the department requests a copy of the client's dental record.

(iii) Pulpal debridement. One gross pulpal debridement per client, per tooth, within a twelve-month period.

(iv) Extractions and surgical extractions for symptomatic teeth, limited to:

(A) Extraction of a nearly-erupted or fully erupted tooth or exposed root;

(B) Surgical removal of an erupted tooth only;

(C) Surgical removal of residual tooth roots; and

(D) Extraction of an impacted wisdom tooth when the tooth is not erupted.

(v) Palliative (emergency) treatment for the treatment of dental pain, one per client, per six-month period, during a limited oral evaluation appointment.

(vi) Local anesthesia and regional blocks as part of the global fee for any procedure being provided to a client.

(vii) Inhalation of nitrous oxide, once per day.

(viii) House or extended care facility visits, for emergency care as defined in this section.

(ix) Emergency office visits after regularly scheduled hours. The department limits coverage to one emergency visit per day, per provider.

(x) Therapeutic drug injections including drugs and/or medicaments (pharmaceuticals) only when used with general anesthesia.

(xi) Treatment of post-surgical complications, such as dry socket.

(c) Emergency healthcare benefit services provided by dentists specialized in oral maxillofacial surgery. Services that are covered under the emergency oral healthcare benefit to assess and treat pain, infection or trauma of the mouth, jaw, or teeth, including treatment of post-surgical complications, such as dry socket and services that are part of a cancer treatment regimen or part of a pre-transplant protocol:

(i) May be provided by dentists specialized in oral maxillofacial surgery; and

(ii) Are billed using only the allowed procedure codes listed in the department's published billing instructions and fee schedules.

(8) Prior Authorization for oral healthcare services provided by dentists for clients age twenty-one and older.

(a) The department uses the determination process described in WAC 388-501-0165 for covered oral healthcare services for clients age twenty-one and older for an emergency condition that requires prior authorization.

(b) The department requires a dental provider who is requesting prior authorization to submit sufficient objective clinical information to establish medical necessity. The request must be submitted in writing on the DSHS 13-835 general information for authorization form which may be obtained at <http://dshs.wa.gov/msa/forms/eforms.html>.

(c) The department may request additional information as follows:

(i) Additional radiographs (X rays);

(ii) Study models;

(iii) Photographs; and

(iv) Any other information as determined by the department.

(d) The department may require second opinions and/or consultations before authorizing any procedure.

(e) When the department authorizes an oral healthcare service for a client, that authorization indicates only that the specific service is medically necessary and an emergency, it is not a guarantee of payment. The authorization is valid for six months and only if the client is eligible and the service is covered in the client's healthcare benefit package on the date of service.

(f) The department denies a request for an oral healthcare service when the requested service:

(i) Is not covered in the client's healthcare benefit package;

(ii) Is covered by another department program;

(iii) Is covered by an agency or other entity outside the department; or

(iv) Fails to meet the clinical criteria, limitations, or restrictions in this section.

(9) Refer to chapter 388-535 WAC and WAC 388-531-1850 and 388-531-1900 for the payment methodologies used for the services listed in this section.

AMENDATORY SECTION (Amending WSR 10-19-057, filed 9/14/10, effective 10/15/10)

WAC 388-531-1300 (~~Podiatric physician related services~~) Foot care services for clients twenty-one years of age and older. (1) ~~((The department covers podiatric services as listed in this section when provided by any of the following:~~

- ~~(a) A medical doctor;~~
- ~~(b) A doctor of osteopathy; or~~
- ~~(c) A podiatric physician.~~

~~(2) The department reimburses for the following:~~

~~(a) Nonroutine foot care when a medical condition that affects the feet (such as diabetes or arteriosclerosis obliterans) requires that any of the providers in subsection (1) of this section perform such care;~~

~~(b) One treatment in a sixty-day period for debridement of nails. The department covers additional treatments in this period if documented in the client's medical record as being medically necessary;~~

~~(c) Impression casting. The department includes ninety-day follow-up care in the reimbursement;~~

~~(d) A surgical procedure performed on the ankle or foot, requiring a local nerve block, and performed by a qualified provider. The department does not reimburse separately for the anesthesia, but includes it in the reimbursement for the procedure; and~~

~~(e) Custom fitted and/or custom molded orthotic devices:~~

~~(i) The department's fee for the orthotic device includes reimbursement for a biomechanical evaluation (an evaluation of the foot that includes various measurements and manipulations necessary for the fitting of an orthotic device); and~~

~~(ii) The department includes an E&M fee reimbursement in addition to an orthotic fee reimbursement if the E&M services are justified and well documented in the client's medical record.~~

~~(3) The department does not reimburse podiatrists for any of the following radiology services:~~

- ~~(a) X rays for soft tissue diagnosis;~~
- ~~(b) Bilateral X rays for a unilateral condition;~~
- ~~(c) X rays in excess of two views;~~
- ~~(d) X rays that are ordered before the client is examined;~~

~~or~~

~~(e) X rays for any part of the body other than the foot or ankle.)~~ This section addresses care of the lower extremities (foot and ankle) referred to as foot care and applies to clients twenty-one years of age and older.

(2) The department covers the foot care services listed in this section when those services are provided by any of the following healthcare providers and billed to the department using procedure codes and diagnosis codes that are within their scope of practice:

- (a) Physicians or physician's assistants-certified (PA-C);
- (b) Osteopathic physicians, surgeons, or physician's assistant-certified (PA-C);
- (c) Podiatric physicians and surgeons; or
- (d) Advanced registered nurse practitioners (ARNP).

(3) The department covers evaluation and management visits to assess and diagnose conditions of the lower extremi-

ties. Once diagnosis is made, the department covers treatment if the criteria in subsection (4) of this section are met.

(4) The department pays for:

(a) Treatment of the following conditions of the lower extremities only when there is an acute condition, an exacerbation of a chronic condition, or presence of a systemic condition such as metabolic, neurologic, or peripheral vascular disease and evidence that the treatment will prevent, cure or alleviate a condition in the client that causes pain resulting in the inability to perform activities of daily living, acute disability, or threatens to cause the loss of life or limb, unless otherwise specified:

(i) Acute inflammatory processes such as, but not limited to tendonitis;

(ii) Circulatory compromise such as, but are not limited to:

(A) Lymphedema;

(B) Raynaud's disease;

(C) Thromboangiitis obliterans; and

(D) Phlebitis.

(iii) Injuries, fractures, sprains, and dislocations;

(iv) Gout;

(v) Lacerations, ulcerations, wounds, blisters;

(vi) Neuropathies (e.g., reflex sympathetic dystrophy, secondary to diabetes, charcot arthropathy);

(vii) Osteomyelitis;

(viii) Post-op complications;

(ix) Warts, corns, or calluses in the presence of an acute condition such as infection and pain effecting the client's ability to ambulate as a result of the warts, corns, or calluses and meets the criteria in subsection (4) of this section;

(x) Soft tissue conditions, such as, but are not limited to:

(A) Rashes;

(B) Infections (fungal, bacterial);

(C) Gangrene;

(D) Cellulitis of lower extremities;

(E) Soft tissue tumors; and

(F) Neuroma.

(xi) Nail bed infections (paronychia); and

(xii) Tarsal tunnel syndrome.

(b) Trimming and/or debridement of nails to treat, as applicable, conditions from the list in subsection (4)(a) of this section. The department pays for one treatment in a sixty-day period. The department covers additional treatments in this period if documented in the client's medical record as being medically necessary;

(c) A surgical procedure to treat one of the conditions in subsection (4) of this section performed on the lower extremities, and performed by a qualified provider;

(d) Impression casting to treat one of the conditions in subsection (4) of this section. The department includes ninety-day follow-up care in the reimbursement;

(e) Custom fitted and/or custom molded orthotic devices to treat one of the conditions in subsection (4) of this section.

(i) The department's fee for the orthotic device includes reimbursement for a biomechanical evaluation (an evaluation of the foot that includes various measurements and manipulations necessary for the fitting of an orthotic device); and

(ii) The department includes an evaluation and management (E&M) fee reimbursement in addition to an orthotic fee

reimbursement if the E&M services are justified and well documented in the client's medical record.

(5) The department does not pay for:

(a) The following radiology services:

(i) Bilateral X-rays for a unilateral condition; or

(ii) X-rays in excess of three views; or

(iii) X-rays that are ordered before the client is examined.

(b) Podiatric physicians or surgeons for X-rays for any part of the body other than the foot or ankle.

WSR 11-10-034

EMERGENCY RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Medicaid Purchasing Administration)

[Filed April 27, 2011, 10:23 a.m., effective April 28, 2011]

Effective Date of Rule: April 28, 2011.

Purpose: Upon order of the governor, the medicaid purchasing administration (MPA) must reduce its budget expenditures for the current fiscal year ending June 30, 2011, by 6.3 percent. To achieve this expenditure reduction, MPA is eliminating a number [of] optional medical services from program benefits packages for clients twenty-one years of age and older. These medical services include vision, hearing, and dental care. Sections in chapter 388-501 WAC are being amended to reflect and support these program cuts.

Citation of Existing Rules Affected by this Order: Amending WAC 388-501-0050, 388-501-0060, 388-501-0065, 388-501-0070, and 388-502-0160.

Statutory Authority for Adoption: RCW 74.08.090.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; and that in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this Finding: Governor Gregoire issued Executive Order 10-04 on September 13, 2010, under the authority of RCW 43.88.110(7). In the executive order, the governor required DSHS and all other state agencies to reduce their expenditures in state fiscal year 2011 by approximately 6.3 percent. As a consequence of the executive order, funding for the benefits was eliminated effective January 1, 2011, as part of these regulatory amendments. Delaying the adoption of these cuts to optional services could jeopardize the state's ability to maintain the mandatory medicaid services for the majority of DSHS clients. MPA has filed a

CR-101 under WSR 10-22-121 to begin the permanent rule-making process and anticipates filing the CR-102 in June 2011.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 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 5, 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 5, Repealed 0.

Date Adopted: April 19, 2011.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 10-07-116, filed 3/22/10, effective 4/22/10)

WAC 388-501-0050 Healthcare general coverage. (1) WAC 388-501-0050 through 388-501-0065 describe the healthcare services available to a client on a fee-for-service basis or to a client enrolled in a managed care organization (MCO) (defined in WAC 388-538-050). For the purposes of this section, healthcare services includes treatment, equipment, related supplies, and drugs. WAC 388-501-0070 describes noncovered services. The following definitions apply to this chapter:

((+)) (a) "Benefits package" means the set of healthcare service categories included in a client's eligibility program. See the table in WAC 388-501-0060.

(b) "Healthcare service categories" means the groupings of healthcare services listed in the table in WAC 388-501-0060. Healthcare service categories are included or excluded depending on the client's benefits package.

(c) "Covered service" means a specific healthcare service within a service category that the department will pay for when all healthcare program requirements have been met.

(d) "Noncovered service" means a specific healthcare service within a service category that the department will not pay for. Noncovered services are identified in WAC 388-501-0070 and in specific health-care program rules.

(2) Healthcare service categories listed in WAC 388-501-0060 do not represent a contract for healthcare services.

((=)) (3) For the provider to receive payment, the client must be eligible for the covered healthcare service on the date the healthcare service is performed or provided.

((=)) (4) Under the department's fee-for-service programs, providers must be enrolled with the department and meet the requirements of chapter 388-502 WAC to be paid for furnishing healthcare services to clients.

((+)) (5) The department pays only for the healthcare services that are:

(a) ~~((Within the scope of))~~ Included in the client's ((medical program)) healthcare benefits package as described in WAC 388-501-0060;

(b) Covered - see subsection ~~((9))~~ (10) of this section;

(c) Ordered or prescribed by a healthcare provider who meets the requirements of chapter 388-502 WAC;

(d) Medically necessary as defined in WAC 388-500-0005;

(e) Submitted for authorization, when required, in accordance with WAC 388-501-0163;

(f) Approved, when required, in accordance with WAC 388-501-0165;

(g) Furnished by a provider according to chapter 388-502 WAC; and

(h) Billed in accordance with department program rules and the department's current published billing instructions and numbered memoranda.

~~((5))~~ (6) The department does not pay for any healthcare service requiring prior authorization from the department, if prior authorization was not obtained before the healthcare service was provided; unless:

(a) The client is determined to be retroactively eligible for medical assistance; and

(b) The request meets the requirements of subsection (4) of this section.

~~((6))~~ (7) The department does not reimburse clients for healthcare services purchased out-of-pocket.

~~((7))~~ (8) The department does not pay for the replacement of department-purchased equipment, devices, or supplies which have been sold, gifted, lost, broken, destroyed, or stolen as a result of the client's carelessness, negligence, recklessness, or misuse unless:

(a) Extenuating circumstances exist that result in a loss or destruction of department-purchased equipment, devices, or supplies, through no fault of the client that occurred while the client was exercising reasonable care under the circumstances; or

(b) Otherwise allowed under chapter 388-500 WAC.

~~((8))~~ (9) The department's refusal to pay for replacement of equipment, device, or supplies will not extend beyond the limitations stated in specific department program rules.

~~((9))~~ (10) **Covered healthcare services**

(a) Covered healthcare services are either:

(i) "Federally mandated" - means the state of Washington is required by federal regulation (42 CFR 440.210 and 220) to cover the healthcare service for medicaid clients; or

(ii) "State-option" - means the state of Washington is not federally mandated to cover the healthcare service but has chosen to do so at its own discretion.

(b) The department may limit the scope, amount, duration, and/or frequency of covered healthcare services. Limitation extensions are authorized according to WAC 388-501-0169.

~~((10))~~ (11) **Noncovered healthcare services**

(a) The department does not pay for any healthcare service

~~((i))~~ That federal or state laws or regulations prohibit the department from covering; or

~~((ii))~~ listed as noncovered in WAC 388-501-0070 or in any other program rule. The department evaluates a request for a noncovered healthcare service only if an exception to rule is requested according to the provisions in WAC 388-501-0160.

(b) When a noncovered healthcare service is recommended during the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) exam and then ordered by a provider, the department evaluates the healthcare service according to the process in WAC 388-501-0165 to determine if it is medically necessary, safe, effective, and not experimental (see WAC 388-534-0100 for EPSDT rules).

AMENDATORY SECTION (Amending WSR 06-24-036, filed 11/30/06, effective 1/1/07)

WAC 388-501-0060 Healthcare coverage—~~((Scope of covered categories of service))~~ Program benefits packages—Scope of service categories. (1) ~~((This rule provides a list (see subsection (5)) of medical, dental, mental health, and substance abuse categories of service covered by the department under categorically needy (CN) medicaid, medically needy (MN) medicaid, Alien Emergency Medical (AEM), and medical care services (MCS) programs. MCS means the limited scope of care financed by state funds and provided to general assistance and Alcohol and Drug Addiction Treatment and Support Act (ADATSA) program clients.~~

(2) ~~Not all categories of service listed in this section are covered under every medical program, nor do they represent a contract for services. Services are subject to the exclusions, limitations, and eligibility requirements contained in department rules.~~

~~(3) Services covered under each listed category:~~

~~(a) Are determined by the department after considering available evidence relevant to the service or equipment to:~~

~~(i) Determine efficacy, effectiveness, and safety;~~

~~(ii) Determine impact on health outcomes;~~

~~(iii) Identify indications for use;~~

~~(iv) Compare alternative technologies; and~~

~~(v) Identify sources of credible evidence that use and report evidence-based information.~~

~~(b) May require prior authorization (see WAC 388-501-0165), or expedited authorization when allowed by the department.~~

~~(c) Are paid for by the department and subject to review both before and after payment is made. The department or the client's managed care organization may deny or recover payment for such services, equipment, and supplies based on these reviews.~~

~~(4) The department does not pay for covered services, equipment, or supplies that:~~

~~(a) Require prior authorization from the department, if prior authorization was not obtained before the service was provided;~~

~~(b) Are provided by providers who are not contracted with the department as required under chapter 388-502 WAC;~~

~~(c) Are included in a department waiver program identified in chapter 388-515 WAC; or~~

(d) Are covered by a third-party payer (see WAC 388-501-0200), including medicare, if the third-party payer has not made a determination on the claim or has not been billed by the provider.

(5) **Scope of covered service categories.** The following table lists the department's covered categories of healthcare services:

- Under the four program columns (CN, MN, MCS, and AEM), the letter "C" means a service category is covered for that program, subject to any limitations listed in the specific medical assistance program WAC and department issuances.

- The letter "N" means a service category is not covered under that program.

- The letter "E" means the service category is available only if it is necessary to treat the client's emergency medical condition and may require prior authorization from the department.

- Refer to WAC 388-501-0065 for a description of each service category and for the specific program WAC containing the limitations and exclusions to services.

Service Categories	CN*	MN	MCS	AEM
(a) Adult day health	€	€	N	E
(b) Ambulance (ground and air)	€	€	€	E
(c) Blood processing/administration	€	€	€	E
(d) Dental services	€	€	€	E
(e) Detoxification	€	€	€	E
(f) Diagnostic services (lab & x ray)	€	€	€	E
(g) Family planning services	€	€	€	E
(h) Healthcare professional services	€	€	€	E
(i) Hearing care (audiology/hearing exams/aids)	€	€	€	E
(j) Home health services	€	€	€	E
(k) Hospice services	€	€	N	E
(l) Hospital services - inpatient/outpatient	€	€	€	E
(m) Intermediate care facility/services for mentally retarded	€	€	€	E
(n) Maternity care and delivery services	€	€	N	E
(o) Medical equipment, durable (DME)	€	€	€	E
(p) Medical equipment, nondurable (MSE)	€	€	€	E
(q) Medical nutrition services	€	€	€	E
(r) Mental health services	€	€	€	E

Service Categories	CN*	MN	MCS	AEM
(s) Nursing facility services	€	€	€	E
(t) Organ transplants	€	€	€	N
(u) Out of state services	€	€	N	E
(v) Oxygen/respiratory services	€	€	€	E
(w) Personal care services	€	€	N	N
(x) Prescription drugs	€	€	€	E
(y) Private duty nursing	€	€	N	E
(z) Prosthetic/orthotic devices	€	€	€	E
(aa) School medical services	€	€	N	N
(bb) Substance abuse services	€	€	€	E
(cc) Therapy - occupational/physical/speech	€	€	€	E
(dd) Vision care (exams/lenses)	€	€	€	E

*Clients enrolled in the State Children's Health Insurance Program and the Children's Health Program receive CN scope of medical care.) This rule provides a table that lists:

(a) The categorically needy (CN) medicaid, medically needy (MN) medicaid, and medical care services (MCS) programs; and

(b) The benefits packages showing what service categories are included for each program.

(2) Within a service category included in a benefits package, some services may be covered and others noncovered.

(3) Services covered within each service category included in a benefits package:

(a) Are determined, in accordance with WAC 388-501-0050 and 388-501-0055 when applicable.

(b) May be subject to limitations, restrictions, and eligibility requirements contained in department rules.

(c) May require prior authorization (see WAC 388-501-0165), or expedited authorization when allowed by the department.

(d) Are paid for by the department and subject to review both before and after payment is made. The department or the client's managed care organization may deny or recover payment for such services, equipment, and supplies based on these reviews.

(4) The department does not pay for covered services, equipment, or supplies that:

(a) Require prior authorization from the department, if prior authorization was not obtained before the service was provided;

(b) Are provided by providers who are not contracted with the department as required under chapter 388-502 WAC;

(c) Are included in a department waiver program identified in chapter 388-515 WAC; or

(d) Are covered by a third-party payer (see WAC 388-501-0200), including medicare, if the third-party payer has not made a determination on the claim or has not been billed by the provider.

(5) Other programs:

(a) Early and periodic screening, diagnosis, and treatment (EPSDT) services are not addressed in the table. For EPSDT services, see chapter 388-534 WAC and WAC 388-501-0050(10).

(b) Alien emergency medical (AEM) services are not addressed in the table. For AEM services, see chapter 388-438 WAC.

(6) **Scope of service categories.** The following table lists the department's categories of healthcare services.

(a) Under the CN and MN headings there are two columns - one addressing clients twenty years of age and younger and the other addresses clients twenty-one years of age and older.

(b) Under the MCS heading, "DL" refers to the disability lifeline medical program.

(c) The letter "I" means a service category is included for that program. Services within each service category are subject to limitations and restrictions listed in the specific medical assistance program WAC and department issuances.

(d) The letter "E" means a service category is excluded under that program.

(e) Refer to WAC 388-501-0065 for a description of each service category and for the specific program WAC containing the limitations and restrictions to services.

<u>Service Categories</u>	<u>CN¹</u>		<u>MN</u>		<u>MCS</u>
	<u>20-</u>	<u>21+</u>	<u>20-</u>	<u>21+</u>	<u>DL</u>
<u>Adult day health</u>	I	I	I ²	E	E
<u>Ambulance (ground and air)</u>	I	I	I	I	I
<u>Blood processing/administration</u>	I	I	I	I	I
<u>Dental services</u>	I	E	I	E	E
<u>Detoxification</u>	I	I	I	I	I
<u>Diagnostic services (lab & x-ray)</u>	I	I	I	I	I
<u>Healthcare professional services</u>	I	I	I	I	I
<u>Hearing evaluations</u>	I	I	I	I	I
<u>Hearing aids</u>	I	E	I	E	E
<u>Home health services</u>	I	I	I	I	I
<u>Hospice services</u>	I	I	I	I	I
<u>Hospital services - inpatient/outpatient</u>	I	I	I	I	I
<u>Intermediate care facility/services for mentally retarded</u>	I	I	I	I	I
<u>Maternity care and delivery services</u>	I	I	I	I	E
<u>Medical equipment, durable (DME)</u>	I	I	I	I	I
<u>Medical equipment, nondurable (MSE)</u>	I	I	I	I	I
<u>Medical nutrition services</u>	I	I	I	I	I
<u>Mental health services:</u>					
• <u>inpatient care</u>	I	I	I	I	I
• <u>outpatient community mental health services</u>	I	I	I	I	I ³
• <u>psychiatrist visits</u>	I	I	I	I	I ⁴
• <u>medication management</u>	I	I	I	I	I
<u>Nursing facility services</u>	I	I	I	I	I
<u>Organ transplants</u>	I	I	I	I	I
<u>Out-of-state services</u>	I	I	I	I	E
<u>Oxygen/respiratory services</u>	I	I	I	I	I
<u>Personal care services</u>	I	I	E	E	E
<u>Prescription drugs</u>	I	I	I	I	I
<u>Private duty nursing</u>	I	I	I	I	E
<u>Prosthetic/orthotic devices</u>	I	I	I	I	I
<u>Psychological evaluation⁵</u>	I	I	I	I	E
<u>Reproductive health services (includes family planning and TAKE CHARGE</u>	I	I	I	I	I

<u>Service Categories</u>	<u>CN¹</u>		<u>MN</u>		<u>MCS</u>
	<u>20-</u>	<u>21+</u>	<u>20-</u>	<u>21+</u>	<u>DL</u>
<u>Substance abuse services</u>	<u>I</u>	<u>I</u>	<u>I</u>	<u>I</u>	<u>I</u>
<u>Therapy - occupational, physical, and speech</u>	<u>I</u>	<u>I</u>	<u>I</u>	<u>I</u>	<u>I</u>
<u>Vision care - exams, refractions, and fittings</u>	<u>I</u>	<u>I</u>	<u>I</u>	<u>I</u>	<u>I</u>
<u>Vision - frames and lenses</u>	<u>I</u>	<u>E</u>	<u>I</u>	<u>E</u>	<u>E</u>

¹ Clients enrolled in the children's health insurance program and the apple health for kids program receive CN-scope of medical care.

² Restricted to 18-20 year olds.

³ Restricted to DL clients enrolled in managed care.

⁴ DL clients can receive one psychiatric diagnostic evaluation per year and eleven monthly visits per year for medication management.

⁵ Only two allowed per lifetime.

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

AMENDATORY SECTION (Amending WSR 06-24-036, filed 11/30/06, effective 1/1/07)

WAC 388-501-0065 Healthcare coverage—Description of ((covered)) categories of service. This rule provides a brief description of the medical, dental, mental health, and substance abuse service categories listed in the table in WAC 388-501-0060. The description of services under each category is not intended to be all inclusive.

(1) For categorically needy (CN), medically needy (MN), and medical care services (MCS), refer to the WAC citations listed in the following descriptions for specific details regarding each service category. ((For Alien Emergency Medical (AEM) services, refer to WAC 388-438-0110.))

(2) The following service categories are subject to the exclusions, limitations, restrictions, and eligibility requirements contained in department rules:

(a) **Adult day health**—((Skilled nursing services, counseling, therapy (physical, occupational, speech, or audiology), personal care services, social services, general therapeutic activities, health education, nutritional meals and snacks, supervision, and protection. [WAC 388-71-0702 through 388-71-0776])) A supervised daytime program providing skilled nursing and rehabilitative therapy services in addition to the core services of adult day care. Adult day health services are for adults with medical or disabling conditions that require the intervention or services of a registered nurse or licensed rehabilitative therapist acting under the supervision of the client's physician or ARNP. [WAC 388-71-0706, 388-71-0710, 388-71-0712, 388-71-0714, 388-71-0720, 388-71-0722, 388-71-0726 and 388-71-0758]

(b) **Ambulance**—Emergency medical transportation and ambulance transportation for nonemergency medical needs. [WAC 388-546-0001 through 388-546-4000]

(c) **Blood processing/administration**—Blood and/or blood derivatives, including synthetic factors, plasma expanders, and their administration. [WAC 388-550-1400 and 388-550-1500]

(d) **Dental services**—Diagnosis and treatment of dental problems including emergency treatment and preventive care. [Chapters 388-535 and 388-535A WAC]

(e) **Detoxification**—Inpatient treatment performed by a certified detoxification center or in an inpatient hospital setting. [WAC 388-800-0020 through 388-800-0035; and 388-550-1100]

(f) **Diagnostic services**—Clinical testing and imaging services. [WAC 388-531-0100; 388-550-1400 and 388-550-1500]

(g) ((**Family planning services**—Gynecological exams; contraceptives, drugs, and supplies, including prescriptions; sterilization; screening and treatment of sexually transmitted diseases; and educational services. [WAC 388-532-530]

(h)) **Healthcare professional services**—Office visits, emergency room, nursing facility, home-based, and hospital-based care; surgery, anesthesia, pathology, radiology, and laboratory services; obstetric services; kidney dialysis and renal disease services; osteopathic care, podiatry services, psychiatry, and pulmonary/respiratory services; and allergen immunotherapy. [Chapter 388-531 WAC]

((+)) (h) **Hearing ((care)) evaluations**—Audiology; diagnostic evaluations; hearing exams and testing((; and hearing aids)). [WAC ((388-544-1200 and 388-544-1300; 388-545-700; and)) 388-531-0100 and 388-531-0375]

(i) **Hearing aids**—[chapter 388-547 WAC]

(j) **Home health services**—Intermittent, short-term skilled nursing care, physical therapy, speech therapy, home infusion therapy, and health aide services, provided in the home. [WAC 388-551-2000 through 388-551-2220]

(k) **Hospice services**—Physician services, skilled nursing care, medical social services, counseling services for client and family, drugs, medications (including biologicals), medical equipment and supplies needed for palliative care, home health aide, homemaker, personal care services, medical transportation, respite care, and brief inpatient care. This benefit also includes services rendered in a hospice care center and pediatric palliative care services. [WAC 388-551-1210 through 388-551-1850]

(l) **Hospital services—Inpatient/outpatient**—Emergency room; hospital room and board (includes nursing care);

inpatient services, supplies, equipment, and prescription drugs; surgery, anesthesia; diagnostic testing, laboratory work, blood/blood derivatives; radiation and imaging treatment and diagnostic services; and outpatient or day surgery, and obstetrical services. [Chapter 388-550 WAC]

(m) **Intermediate care facility/services for mentally retarded**—Habilitative training, health-related care, supervision, and residential care. [Chapter 388-835 WAC]

(n) **Maternity care and delivery services**—Community health nurse visits, nutrition visits, behavioral health visits, midwife services, maternity and infant case management services, family planning services and community health worker visits. [WAC ((~~388-533-0330~~)) 388-533-0300]

(o) **Medical equipment, durable (DME)**—Wheelchairs, hospital beds, respiratory equipment; prosthetic and orthotic devices; casts, splints, crutches, trusses, and braces. [WAC 388-543-1100]

(p) **Medical equipment, nondurable (MSE)**—Antiseptics, germicides, bandages, dressings, tape, blood monitoring/testing supplies, braces, belts, supporting devices, decubitus care products, ostomy supplies, pregnancy test kits, syringes, needles, transcutaneous electrical nerve stimulators (TENS) supplies, and urological supplies. [WAC 388-543-2800]

(q) **Medical nutrition services**—Enteral and parenteral nutrition, including supplies. [Chapters 388-553 and 388-554 WAC]

(r) **Mental health services**—(~~Inpatient and outpatient psychiatric services and community mental health services. [Chapter 388-865 WAC]~~) Crisis mental health services are available to state residents through the regional support networks (RSNs).

(i) **Inpatient care**—Voluntary and involuntary admissions for psychiatric services. [WAC 388-550-2600]

(ii) **Outpatient (community mental health) services**—Nonemergency, nonurgent counseling. [WAC 388-531-1400, 388-865-0215, and 388-865-0230]

(iii) **Psychiatrist visits**—[WAC 388-531-1400 and 388-865-0230]

(iv) **Medication management**—[WAC 388-531-1400]

(s) **Nursing facility services**—Nursing, therapies, dietary, and daily care services. [Chapter 388-97 WAC]

(t) **Organ transplants**—Solid organs, e.g., heart, kidney, liver, lung, pancreas, and small bowel; bone marrow and peripheral stem cell; skin grafts; and corneal transplants. [WAC 388-550-1900 and 388-550-2000, and 388-556-0400]

(u) **Out-of-state services**—(~~Emergency services; prior authorized care. Services provided in bordering cities are treated as if they were provided in state. [WAC 388-501-0175 and 388-501-0180; 388-531-1100; and 388-556-0500]~~) See WAC 388-502-0120 for payment of services out-of-state.

(v) **Oxygen/respiratory services**—Oxygen, oxygen equipment and supplies; oxygen and respiratory therapy, equipment, and supplies. [Chapter 388-552 WAC]

(w) **Personal care services**—Assistance with activities of daily living (e.g., bathing, dressing, eating, managing medications) and routine household chores (e.g., meal preparation, housework, essential shopping, transportation to medical services). [WAC ((~~388-106-0010, 388-106-0300, 388-~~

~~106-0400, 388-106-0500, 388-106-0600, 388-106-0700, 388-106-0720 and 388-106-0900~~) 388-106-0010, 388-106-0200, 388-106-0300, 388-106-0400, 388-106-0500, 388-106-0700, 388-106-0720 and 388-106-0745]

(x) **Prescription drugs**—Outpatient drugs (including in nursing facilities), both generic and brand name; drug devices and supplies; some over-the-counter drugs; oral, topical, injectable drugs; vaccines, immunizations, and biologicals; and family planning drugs, devices, and supplies. [WAC 388-530-1100] Additional coverage for medications and prescriptions is addressed in specific program WAC sections.

(y) **Private duty nursing**—Continuous skilled nursing services provided in the home, including client assessment, administration of treatment, and monitoring of medical equipment and client care for clients seventeen years of age and under. [WAC 388-551-3000.] For benefits for clients eighteen years of age and older, see WAC 388-106-1000 through 388-106-1055.

(z) **Prosthetic/orthotic devices**—Artificial limbs and other external body parts; devices that prevent, support, or correct a physical deformity or malfunction. [WAC 388-543-1100]

(aa) (~~School medical services—Medical services provided in schools to children with disabilities under the Individuals with Disabilities Education Act (IDEA). [Chapter 388-537 WAC]~~

(~~bb~~)) **Psychological evaluation**—Complete diagnostic history, examination, and assessment, including the testing of cognitive processes, visual motor responses, and abstract abilities. [WAC 388-865-0610]

(~~bb~~) **Reproductive health services**—Gynecological exams; contraceptives, drugs, and supplies, including prescriptions; sterilization; screening and treatment of sexually transmitted diseases; and educational services. [WAC 388-532-530]

(~~cc~~) **Substance abuse services**—Chemical dependency assessment, case management services, and treatment services. [WAC 388-533-0701 through 388-533-0730; 388-556-0100 and 388-556-0400; and 388-800-0020]

(~~ee~~) (~~dd~~) **Therapy—Occupational/physical/speech**—Evaluations, assessments, and treatment. [WAC ((~~388-545-300, 388-545-500, and 388-545-700~~)) 388-531-1725 and chapter 388-545 WAC]

(~~dd~~) (~~ee~~) **Vision care**—Eye exams, refractions, (~~frames, lenses~~) fittings, visual field testing, vision therapy, ocular prosthetics, and surgery. [WAC ((~~388-544-0250 through 388-544-0550~~)) 388-531-1000]

(~~ff~~) **Vision hardware - frames and lenses**—[Chapter 388-544 WAC]

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.

AMENDATORY SECTION (Amending WSR 09-23-112, filed 11/18/09, effective 12/19/09)

WAC 388-501-0070 Healthcare coverage—Noncovered services. (1) The department does not pay for any healthcare service not listed or referred to as a covered healthcare service under the medical programs described in WAC 388-501-0060, regardless of medical necessity. For the

purposes of this section, healthcare services includes treatment, equipment, related supplies, and drugs. Circumstances in which clients are responsible for payment of healthcare services are described in WAC 388-502-0160.

(2) This section does not apply to healthcare services provided as a result of the early and periodic screening, diagnosis, and treatment (EPSDT) program as described in chapter 388-534 WAC.

(3) The department does not pay for any ancillary healthcare service(s) provided in association with a noncovered healthcare service.

(4) The following list of noncovered healthcare services is not intended to be exhaustive. Noncovered healthcare services include, but are not limited to:

(a) Any healthcare service specifically excluded by federal or state law;

(b) Acupuncture, Christian Science practice, faith healing, herbal therapy, homeopathy, massage, massage therapy, naturopathy, and sanipractice;

(c) Chiropractic care for adults;

(d) Cosmetic, reconstructive, or plastic surgery, and any related healthcare services, not specifically allowed under WAC 388-531-0100(4).

(e) Discography;

(f) Ear or other body piercing;

(g) Face lifts or other facial cosmetic enhancements;

(h) Fertility, infertility or sexual dysfunction testing, and related care, drugs, and/or treatment including but not limited to:

(i) Artificial insemination;

(ii) Donor ovum, sperm, or surrogate womb;

(iii) In vitro fertilization;

(iv) Penile implants;

(v) Reversal of sterilization; and

(vi) Sex therapy.

(i) Gender reassignment surgery and any surgery related to trans-sexualism, gender identity disorders, and body dysmorphism, and related healthcare services or procedures, including construction of internal or external genitalia, breast augmentation, or mammoplasty;

(j) Hair transplants, epilation (hair removal), and electrolysis;

(k) Marital counseling;

(l) Motion analysis, athletic training evaluation, work hardening condition, high altitude simulation test, and health and behavior assessment;

(m) Nonmedical equipment;

(n) Penile implants;

(o) Prosthetic testicles;

(p) Psychiatric sleep therapy;

(q) Subcutaneous injection filling;

(r) Tattoo removal;

(s) Transport of Involuntary Treatment Act (ITA) clients to or from out-of-state treatment facilities, including those in bordering cities;

(t) Upright magnetic resonance imaging (MRI); and

(u) Vehicle purchase - new or used vehicle.

(5) For a specific list of noncovered healthcare services in the following service categories, refer to the WAC citation:

(a) Ambulance transportation and nonemergent transportation as described in chapter 388-546 WAC;

(b) Dental services for clients twenty years of age and younger as described in chapter 388-535 WAC;

(c) ~~((d)) Dental services for clients twenty-one years of age and older as described in chapter 388-535 WAC;~~

~~((d))~~ Durable medical equipment as described in chapter 388-543 WAC;

~~((e))~~ (d) Hearing ~~((care services))~~ aids for clients twenty years of age and younger as described in chapter 388-547 WAC;

~~((f))~~ (e) Home health services as described in WAC 388-551-2130;

~~((g))~~ (f) Hospital services as described in WAC 388-550-1600;

~~((h))~~ (g) Physician-related services as described in WAC 388-531-0150;

~~((i))~~ (h) Prescription drugs as described in chapter 388-530 WAC; ~~((and))~~

~~((j))~~ (i) Vision care ~~((services))~~ hardware for clients twenty years of age and younger as described in chapter 388-544 WAC; and

(j) Vision care exams as described in WAC 388-531-1000.

(6) A client has a right to request an administrative hearing, if one is available under state and federal law. When the department denies all or part of a request for a noncovered healthcare service(s), the department sends the client and the provider written notice, within ten business days of the date the decision is made, that includes:

(a) A statement of the action the department intends to take;

(b) Reference to the specific WAC provision upon which the denial is based;

(c) Sufficient detail to enable the recipient to:

(i) Learn why the department's action was taken; and

(ii) Prepare a response to the department's decision to classify the requested healthcare service as noncovered.

(d) The specific factual basis for the intended action; and

(e) The following information:

(i) Administrative hearing rights;

(ii) Instructions on how to request the hearing;

(iii) Acknowledgement that a client may be represented at the hearing by legal counsel or other representative;

(iv) Instructions on how to request an exception to rule (ETR);

(v) Information regarding department-covered healthcare services, if any, as an alternative to the requested noncovered healthcare service; and

(vi) Upon the client's request, the name and address of the nearest legal services office.

(7) A client can request an exception to rule (ETR) as described in WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 10-19-057, filed 9/14/10, effective 10/15/10)

WAC 388-502-0160 Billing a client. (1) The purpose of this section is to specify the limited circumstances in which:

(a) Fee-for-service or managed care clients can choose to self-pay for medical assistance services; and

(b) Providers (as defined in WAC 388-500-0005) have the authority to bill fee-for-service or managed care clients for medical assistance services furnished to those clients.

(2) The provider is responsible for:

(a) Verifying whether the client is eligible to receive medical assistance services on the date the services are provided;

(b) Verifying whether the client is enrolled with a department-contracted managed care organization (MCO);

(c) Knowing the limitations of the services within the scope of the eligible client's medical program (see WAC 388-501-0050 (4)(a) and 388-501-0065);

(d) Informing the client of those limitations;

(e) Exhausting all applicable department or department-contracted MCO processes necessary to obtain authorization for requested service(s);

(f) Ensuring that translation or interpretation is provided to clients with limited English proficiency (LEP) who agree to be billed for services in accordance with this section; and

(g) Retaining all documentation which demonstrates compliance with this section.

(3) Unless otherwise specified in this section, providers must accept as payment in full the amount paid by the department or department-contracted MCO for medical assistance services furnished to clients. See 42 CFR § 447.15.

(4) A provider must not bill a client, or anyone on the client's behalf, for any services until the provider has completed all requirements of this section, including the conditions of payment described in department's rules, the department's fee-for-service billing instructions, and the requirements for billing the department-contracted MCO in which the client is enrolled, and until the provider has then fully informed the client of his or her covered options. A provider must not bill a client for:

(a) Any services for which the provider failed to satisfy the conditions of payment described in department's rules, the department's fee-for-service billing instructions, and the requirements for billing the department-contracted MCO in which the client is enrolled.

(b) A covered service even if the provider has not received payment from the department or the client's MCO.

(c) A covered service when the department denies an authorization request for the service because the required information was not received from the provider or the prescriber under WAC 388-501-0165 (7)(c)(i).

(5) If the requirements of this section are satisfied, then a provider may bill a fee-for-service or a managed care client for a covered service, defined in WAC (~~388-501-0050(9)~~) 388-501-0050(10), or a noncovered service, defined in WAC (~~388-501-0050(10)~~) 388-501-0050(11) and 388-501-0070. The client and provider must sign and date the DSHS form 13-879, Agreement to Pay for Healthcare Services, before the service is furnished. DSHS form 13-879, including translated versions, is available to download at <http://www1.dshs.wa.gov/msa/forms/eforms.html>. The requirements for this subsection are as follows:

(a) The agreement must:

(i) Indicate the anticipated date the service will be provided, which must be no later than ninety calendar days from the date of the signed agreement;

(ii) List each of the services that will be furnished;

(iii) List treatment alternatives that may have been covered by the department or department-contracted MCO;

(iv) Specify the total amount the client must pay for the service;

(v) Specify what items or services are included in this amount (such as pre-operative care and postoperative care). See WAC 388-501-0070(3) for payment of ancillary services for a noncovered service;

(vi) Indicate that the client has been fully informed of all available medically appropriate treatment, including services that may be paid for by the department or department-contracted MCO, and that he or she chooses to get the specified service(s);

(vii) Specify that the client may request an exception to rule (ETR) in accordance with WAC 388-501-0160 when the department denies a request for a noncovered service and that the client may choose not to do so;

(viii) Specify that the client may request an administrative hearing in accordance with WAC 388-526-2610 to appeal the department's denial of a request for prior authorization of a covered service and that the client may choose not to do so;

(ix) Be completed only after the provider and the client have exhausted all applicable department or department-contracted MCO processes necessary to obtain authorization of the requested service, except that the client may choose not to request an ETR or an administrative hearing regarding department denials of authorization for requested service(s); and

(x) Specify which reason in subsection (b) below applies.

(b) The provider must select on the agreement form one of the following reasons (as applicable) why the client is agreeing to be billed for the service(s). The service(s) is:

(i) Not covered by the department or the client's department-contracted MCO and the ETR process as described in WAC 388-501-0160 has been exhausted and the service(s) is denied;

(ii) Not covered by the department or the client's department-contracted MCO and the client has been informed of his or her right to an ETR and has chosen not to pursue an ETR as described in WAC 388-501-0160;

(iii) Covered by the department or the client's department-contracted MCO, requires authorization, and the provider completes all the necessary requirements; however the department denied the service as not medically necessary (this includes services denied as a limitation extension under WAC 388-501-0169); or

(iv) Covered by the department or the client's department-contracted MCO and does not require authorization, but the client has requested a specific type of treatment, supply, or equipment based on personal preference which the department or MCO does not pay for and the specific type is not medically necessary for the client.

(c) For clients with limited English proficiency, the agreement must be the version translated in the client's pri-

mary language and interpreted if necessary. If the agreement is translated, the interpreter must also sign it;

(d) The provider must give the client a copy of the agreement and maintain the original and all documentation which supports compliance with this section in the client's file for six years from the date of service. The agreement must be made available to the department for review upon request; and

(e) If the service is not provided within ninety calendar days of the signed agreement, a new agreement must be completed by the provider and signed by both the provider and the client.

(6) There are limited circumstances in which a provider may bill a client without executing DSHS form 13-879, Agreement to Pay for Healthcare Services, as specified in subsection (5) of this section. The following are those circumstances:

(a) The client, the client's legal guardian, or the client's legal representative:

(i) Was reimbursed for the service directly by a third party (see WAC 388-501-0200); or

(ii) Refused to complete and sign insurance forms, billing documents, or other forms necessary for the provider to bill the third party insurance carrier for the service.

(b) The client represented himself/herself as a private pay client and not receiving medical assistance when the client was already eligible for and receiving benefits under a medical assistance program. In this circumstance, the provider must:

(i) Keep documentation of the client's declaration of medical coverage. The client's declaration must be signed and dated by the client, the client's legal guardian, or the client's legal representative; and

(ii) Give a copy of the document to the client and maintain the original for six years from the date of service, for department review upon request.

(c) The bill counts toward the financial obligation of the client or applicant (such as spenddown liability, client participation as described in WAC 388-513-1380, emergency medical expense requirement, deductible, or copayment required by the department). See subsection (7) of this section for billing a medically needy client for spenddown liability;

(d) The client is under the department's or a department-contracted MCO's patient review and coordination (PRC) program (WAC 388-501-0135) and receives nonemergency services from providers or healthcare facilities other than those to whom the client is assigned or referred under the PRC program;

(e) The client is a dual-eligible client with medicare Part D coverage or similar creditable prescription drug coverage and the conditions of WAC 388-530-7700 (2)(a)(iii) are met;

(f) The services provided to a TAKE CHARGE or family planning only client are not within the scope of the client's benefit package;

(g) The services were noncovered ambulance services (see WAC 388-546-0250(2));

(h) A fee-for-service client chooses to receive nonemergency services from a provider who is not contracted with the department after being informed by the provider that he or she is not contracted with the department and that the services

offered will not be paid by the client's healthcare program; ~~((and))~~

(i) A department-contracted MCO enrollee chooses to receive nonemergency services from providers outside of the MCO's network without authorization from the MCO, i.e., a nonparticipating provider; and

(j) The service is within a service category excluded from the client's benefits package. See WAC 388-501-0060.

(7) Under chapter 388-519 WAC, an individual who has applied for medical assistance is required to spend down excess income on healthcare expenses to become eligible for coverage under the medically needy program. An individual must incur healthcare expenses greater than or equal to the amount that he or she must spend down. The provider is prohibited from billing the individual for any amount in excess of the spenddown liability assigned to the bill.

(8) There are situations in which a provider must refund the full amount of a payment previously received from or on behalf of an individual and then bill the department for the covered service that had been furnished. In these situations, the individual becomes eligible for a covered service that had already been furnished. Providers must then accept as payment in full the amount paid by the department or managed care organization for medical assistance services furnished to clients. These situations are as follows:

(a) The individual was not receiving medical assistance on the day the service was furnished. The individual applies for medical assistance later in the same month in which the service was provided and the department makes the individual eligible for medical assistance from the first day of that month;

(b) The client receives a delayed certification for medical assistance as defined in WAC 388-500-0005; or

(c) The client receives a certification for medical assistance for a retroactive period according to 42 CFR § 435.914(a) and defined in WAC 388-500-0005.

(9) Regardless of any written, signed agreement to pay, a provider may not bill, demand, collect, or accept payment or a deposit from a client, anyone on the client's behalf, or the department for:

(a) Copying, printing, or otherwise transferring healthcare information, as the term healthcare information is defined in chapter 70.02 RCW, to another healthcare provider. This includes, but is not limited to:

(i) Medical/dental charts;

(ii) Radiological or imaging films; and

(iii) Laboratory or other diagnostic test results.

(b) Missed, cancelled, or late appointments;

(c) Shipping and/or postage charges;

(d) "Boutique," "concierge," or enhanced service packages (e.g., newsletters, 24/7 access to provider, health seminars) as a condition for access to care; or

(e) The price differential between an authorized service or item and an "upgraded" service or item (e.g., a wheelchair with more features; brand name versus generic drugs).

WSR 11-11-001
EMERGENCY RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Medicaid Purchasing Administration)

[Filed May 4, 2011, 12:13 p.m., effective May 4, 2011, 12:13 p.m.]

Effective Date of Rule: Immediately.

Purpose: Upon order of the governor, the medicaid purchasing administration must reduce its budget expenditures for the current fiscal year ending June 30, 2011, by 6.3 percent. This cost-saving measure is required to amend the rule to bring department payment methodology for qualified medicare beneficiary (QMB) clients into alignment with the payment formula established in WAC 388-502-0110 for medicare/medicaid dual-eligible QMB clients.

Citation of Existing Rules Affected by this Order: Amending WAC 388-517-0320.

Statutory Authority for Adoption: RCW 74.08.090.

Other Authority: 42 U.S.C. § 1396a (n)(2).

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; and that in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this Finding: Governor Gregoire issued Executive Order 10-04 on September 13, 2010, under the authority of RCW 43.88.110(7). In the executive order, the governor required DSHS and all other state agencies to reduce their expenditures in state fiscal year 2011 by approximately 6.3 percent.

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

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

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

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

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

Date Adopted: May 3, 2011.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 07-15-032, filed 7/12/07, effective 8/12/07)

WAC 388-517-0320 Medicare savings and state-funded medicare buy-in programs cover some client costs. (1) For qualified medicare beneficiary (QMB) clients, the department pays(=

(a) ~~Medicare Part A premiums (if any);~~

(b) ~~Medicare Part B premiums;~~

(c) ~~Coinsurance, deductibles, and copayments for medicare Part A, Part B, and medicare advantage Part C with the following conditions:~~

(i) ~~Only the Part A and Part B deductible, coinsurance, and copayments up to the medicare or medicaid allowed amount, whichever is less (WAC 388-502-0110), if the service is covered by medicare and medicaid.~~

(ii) ~~Only the deductible, coinsurance, and copayments up to the medicare allowed amount if the service is covered only by medicare.~~

(d) ~~Copayments for QMB-eligible clients enrolled in medicare advantage Part C up to the medicare or medicaid allowed amount whichever is less (WAC 388-502-0110).~~

(e) ~~QMB Part A and/or Part B premiums the first of the month following the month the QMB eligibility is determined)~~ medicare Part A premiums (if any) and medicare Part B premiums the first of the month following the month the QMB eligibility is determined. The department pays medicare coinsurance, deductibles, and copayments for medicare Part A, Part B and medicare advantage Part C.

(2) For specified low-income medicare beneficiary (SLMB) clients, the department pays medicare Part B premiums effective up to three months prior to the certification period if eligible for those months. No other payments are made for SLMBs.

(3) For qualified individual (QI-1) clients, the department pays medicare Part B premiums effective up to three months prior to the certification period if eligible for those months unless:

(a) The client receives medicaid categorically needy (CN) or medically needy (MN) benefits; and/or

(b) The department's annual federal funding allotment is spent. The department resumes QI-1 benefit payments the beginning of the next calendar year.

(4) For qualified disabled working individual (QDWI) clients, the department pays medicare Part A premiums effective up to three months prior to the certification period if eligible for those months. The department stops paying medicare Part A premiums if the client begins to receive CN or MN medicaid.

(5) For state-funded medicare buy-in program clients, the department pays(=

(a) ~~Medicare Part B premiums; and~~

(b) ~~Only the Part A and B co-insurance, deductibles, and copayments up to the medicare or medicaid allowed amount, whichever is less (WAC 388-502-0110), if the service is covered by medicare and medicaid.~~

(6) ~~For the dual-eligible client, (a client receiving both medicare and CN or MN medical coverage) the department pays as follows:~~

(a) ~~If the service is covered by medicare and medicaid, medicaid pays only the deductible, and coinsurance up to the~~

~~medicare or medicaid allowed amount, whichever is less (WAC 388-502-0110); and~~

~~(b) Copayments for medicare advantage Part C up to the medicare or medicaid allowed copayment amount, whichever is less (WAC 388-502-0110);~~

~~(c) If no medicaid rate exists, the department will deny payment unless the client is also QMB then refer to section (1) above)) medicare Part B premiums. Cost sharing for medicare deductibles, copayments and co-insurance is paid by the categorically needy (CN) or medically needy (MN) medicaid program.~~

WSR 11-11-003
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-84—Filed May 5, 2011, 9:02 a.m.]

Effective Date of Rule: Immediately.

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

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

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

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

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

Reasons for this Finding: Recent strong counts over Bonneville Dam have provided some confidence in the strength of the upriver spring chinook return. The spring chinook sport fishery is extended for an additional four days in the area above Bonneville Dam. Chinook remain available on the preupdate harvest guideline. Continues to stipulate that the hatchery adult bag limit in Deep River is consistent with the adjacent Columbia River when both areas are open. Continues to include rules that prohibit full removal of nonlegal fish from the water. Regulation is consistent with guidance from Washington fish and wildlife commission and director and joint state action of February 8 and May 4, 2011.

The fishery is consistent with the *U.S. v. Oregon* Management Agreement and the associated biological opinion. Conforms Washington state rules with Oregon state rules. There is insufficient time to adopt permanent rules.

Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish; and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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

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

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

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

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

Date Adopted: May 5, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900G Exceptions to statewide rules—Columbia River. Notwithstanding the provisions of WAC 232-28-619, it is unlawful to violate the following pro-

visions, provided that unless otherwise amended, all permanent rules remain in effect:

1. Columbia River:

i. From Tower Island power lines in Bonneville Pool upstream to the Oregon and Washington border, plus the Washington bank between Bonneville Dam and the Tower Island power lines located approximately 6 miles below The Dalles Dam (except for those waters closed under permanent regulations): Effective May 7 through May 10, 2011: daily salmonid limit is 6 fish, of which no more than 2 may be hatchery adult Chinook salmon or hatchery steelhead or one of each. Release all salmon other than hatchery Chinook and all trout other than hatchery steelhead. Minimum size for salmon is 12 inches.

ii. Effective immediately through June 15, 2011: For the mainstem Columbia River salmon and steelhead fishery from the Rocky Point/Tongue Point line upstream to Oregon/Washington border, it is unlawful when fishing from vessels which are less than 30 feet in length, substantiated by Coast Guard documentation or Marine Board registration, to totally remove from the water any salmon or steelhead required to be released.

iii. Effective immediately until further notice: Anglers may not possess, in the field, fish mutilated so that size, species or fin clip cannot be determined, until anglers have reached their automobile or principle means of land transportation and have completed their daily angling.

2. Deep River (Wahkiakum Co.): Effective immediately through June 15, 2011: the hatchery adult Chinook daily limit will be the same as the adjacent mainstem Columbia River during those days when the mainstem Columbia River is open for adult Chinook retention. When the adjacent mainstem Columbia River is closed for adult Chinook retention, the salmon daily limit will revert to permanent rules for Deep River.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 232-28-61900C Exceptions to statewide rules—Columbia River. (11-73)

**WSR 11-11-007
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 11-85—Filed May 5, 2011, 4:25 p.m., effective May 9, 2011, 12:01 a.m.]

Effective Date of Rule: May 9, 2011, 12:01 a.m.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-03000I; and amending WAC 220-52-030.

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

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

Reasons for this Finding: Based on historical catches and on-site inspection, there should be adequate clams to support an eight-week season. Biotxin levels currently fall below the regulatory threshold. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 5, 2011.

Philip Anderson
Director

NEW SECTION

WAC 220-52-03000I Commercial razor clams. Notwithstanding the provisions of WAC 220-52-030, effective 12:01 a.m. May 9, 2011, through 11:59 p.m. July 8, 2011, a person may dig for and possess razor clams for commercial purposes only in those waters and detached beaches of Razor Clam Area 1, lying south of the Willapa Bay Ship Channel, west of Ellen Sands and north of the tip of Leadbetter point; and in those waters and attached beaches north of the line of boundary markers consisting of four fluorescent orange posts near the northern tip of Leadbetter Point*; all other areas remain closed.

*The GPS coordinates for the eastern and western - most posts are:

East:	N 46° 39.554
	W 124° 03.588
West:	N 46° 39.515
	W 124° 03.830

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

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. July 9, 2011:

WAC 220-52-03000I Commercial razor clams.

WSR 11-11-009
EMERGENCY RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Economic Services Administration)

[Filed May 6, 2011, 11:22 a.m., effective May 8, 2011]

Effective Date of Rule: May 8, 2011.

Purpose: The department is extending the emergency rule filed as WSR 11-03-018 amending by emergency adoption WAC 388-478-0020, 388-478-0035, and 388-436-0050.

This rule filing retains a reduction of fifteen percent to:

- TANF, SFA, RCA, CEAP payment standards; and
- The maximum gross earned income limit.

These changes are necessary to address a growing WorkFirst budget shortfall, driven by increased demand for services by families affected by the economic recession as described [in the] "WorkFirst Reductions" announcement dated December 17, 2010.

The department continues the emergency rule filed as WSR 11-03-018 while the department continues the permanent rule-making process. The department filed a "preproposal statement of inquiry" in [on] January 5, 2011, as WSR 11-02-068; and plans to file a "proposed rule making" (CR-102) notice mid May.

Citation of Existing Rules Affected by this Order: Amending WAC 388-478-0020, 388-478-0035, and 388-436-0050.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.055, 74.04.057, 74.04.660, and 74.08.090.

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

Reasons for this Finding: The department needs to make further reductions to TANF-related programs in order to achieve a balanced WorkFirst budget for the current fiscal year (which ends June 30, 2011) and the 2011-13 biennium (which begins July 1, 2011). This shortfall is the result of increased demand for TANF benefits due to the economic recession. In the last two years, the WorkFirst caseload has grown by more than thirty percent, from 51,106 cases in July 2008 to 66,634 cases in June of this year.

In September 2010, the governor directed agencies to implement cuts by October 1 to avoid running out of state general funds to address a growing WorkFirst budget shortfall. In particular, the Governor's Executive Order 10-04

(Ordering Expenditure Reductions in Allotments of State General Fund Appropriations), signed on September 13, 2010, found that:

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

Accordingly, the governor ordered across-the-board reductions of state general fund allotments by 6.287 percent, effective October 1, 2010.

In November 2010, the departments announced further reductions to keep the WorkFirst budget in balanced [balance]. The projected WorkFirst deficit reached approximately \$82 million for current fiscal year and \$225 million for the next biennium.

In December 2010:

- During December 11, 2010, special session, HB 3225 approved by legislature modified appropriations for the 2009-11 operating budget. The state general fund appropriations were reduced by \$490.4 million, while the total budgeted amount was reduced by \$336.5 million. The department appropriations included a reduction of \$856,000 GF-S for the remaining of SFY 2011.
- December 15, 2010, Governor Gregoire announced proposed 2011-2013 budget cuts needed to close an additional \$4.6 billion projected shortfall in the next state fiscal biennium, and proposed eliminating or restructuring many state programs, agencies, boards and commissions. "We face unprecedented times," the governor said. "Few alive today have witnessed a recession of this magnitude and length." See the governor's proposed budget for SFY 2011-2013 at this link http://www.governor.wa.gov/priorities/budget/press_packet.pdf.

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

This filing continues the emergency rule filed January 7, 2011, as WSR 11-03-018 while the department continues the permanent rule-making process. The department filed January 5, 2011, the preproposal statement of inquiry as WSR 11-02-068; and plans to file a "proposed rule making" (CR-102) notice mid May.

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

Recently Enacted State Statutes: New 3, Amended 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 3, Amended 0, Repealed 0.

Date Adopted: May 2, 2011.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 09-14-040, filed 6/24/09, effective 7/25/09)

WAC 388-436-0050 Determining financial need and benefit amount for CEAP. (1) To be eligible for CEAP assistance, the assistance unit's nonexcluded income, minus allowable deductions, must be less than ninety percent of the TANF payment standard for households with shelter costs. The net income limit for CEAP assistance units is:

Assistance Unit Members	Net Income Limit
1	\$ ((323)) <u>275</u>
2	((407)) <u>346</u>
3	((505)) <u>429</u>
4	((594)) <u>505</u>
5	((685)) <u>582</u>
6	((779)) <u>662</u>
7	((900)) <u>762</u>
8 or more	((996)) <u>847</u>

(2) The assistance unit's allowable amount of need is the lesser of:

(a) The TANF payment standard, based on assistance unit size, for households with shelter costs as specified under WAC 388-478-0020; or

(b) The assistance unit's actual emergent need, not to exceed maximum allowable amounts, for the following items:

Need Item: Maximum allowable amount by assistance unit size:

	1	2	3	4	5	6	7	8 or more
Food	\$((217)) <u>184</u>	\$((276)) <u>235</u>	\$((341)) <u>290</u>	\$((402)) <u>342</u>	\$((463)) <u>394</u>	\$((526)) <u>447</u>	\$((600)) <u>510</u>	\$((664)) <u>564</u>
Shelter	((265)) <u>225</u>	((334)) <u>284</u>	((416)) <u>354</u>	((490)) <u>417</u>	((564)) <u>479</u>	((639)) <u>543</u>	((740)) <u>629</u>	((818)) <u>695</u>
Clothing	((31)) <u>26</u>	((39)) <u>33</u>	((48)) <u>41</u>	((57)) <u>48</u>	((65)) <u>55</u>	((75)) <u>64</u>	((85)) <u>72</u>	((96)) <u>82</u>
Minor Medical Care	((184)) <u>156</u>	((234)) <u>199</u>	((290)) <u>247</u>	((341)) <u>290</u>	((393)) <u>334</u>	((444)) <u>377</u>	((516)) <u>439</u>	((570)) <u>485</u>
Utilities	((89)) <u>76</u>	((113)) <u>96</u>	((140)) <u>119</u>	((164)) <u>139</u>	((189)) <u>161</u>	((216)) <u>184</u>	((250)) <u>213</u>	((276)) <u>235</u>
Household maintenance	((65)) <u>55</u>	((83)) <u>71</u>	((103)) <u>88</u>	((121)) <u>103</u>	((140)) <u>119</u>	((159)) <u>135</u>	((183)) <u>156</u>	((202)) <u>172</u>
Job related transportation	((359)) <u>305</u>	((453)) <u>385</u>	((562)) <u>478</u>	((661)) <u>562</u>	((762)) <u>648</u>	((866)) <u>736</u>	((1000)) <u>850</u>	((1107)) <u>941</u>
Child related transportation	((359)) <u>305</u>	((453)) <u>385</u>	((562)) <u>478</u>	((661)) <u>562</u>	((762)) <u>648</u>	((866)) <u>736</u>	((1000)) <u>850</u>	((1107)) <u>941</u>

(3) The assistance unit's CEAP payment is determined by computing the difference between the allowable amount of need, as determined under subsection (2) of this section, and the total of:

(a) The assistance unit's net income, as determined under subsection (1) of this section;

(b) Cash on hand, if not already counted as income; and

(c) The value of other nonexcluded resources available to the assistance unit.

(4) The assistance unit is not eligible for CEAP if the amount of income and resources, as determined in subsection (3) of this section, is equal to or exceeds its allowable amount of need.

AMENDATORY SECTION (Amending WSR 08-16-105, filed 8/5/08, effective 9/5/08)

WAC 388-478-0020 Payment standards for TANF, SFA, and RCA. (1) The payment standards for temporary assistance for needy families (TANF), state family assistance (SFA), and refugee cash assistance (RCA) assistance units with obligations to pay shelter costs are:

Table with 4 columns: Assistance Unit Size, Payment Standard, Assistance Unit Size, Payment Standard. Rows 1-5 with values like \$((359)), 305, 736, etc.

(2) The payment standards for TANF, SFA, and RCA assistance units with shelter provided at no cost are:

Table with 4 columns: Assistance Unit Size, Payment Standard, Assistance Unit Size, Payment Standard. Rows 1-5 with values like \$((218)), 185, 447, etc.

AMENDATORY SECTION (Amending WSR 08-16-105, filed 8/5/08, effective 9/5/08)

WAC 388-478-0035 Maximum earned income limits for TANF, SFA and RCA. To be eligible for temporary assistance for needy families (TANF), state family assistance (SFA), or refugee cash assistance (RCA), a family's gross earned income must be below the following levels:

Table with 4 columns: Number of Family Members, Maximum Earned Income Level, Number of Family Members, Maximum Earned Income Level. Rows 1-3 with values like \$((718)), 610, 1,472, etc.

Table with 4 columns: Number of Family Members, Maximum Earned Income Level, Number of Family Members, Maximum Earned Income Level. Rows 4, 5 with values like ((1,322)), 1,124, 9, 2,066, etc.

WSR 11-11-010 EMERGENCY RULES DEPARTMENT OF FISH AND WILDLIFE

[Order 10-88—Filed May 6, 2011, 2:08 p.m., effective May 10, 2011]

Effective Date of Rule: May 10, 2011.

Purpose: The purpose of this rule making is to allow nontreaty commercial fishing opportunity in the Columbia River while protecting fish listed as threatened or endangered under the Endangered Species Act (ESA).

Citation of Existing Rules Affected by this Order: Repealing WAC 220-33-03000G; and amending WAC 220-33-030.

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

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

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

Reasons for this Finding: Sets the standard shad commercial fishery in the Washougal Reef. Harvestable numbers of shad are expected, and industry has expressed interest in fishing in the reef as market strength has improved. Allows the sales of shad caught with an experimental gear permit issued by the state of Oregon.

Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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

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

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

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

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

Date Adopted: May 6, 2011.

Philip Anderson
Director

NEW SECTION

WAC 220-33-03000G Commercial shad—Columbia River. Notwithstanding the provisions of WAC 220-33-030:

1. Washougal Reef.

a. Area: Waters of Zone 4-5 inside a line commencing at the white six-second equal-interval light approximately 3/4 miles east of the Washougal Woolen Mill pipeline and pro-

jected westerly to the Washougal blinker light, thence to the four-second blinker light on the east end of Lady Island, thence easterly and along the shoreline of Lady Island to the State Highway 14 Bridge, thence easterly across the State Highway 14 Bridge to the mainland.

b. Season: Monday through Friday from May 10 through June 20, 2011, except closed on the observed Memorial Day holiday. Open hours are 8:00 p.m. to 12:00 a.m.

c. Gear: Drift gill net only. Single-wall, unslackened, floater gill net, with breaking strength of less than 30 pounds. Mesh size: 5 3/8 inches to 6 1/4 inches.

d. Allowable Sales: Only shad may be kept and sold. All salmonids, walleye and sturgeon must be immediately returned to the water, and those alive must be released unharmed.

2. Mainstem Columbia River

a. Stipulations: Shad may be taken and sold for commercial purposes with experimental fishing gears. A permit issued by the State of Oregon as described in the Oregon Administrative Rule 635-006-0020 is required to use experimental gear types for shad. Conditions under which shad may be taken and sold for commercial purposes will be specified in the permit.

b. Area: SMCRA 1A-1E

c. Season: May 16-July 15, 2011

d. Gear: experimental

e. Allowable Sales: Only shad may be kept and sold. All salmonids, sturgeon, and non-target species taken as incidental catch in operation of such gear shall immediately, with care and least possible injury, be released and transferred to the water without violence.

REPEALER

The following section of the Washington Administrative Code is repealed effective July 16, 2011:

WAC 220-33-03000G Commercial shad—Columbia River.

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

[Order 11-89—Filed May 6, 2011, 2:09 p.m., effective May 14, 2011]

Effective Date of Rule: May 14, 2011.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: The spring chinook fishery is open Wednesdays through Sundays. The normal opening day of May 16 falls on a Monday this year. As a result of discussions with the Hoh Tribe, the starting date was moved to Saturday, May 14, 2011, offering additional fishing opportunity. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 6, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900J Exceptions to statewide rules—Hoh River. Notwithstanding the provisions of WAC 232-28-619, effective May 14 through May 15, 2011 a person may fish for salmon and gamefish in waters of the Hoh River from the Olympic National Park boundary upstream to the DNR Oxbow Campground Boat Launch to Willoughby Creek.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 232-28-61900D Exceptions to statewide rules—Hoh River. (11-76)

The following section of the Washington Code is repealed effective May 16, 2011:

WAC 232-28-61900J Exceptions to statewide rules—Hoh River.

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

**WSR 11-11-023
EMERGENCY RULES
DEPARTMENT OF**

SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed May 10, 2011, 11:48 a.m., effective May 10, 2011, 11:48 a.m.]

Effective Date of Rule: Immediately.

Purpose: The department is amending chapter 388-71 WAC, Home and community services and programs; and chapter 388-106 WAC, Long-term care services. Amendments are necessary to implement adult day health (ADH) changes required by federal directive, which requires the program to be offered under a different federal statutory authority - 1915(i) of the Social Security Act. The 1915(i) option has different financial eligibility requirements than the current program. ADH transportation will no longer be provided by the medicaid transportation broker. Transportation will be the responsibility of the ADH center to provide or arrange.

This filing continues emergency rules filed January 12, 2011, as WSR 11-03-038.

Citation of Existing Rules Affected by this Order: Repealing WAC 388-71-0734; and amending WAC 388-71-0720, 388-71-0724, 388-71-0726, and 388-106-0815.

Statutory Authority for Adoption: RCW 74.08.090, 74.09.520.

Other Authority: Section 1915(i) of the Social Security Act.

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

Reasons for this Finding: All modifications are required to comply with the new federally approved 1915(i) plan for the provision of the ADH services. Federal funds for this program ended December 31, 2009, due to a federal directive requiring ADH services to be removed from the rehabilitation services section of the medicaid state plan. In order to continue ADH services, the aging and disability services administration (ADSA) will provide ADH services under 1915(i) of the Social Security Act. The 1915(i) option has different financial eligibility rules that require nonexcluded income to be at or below one hundred fifty percent of the federal poverty level. ADSA will no longer pay for transportation to ADH by the medicaid transportation broker. ADSA will increase the ADH rate and ADH providers can provide transportation directly or through an arrangement with a third party. The department is currently in the process of filing the CR-102, proposed rule making. This CR-103E continues emergency rules filed January 12, 2011, as WSR 11-03-038 while the department completes the process for permanent adoption.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 1, Amended 4, Repealed 1; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 1, Amended 4, Repealed 1.

Date Adopted: May 9, 2011.

Katherine I. Vasquez
Rules Coordinator

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

WAC 388-71-0720 Adult day health—Assessment and service plan. (1) The department or an authorized case manager must perform a CARE assessment to determine a client's need for a referral to adult day health, per WAC 388-106-0065. Based on the assessment, the case manager determines whether the client should be referred for day health services or whether the client's needs can be met in other ways.

(2) If the client **has** a department or area agency on aging case manager, the adult day health center or other referral source must notify the case manager of the client's potential adult day health service need. The case manager must ~~((assess))~~ determine the client's need for a referral to ADH skilled nursing or skilled rehabilitative therapy within the department's normal time frames for client reassessments.

(3) If the client does not have a department or area agency on aging case manager, the adult day health center or other referral source must notify the department of the referral and the client's potential adult day health service need, or refer the client to the department for intake. The department's assigned case manager must assess the client's need for a referral to adult day health services within the department's normal time frames for initial client eligibility assessments.

(4) The case manager may consult with the client's practitioner, department or area agency on aging nursing services staff, or other pertinent collateral contacts, concerning the client's need for a referral to ADH skilled nursing or rehabilitative therapy.

(5) If the department or area agency on aging case manager determines ~~((and documents a potential unmet))~~ a need for ~~((day health services))~~ a referral to skilled nursing or skilled rehabilitative therapy, the case manager works with the client and/or the client's representative to develop a service plan that documents the potential unmet needs and ~~((the anticipated number of days per week that the services are needed))~~ whether the client wants a referral to ADH or another service provider.

(6) The case manager refers the client to a department contracted day health center for evaluation and the development of a preliminary negotiated plan of care.

~~((6))~~ (7) The department or area agency on aging case manager must reassess adult day health clients at least annually. Clients must also be reassessed if they have a break in service of more than thirty days. The adult day center must inform the case manager of the break in service so payment authorization can be discontinued.

~~((7))~~ (8) Recipients of adult day health services must be assessed by the department or an authorized case manager for continued or initial eligibility as follows:

- (a) Annual reassessment for department clients;
- (b) Adult day health quarterly review for current nondepartmental clients as resources allow; and

(c) New referrals for adult day health services are to be forwarded to local department offices for intake and assessment for eligibility.

~~((8))~~ (9) The department or area agency on aging case manager must review a client's continued eligibility for adult day health services every ninety days, coinciding with the quarterly review completed by the adult day health program. At the case manager's discretion, additional information will be gathered through face to face, collateral or other contact methods to determine continued eligibility. Services will be continued, adjusted, or terminated based upon the case manager's determination during the eligibility review.

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

WAC 388-71-0724 Adult day services—Contracting and rates. (1) The department, or an area agency on aging (or other department designee) as authorized by the department, must determine that the adult day care or day health center meets the applicable adult day care or day health requirements and any additional requirements for contracting with the area agency on aging through a COPES contract or with the department through a medicaid provider contract. If a center is contracting for both day care and day health, requirements of both adult day services must be met.

(a) A prospective provider desiring to provide adult day services shall be provided an application form from the department or the area agency on aging.

(b) The prospective provider will provide the area agency on aging with evidence of compliance with, or administrative procedures to comply with, the adult day service rules under this chapter.

(c) The area agency on aging will conduct a site inspection of the adult day center and review of the requirements for contracting.

(d) Within thirty days of completing the site visit, the area agency on aging will advise the prospective provider in writing of any deficiencies in meeting contracting requirements.

(e) The area agency on aging will verify correction of any deficiencies within thirty days of receiving notice from the prospective provider that deficiencies have been corrected, before contracting can take place.

(f) The area agency on aging will provide the department with a written recommendation as to whether or not the center meets contracting requirements.

(2) Minimum application information required to apply for contract with the department, or an area agency on aging includes:

(a) Mission statement, articles of incorporation, and bylaws, as applicable;

(b) Names and addresses of the center's owners, officers, and directors as applicable;

(c) Organizational chart;

(d) Total program operating budget including all anticipated revenue sources and any fees generated;

(e) Program policies and operating procedure manual;

(f) Personnel policies and job descriptions of each paid staff position and volunteer position functioning as staff;

(g) Policies and procedures meeting the requirements of mandatory reporting procedures as described in chapter 74.34 RCW to adult protective services for vulnerable adults and local law enforcement for other participants;

(h) Audited financial statement;

(i) Floor plan of the facility;

(j) Local building inspection, fire department, and health department reports;

(k) Updated TB test for each staff member according to local public health requirements;

(l) Sample client case file including all forms that will be used; and

(m) Activities calendar for the month prior to application, or a sample calendar if the day service provider is new.

(3) The area agency on aging or other department designee monitors the adult day center at least annually to determine continued compliance with adult day care and/or adult day health requirements and the requirements for contracting with the department or the area agency on aging.

(a) The area agency on aging will send a written notice to the provider indicating either compliance with contacting requirements or any deficiencies based on the annual monitoring visit and request a corrective action plan. The area agency on aging will determine the date by which the corrective action must be completed

(b) The area agency on aging will notify the department of the adult day center's compliance with contracting requirements or corrected deficiencies and approval of the corrective action plan for continued contracting.

(4) Adult day care services are reimbursed on an hourly basis up to four hours per day. Service provided four or more hours per day will be reimbursed at the daily rate.

(5) ~~((Payment rates are established on an hourly and daily basis for adult day care centers as may be adopted in rule.))~~ Rate adjustments are determined by the state legislature. ~~((Providers seeking current reimbursement rates can refer to SSPS billing instructions))~~ Information on current reimbursement rates is available at <http://www.adsa.dshs.wa.gov/professional/> under the "office of rates management" section.

(6) ~~((Rates as of July 1, 2002, are as follows:))~~

((Counties	COPES Adult Day Care	
	Daily Rate	Hourly Rate
King	\$36.48	\$9.10
Benton, Clark, Franklin, Island, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, & Yakima	\$32.45	\$8.11
All other counties	\$30.75	\$7.69))

~~((7))~~ Payment rates are established on a daily basis for adult day health centers ~~((as may be adopted in rule))~~. Rate adjustments are determined by the state legislature. ~~((Providers seeking))~~ Information on current reimbursement rates ((can refer to MAA billing instructions or <http://maa.dshs.wa.gov>)) is available at <http://www.adsa.dshs.wa.gov/professional/> under the "office of rates management" section.

~~((8))~~ (7) ~~((Rates as of July 1, 2002, are as follows:))~~

Counties	Day Health Daily
King	\$47.48
Benton, Clark, Franklin, Island, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, & Yakima	\$43.06
All other counties	\$40.68))

A one-time only initial intake evaluation provided by an adult day health center, including development of a negotiated care plan, is reimbursed at an established rate ~~((as may be adopted in rule))~~. ~~((The rate as of July 1, 2002 is eighty-nine dollars and thirty-eight cents))~~ Information on current reimbursement rates is available at <http://www.adsa.dshs.wa.gov/professional/> under the "office of rates management" section. Rate adjustments are determined by the state legislature. Separate reimbursement is not available for subsequent evaluations.

~~((9))~~ (8) Transportation to and from the program site is not reimbursed under the adult day care rate. Transportation arrangements are made with locally available transportation providers or informal resources.

~~((10))~~ (9) ~~((Transportation to and from the program site is not reimbursed under the adult day health rate. Transportation arrangements for eligible medicaid clients are made with local medicaid transportation brokers, informal providers, or other available resources per chapter 388-546 WAC))~~ Adult day health providers must arrange or provide transportation within the daily rate.

AMENDATORY SECTION (Amending WSR 03-06-024, filed 2/24/03, effective 7/1/03)

WAC 388-71-0726 Adult day health transportation.

~~((The following rules apply if medicaid transportation services are requested:))~~

(1) The day health center must refer the client to a local medicaid transportation broker. The broker may consult with the client, the client's physician, family, case manager, or day health center as needed in making any transportation arrangements.

(2) In referring the client to a day health center, the case manager may consider: The frailty and endurance of the client, the client's skilled nursing or rehabilitative therapy needs, and a reasonable round-trip travel time that may not exceed two hours, unless there is no closer center that can meet the client's skilled care needs. Documentation of language barriers may be considered on an exception to rule basis by the case manager.

(3) All brokered transportation under this subsection is subject to the requirements of chapter 388-546 WAC or its successors. In the case of any conflicts, the provisions of chapter 388-546 WAC take precedence)) (1) Adult day health providers must coordinate or provide transportation as necessary to assure client access to service.

(2) Adult day health providers must arrange or provide transportation within the daily rate.

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

WAC 388-106-0815 Am I eligible for adult day health? (1) You are eligible for adult day health services if you meet all of the following criteria. You are:

- (a) Age eighteen years or older.
- (b) Enrolled in ~~((one of the following))~~ a categorically needy (CNP) medical assistance ~~((programs:~~
 - ~~(i) Categorically needy (CNP);~~
 - ~~(ii) Categorically needy qualified medicare beneficiaries (CNP-QMB);~~
 - ~~(iii) General assistance—Expedited medicaid disability (GA-X); or~~
 - ~~(iv) Alcohol and Drug Abuse Treatment and Support Act (ADATSA))~~ program as defined in WAC 388-500-0005.
- (c) Your nonexcluded income does not exceed one hundred fifty percent of the federal poverty level (FPL).

(d) Assessed as having an unmet need for skilled nursing under WAC 388-71-0712 or skilled rehabilitative therapy under WAC 388-71-0714((:)) and;

(i) There is a reasonable expectation that these services will improve, restore or maintain your health status, or in the case of a progressive disabling condition, will either restore or slow the decline of your health and functional status or ease related pain or suffering; and

(ii) You are at risk for deteriorating health, deteriorating functional ability, or institutionalization; and

(iii) You have a chronic or acute health condition that you are not able to safely manage due to a cognitive, physical, or other functional impairment.

~~((d))~~ (e) Assessed as having needs for personal care or other core services, whether or not those needs are otherwise met.

(2) You are not eligible for adult day health if you:

(a) Can independently perform or obtain the services provided at an adult day health center;

(b) Have referred care needs that:

(i) Exceed the scope of authorized services that the adult day health center is able to provide;

(ii) Do not need to be provided or supervised by a licensed nurse or therapist;

(iii) Can be met in a less structured care setting; or

(iv) In the case of skilled care needs, are being met by paid or unpaid caregivers.

(c) Live in a nursing home or other institutional facility; or

(d) Are not capable of participating safely in a group care setting.

NEW SECTION

WAC 388-106-0820 Is there a wait list for adult day health? The department may maintain a wait list when the number of participants reaches federally approved capacity. Wait list clients will gain access in the following priority:

(1) Residents of nursing homes, or ICFs/MR, or hospital patients who are waiting for discharge will be ranked first on the wait list by date of application for services.

(2) All other applicants, in order of date and time the referral request is received by aging and disability services administration.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 388-71-0734 Limiting expenditures.

**WSR 11-11-025
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 11-90—Filed May 10, 2011, 1:07 p.m., effective May 13, 2011, 12:01 a.m.]

Effective Date of Rule: May 13, 2011, 12:01 a.m.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: This rule change is necessary to ensure a safe and successful event. The reason for closing the lake is to ensure safety for the public as well as the event participants. There is expected to be over six hundred youth participating in the fishing event and safety day program.

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

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

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

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

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

Date Adopted: May 10, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900K Exceptions to statewide rules—Kress Lake (Cowlitz Co.) Notwithstanding the provisions of WAC 232-28-619, effective 12:01 a.m. May 13 through 6:00 p.m. May 14, 2011, it is unlawful to fish in those waters of Kress Lake, except open to fishing 10:00 a.m. through 3:00 p.m. May 14, 2011, to juvenile anglers participating in the Fishing event and Safety Day Program.

REPEALER

The following section of the Washington Administrative Code is repealed effective 6:01 p.m. May 14, 2011:

WAC 232-28-61900K Exceptions to statewide rules—Kress Lake (Cowlitz Co.)

**WSR 11-11-027
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 11-79—Filed May 10, 2011, 3:53 p.m., effective May 11, 2011]

Effective Date of Rule: May 11, 2011.

Purpose: Amend recreational fishing regulations.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-23000I; and amending WAC 220-56-230.

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: This emergency rule is needed to conform Washington's recreational bottomfish rules to federal action taken by the Pacific Fishery Management Council. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 10, 2011.

Philip Anderson
Director

NEW SECTION

WAC 220-56-23000I Bottomfish closed areas. Notwithstanding the provisions of WAC 220-56-230, WAC 220-56-235, and WAC 220-56-250, effective immediately through June 15, 2011, it is unlawful to take, fish for or possess bottomfish seaward of 30 fathoms in Marine Area 2, except that effective May 11 through June 15, 2011, a person may fish for and possess sablefish, Pacific Cod and rockfish seaward of 30 fathoms in Marine Area 2.

The following coordinates define the 30-fathom line:

47°31.70'N lat.	124°37.03'W long.;
47°25.67'N lat.	124°34.79'W long.;
47°12.82'N lat.	124°29.12'W long.;
46°52.94'N lat.	124°22.58'W long.;
46°44.18'N lat.	124°18.00'W long.;
46°38.17'N lat.	124°15.88'W long.

REPEALER

The following section of the Washington Administrative code is repealed effective June 16, 2011:

WAC 220-56-23000I Bottomfish closed areas.

**WSR 11-11-028
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 11-92—Filed May 10, 2011, 3:54 p.m., effective May 10, 2011, 6:00 p.m.]

Effective Date of Rule: May 10, 2011, 6:00 p.m.

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

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

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

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

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is

necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Allows the sale of platform and hook-and-line caught fish from mainstem tribal fisheries. Allows the sale of fish caught in Yakama Nation tributary fisheries. Closes the tribal fishery downstream of Bonneville Dam after 8 p.m. May 14, 2011. Fisheries are consistent with the 2008-2017 management agreement and the associated biological opinion. Rule is consistent with action of the Columbia River compact on May 10, 2011. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

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

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

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 1, Amended 0, Repealed 1.

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

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

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

Date Adopted: May 10, 2011.

Philip Anderson
Director

NEW SECTION

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

1. Open Area: SMCRA 1F, 1G, 1H (Zone 6):
 - a. Season: 6:00 p.m. Tuesday, May 10, 2011, until further notice.
 - b. Gear: Hoop nets, dip bag nets, and rod and reel with hook and line.
 - c. Allowable sale: Salmon, steelhead, shad, carp, catfish, walleye, bass, and yellow perch. Sturgeon between 38-54 inches in fork length in the Bonneville Pool and sturgeon between 43-54 inches in fork length in The Dalles and John Day pools may be retained for subsistence purposes. Live release of all oversize and under-size sturgeon is required.
 - d. River mouth sanctuaries (WAC 220-32-058) remain in effect, except the Spring Creek Hatchery sanctuary.
2. Open Area: SMCRA 1E. Each of the four Columbia River treaty tribes has an MOA or MOU with the Washington Department of Fish and Wildlife regarding tribal fisheries in the area just downstream of Bonneville Dam. Tribal fisheries in this area may only occur in accordance with the appropriate MOA or MOU specific to each tribe.
 - a. Participants: Tribal members may participate under the conditions described in the 2007 Memorandum of Agreement (MOA) with the Yakama Nation (YN), in the 2010 Memorandum of Understanding (MOU) with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), in the 2010 MOU with the Confederated Tribes of the Warm Spring Reservation (CTWS), and in the 2011 MOU with the Nez Perce Tribe. Tribal members fishing below Bonneville Dam must carry an official tribal enrollment card.
 - b. Season: Immediately through 8:00 p.m. Saturday, May 14, 2011.
 - c. Gear: Hoop nets, dip bag nets, and rod and reel with hook-and-line.
 - d. Allowable Sales: Salmon, steelhead, shad, carp, catfish, walleye, bass, and yellow perch. Sturgeon retention is prohibited, and sturgeon may not be sold or retained for ceremonial or subsistence purposes. Sale of platform or hook-and-line-caught fish is allowed. Sales may not occur on USACE property.
3. Columbia River Tributaries above Bonneville Dam
 - a. Season: 6:00 p.m. May 10, 2011, until further notice, and only during those days and hours when the tributaries

listed below are open under lawfully enacted Yakama Nation tribal subsistence fishery regulations for enrolled Yakama Nation members.

b. Area: Drano Lake, and the White Salmon, Klickitat, and Wind rivers.

c. Gear: Hoop nets, dip bag nets, and rod and reel with hook-and-line. Gill nets may only be used in Drano Lake.

Allowable Sales: Salmon, steelhead, shad, carp, catfish, walleye, bass, and yellow perch.

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

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

REPEALER

The following section of the Washington Administrative Code is repealed effective 6:00 p.m. May 10, 2011:

WAC 220-32-05100U Columbia River salmon seasons above Bonneville Dam. (11-24)

WSR 11-11-034
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-93—Filed May 11, 2011, 3:30 p.m., effective May 18, 2011, 12:01 a.m.]

Effective Date of Rule: May 18, 2011, 12:01 a.m.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

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

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

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

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

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

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

Date Adopted: May 11, 2011.

Philip Anderson
Director

NEW SECTION

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

1. Effective 12:01 a.m. May 21 through 11:59 a.m. May 22, 2011, razor clam digging is allowed in Razor Clam Area 1. Digging is allowed from 12:01 a.m. to 11:59 a.m. each day only.

2. Effective 12:01 a.m. May 18 through 11:59 a.m. May 22, 2011, razor clam digging is allowed in Razor Clam Area 2 and that portion of Razor Clam Area 1 that includes the northern shore of Willapa Bay west of the western boundary of the Shoalwater Indian Reservation. Digging is allowed from 12:01 a.m. to 11:59 a.m. each day only.

3. Effective 12:01 a.m. May 20 through 11:59 a.m. May 22, 2011, razor clam digging is allowed in that portion Razor Clam Area 3 that is between the Copalis River and the southern boundary of the Quinault Indian Nation (Grays Harbor County). Digging is allowed from 12:01 a.m. to 11:59 a.m. each day only.

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

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

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 p.m. May 22, 2011:

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

WSR 11-11-035
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-94—Filed May 11, 2011, 3:30 p.m., effective May 11, 2011, 3:30 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-03000I and 220-52-03000J; and amending WAC 220-52-030.

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

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

Reasons for this Finding: The closure is needed to avoid the confusion and potential for illegal activity that could result from having this area open concurrently to both recreational and commercial razor clam harvesters. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 11, 2011.

Philip Anderson
Director

NEW SECTION

WAC 220-52-03000J Commercial razor clams. Notwithstanding the provisions of WAC 220-52-030, effective immediately through 11:59 p.m. May 20, 2011, and then from 12:01 a.m. May 23 through 11:59 p.m. July 8, 2011, a person may dig for and possess razor clams for commercial purposes only in those waters and detached beaches of Razor Clam Area 1 lying south of the Willapa Bay Ship Channel, west of Ellen Sands, and north of the tip of Leadbetter point; and in those waters and attached beaches north of the line of boundary markers consisting of four fluorescent orange posts near the northern tip of Leadbetter Point*; all other areas remain closed.

*The GPS coordinates for the eastern- and western-most posts are:

East: N 46° 39.554
W 124° 03.588
West: N 46° 39.515
W 124° 03.830

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

REPEALER

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

WAC 220-52-03000I Commercial razor clams.
(11-85)

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. July 9, 2011:

WAC 220-52-03000J Commercial razor clams.

WSR 11-11-036 EMERGENCY RULES DEPARTMENT OF FISH AND WILDLIFE

[Order 10-96—Filed May 11, 2011, 4:36 p.m., effective May 11, 2011, 4:36 p.m.]

Effective Date of Rule: Immediately.

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

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

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

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

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

Reasons for this Finding: Sets a mainstem commercial spring chinook fishing period, and modifies the fishing day from Thursday night to Wednesday night in Tongue Point and Blind Slough to accommodate the mainstem fishery. The upriver spring chinook run size has been updated and is projected to be greater than the preseason forecast, which provides additional upriver spring chinook to the commercial fishery. Impacts to ESA-listed salmon are expected to be within ESA limits. The fishery is consistent with the *U.S. v Oregon* Management Agreement and the associated biological opinion. Conforms Washington state rules with Oregon state rules. Regulation is consistent with compact action of

February 8 and May 11, 2011. There is insufficient time to promulgate permanent rules.

Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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

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

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

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

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

Date Adopted: May 11, 2011.

Philip Anderson
Director

NEW SECTION

WAC 220-33-01000W Columbia River seasons below Bonneville. Notwithstanding the provisions of WAC 220-33-010, WAC 220-33-020, and WAC 220-33-030, it is unlawful for a person to take or possess salmon, sturgeon,

and shad for commercial purposes from Columbia River Salmon Management and Catch Reporting Areas 1A, 1B, 1C, 1D, 1E and Select Areas, except during the times and conditions listed below:

1. Mainstem Columbia River

a) Area: SMCRA 1A, 1B, 1C, and 1D upstream to Kelley Point.

b) Dates: 3:00 p.m. May 12 to 5:00 a.m. May 13, 2011.

c) Allowable Sales: Adipose fin-clipped salmon, sockeye, white sturgeon (43-54 inch fork length), and shad. A maximum of five white sturgeon may be possessed or sold by each participating vessel during each calendar week (Sunday through Saturday) that the fishery is open. Limit applies to mainstem only.

d) Sanctuaries: Grays River, Elochoman-B, Abernathy Creek, Cowlitz River, Kalama-B, Lewis-B.

e) Gear: Drift gill nets only; 8-inch minimum mesh. Net length not to exceed 150 fathoms. In the Columbia River downstream of Bonneville Dam and in the Select Areas (described in WAC 220-22-010(9)), it shall be lawful to have onboard a commercial fishing vessel more than one licensed net in excess of the lawful size or length prescribed for a single net as long as the net or nets are of legal size for the fishery, or the net has a minimum mesh size of 9 inches, and the length of any one net does not exceed 1,500 feet in length. Nets not lawful for use at that time and area may be onboard the boat if properly stored. A properly "stored" net is defined as a net on a drum that is fully covered by tarp (canvas or plastic) and bound with a minimum of ten revolutions of rope with a diameter of 3/8 (0.375) inches or greater.

f) Miscellaneous Regulations:

Soak times: Defined as the time elapsed from when the first of the gill net web is deployed into the water until the gill net web is fully retrieved from the water, must not exceed 45 minutes.

Red corks: Are required at 25 fathom intervals, and red corks must be in contrast to the corks used in the remainder of the net.

Lighted Buoys: Nets that are fished at any time between official sunset and official sunrise must have lighted buoys on both ends of the net unless the net is attached to the boat. If the net is attached to the boat, then one lighted buoy on the opposite end of the net from the boat is required.

Recovery Box: Each boat will be required to have on board two operable recovery boxes or one box with two chambers. Each box and chamber and associated pump shall be operating during any time that the net is being retrieved or picked. Each chamber of the recovery box(es) must include an operating water pumping system capable of delivering a minimum flow of 16 gallons per minute, not to exceed 20 gallons per minute of freshwater per chamber.

Each chamber of the recovery box must meet the following dimensions as measured from within the box; the inside length measurement must be at or within 39 1/2 inches to 48 inches, the inside width measurements must be at or within 8 to 10 inches, and the inside height measurement must be at or within 14 to 16 inches.

Each chamber of the recovery box must include a water inlet hole between 3/4 inch and 1 inch in diameter, centered horizontally across the door or end wall of the chamber and 1

3/4 inches from the floor of the chamber. Each chamber of the recovery box must include a water outlet hole that is at least 1 1/2 inches in diameter located on either the same or opposite end as the inlet. The center of the outlet hole must be located a minimum of 12 inches above the floor of the box or chamber. The fisher must demonstrate to WDFW and ODFW employees, fish and wildlife enforcement officers, or other peace officers, upon request, that the pumping system is delivering the proper volume of fresh river water into each chamber.

All non-legal sturgeon, non-retainable salmon, and steelhead must be released immediately to the river with care and with the least possible injury to the fish, or placed into an operating recovery box.

Any fish that is bleeding or lethargic must be placed in the recovery box prior to being released. All fish placed in recovery boxes must be released to the river prior to landing or docking.

Observer program: As a condition of fishing, owners or operators of commercial fishing vessels must cooperate with department observers or observers collecting data for the department, when notified by the observer of his or her intent to board the commercial vessel for observation and sampling during an open fishery.

Live Capture workshop: Only licensed Columbia River commercial fishers that have completed the required state-sponsored workshop concerning live capture commercial fishing techniques may participate in this fishery. At least one fisher on each boat must have live capture certification.

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

2. Deep River Select Area

a) Area: From the markers at USCG navigation marker #16, upstream to the Highway 4 Bridge.

b) Dates: Open hours are: 7:00 p.m. Sundays to 7:00 a.m. Mondays, and 7:00 p.m. Wednesdays to 7:00 a.m. Thursdays, immediately through June 9, 2011.

c) Gear: Gillnets. 9 3/4-inch maximum mesh. Nets are restricted to 100 fathoms in length with no weight restriction on leadline. Use of additional weights or anchors attached directly to the leadline is allowed. Nets cannot be tied off to stationary structures. Nets may not fully cross navigation channel. It is unlawful to operate in any river, stream or channel any gillnet longer than three-fourths the width of the stream (WAC 220-20-015(1)). It shall be unlawful in any area to use, operate, or carry aboard a commercial fishing vessel a licensed net or combination of such nets, whether fished singly or separately, in excess of the maximum lawful size or length prescribed for a single net in that area, except as otherwise provided for in the rules and regulations of the department (WAC 220-20-010(17)).

Nets (or parts of nets) not specifically authorized for use in these areas may be onboard a vessel if properly stored. A properly stored net is defined as a net on a drum that is fully covered by a tarp (canvas or plastic) and bound with a minimum of ten revolutions of rope with a diameter of 3/8 (0.375) inches or greater. Nets that are fished at any time between official sunset and official sunrise must have lighted buoys on both ends of the net unless the net is attached to the boat.

If the net is attached to the boat, then one lighted buoy on the opposite end of the net from the boat is required.

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

e) Miscellaneous: Transportation or possession of fish outside the fishing area (except to the sampling station) is unlawful until department staff has biologically sampled individual catches. After sampling, fishers will be issued a transportation permit by agency staff. A sampling station will be established approximately 2 miles downstream of the Highway 4 Bridge near Stephan's dock.

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

3. Tongue Point/South Channel

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

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

b) Dates: Open hours are 7:00 p.m. Mondays to 7:00 a.m. Tuesdays, and 7:00 p.m. Thursdays to 7:00 a.m. Fridays, from May 16 through June 10, 2011. In addition, the fishery is open from 7:00 p.m. Wednesday, May 11, to 7:00 a.m. Thursday, May 12, 2011.

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

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

e) Miscellaneous: Effective May 11 through the remainder of the season, fishers in the Tongue Point/South Channel fishery are no longer required to have their catches sampled at the sampling station near Tongue Point. Fishers are instead required to call 503-428-0518 and leave a message including name, amount of catch, and location and time the fish will be sold.

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

4. Blind Slough/Knappa Slough Select Area

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

b) Dates: Open hours are 7:00 p.m. Mondays to 7:00 a.m. Tuesdays, and 7:00 p.m. Thursdays to 7:00 a.m. Fridays, from May 16 through June 10, 2011. In addition, the fishery is open from 7:00 p.m. Wednesday, May 11, to 7:00 a.m. Thursday May 12, 2011.

c) Gear: Gillnets. Spring Season: 9 3/4-inch maximum mesh. Nets are restricted to 100 fathoms in length, with no weight restriction on headline.

Use of additional weights or anchors attached directly to the headline is allowed. Nets fished any time between official sunset and official sunrise must have lighted buoys on both ends of the net. If the net is attached to the boat, then one lighted buoy on the end of the net opposite the boat is required.

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

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

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

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

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-33-01000V Columbia River seasons below Bonneville. (11-74)

**WSR 11-11-043
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 11-95—Filed May 12, 2011, 11:48 a.m., effective May 14, 2011]

Effective Date of Rule: May 14, 2011.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is

necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Based on current chinook run estimate and projected harvest numbers and catch rates being observed, the allowable catch of salmon for the Snake River in Washington will be reached sooner than initially identified. Because the wild portion of the run is protected under the Endangered Species Act (ESA), fisheries must be managed to remain within the guidelines of the ESA. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 12, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900L Exceptions to statewide rules—Snake River. Notwithstanding the provisions of WAC 232-28-619:

(1) Effective May 14, 2011, until further notice, it is unlawful to fish for and possess salmon in waters of the Snake River from the South Bound Highway 12 Bridge at Pasco, upstream about 7 miles to the fishing restriction boundary approximately 400 ft. below Ice Harbor Dam.

(2) Effective immediately through May 15, 2011, a person may fish for and possess salmon in the following waters of the Snake River:

(a) From the Railroad Bridge about 0.5 miles downstream of the Tucannon River mouth, up about 9 miles to the Army Corps of Engineers boat launch (approximately 1 mile upstream of Little Goose Dam along the south shore). This zone includes the area between the juvenile bypass return pipe and Little Goose Dam along the south shoreline of the facility (includes the walkway area locally known as "the wall" in front of the juvenile collection facility).

(b) From the intersection of Steptoe Canyon Road with Hwy 193 (Snake River Road) in Whitman County, upriver about 12 miles to the Idaho state line that runs from the north termination of the rock levee on the east side of the Greenbelt boat launch (near the US Army Corps of Engineers Office) northwest across the Snake River to the Idaho/Washington marker on the north shore in Whitman County.

(i) Daily limit of two adult hatchery Chinook and four jack Chinook salmon. Minimum size for Chinook is 12 inches in length.

(ii) However, when fishing along the "wall" and walkway area upstream of the juvenile fish bypass return pipe below Little Goose Dam, the daily limit is one adult hatchery Chinook and one jack salmon. May continue to fish until the daily adult limit is retained. Minimum size for Chinook is 12 inches in length.

(iii) All Chinook with the adipose fin intact, and all steelhead, must be released immediately, unharmed.

(iv) Hooks must be barbless when fishing for all species, and only single barbless hooks are allowed when fishing for sturgeon.

(v) It is unlawful to use any hook larger than 5/8-inch (point of hook to shank) for all species except sturgeon.

(vi) Night closure is in effect for salmon and sturgeon.

(vii) For areas open for Chinook, anglers must cease fishing for salmon for the day when they retain the adult daily limit.

REPEALER

The following section of the Washington Administrative code is repealed effective May 14, 2011:

WAC 232-28-61900S Exceptions to statewide rules—Snake River. (11-57)

WSR 11-11-045
EMERGENCY RULES
OFFICE OF

INSURANCE COMMISSIONER

[Insurance Commissioner Matter No. R 2011-09—Filed May 13, 2011, 7:23 a.m., effective May 13, 2011, 7:23 a.m.]

Effective Date of Rule: Immediately.

Purpose: This rule replaces an expiring emergency rule implementing the federal reforms related to the Affordable Care Act provisions precluding health carriers and health benefit plans from using preexisting condition exclusions as a factor in coverage or eligibility determinations for persons under age nineteen. The permanent rule making for this subject is scheduled for completion in June 2011.

Statutory Authority for Adoption: RCW 48.02.060, 48.18.120(2), 48.20.450, 48.44.050, 48.46.200.

Other Authority: RCW 48.18.120(2), 48.20.450, 48.43.-012, 48.43.015, 48.43.018, Pub. Law 111-148, sec. 2704.

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

Reasons for this Finding: The Affordable Care Act provisions affecting this practice became effective September 23, 2010.

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

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

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

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

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

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

Date Adopted: May 13, 2011.

Mike Kreidler
Insurance Commissioner

SUBCHAPTER J
HEALTH PLAN ENROLLMENT AND COVERAGE
REQUIREMENTS

NEW SECTION

WAC 284-43-970 Purpose and scope. These rules explain the requirements in effect in Washington governing the issue of individual health insurance or health benefit plans to persons under age nineteen, based on section 2704 of the Public Health Service Act, as amended by section 1201 of the Patient Protection and Affordable Care Act, P.L. 111-148 and the interim final regulations interpreting it, 45 CFR 145.103 and 147.108 (2010), which provide that a carrier may not apply preexisting condition exclusions or coverage limitations for persons under age nineteen.

NEW SECTION

WAC 284-43-975 Definitions. As used in this section, unless the context requires otherwise:

(1) "Applicant" means a person who applies for enrollment in an individual health plan as a subscriber or an enrollee, or the dependent or spouse of a subscriber or enrollee. For purposes of this subchapter J, a legal guardian is an applicant if they apply for an individual coverage on behalf of a person under age nineteen.

(2) "Carrier" has the same meaning as its definition in RCW 48.43.005(18) and includes "issuers" as that term is used in the Patient Protection and Affordable Care Act, P.L. 111-148.

(3) "Open enrollment" means a period of time as defined in these rules, held at the same time each year, during which applicants may enroll in the carrier's individual health benefit plan without being subject to health screening or otherwise required to provide evidence of insurability as a condition for enrollment.

(4) "Special enrollment" means a defined period of time of not less than thirty-one days, triggered by a specific qualifying event experienced by the applicant, during which applicants may enroll in the carrier's individual health benefit plan without being subject to health screening or otherwise

required to provide evidence of insurability as a condition for enrollment.

(5) "Standard health questionnaire" means the standard health questionnaire designated under chapter 48.41 RCW.

NEW SECTION

WAC 284-43-980 Preexisting conditions. For individual health plan applicants and non-grandfathered individual plan enrollees under age nineteen, a carrier must not apply a preexisting condition to limit eligibility, exclude benefits, deny coverage, or otherwise limit coverage. This requirement includes those persons under age nineteen with a preexisting condition who seek coverage as the primary insured or as a dependent or as a spouse under individual health benefit plans that permit the enrollment of dependents, and enrolled persons under age nineteen who seek benefits for which they are otherwise eligible.

NEW SECTION

WAC 284-43-985 Enrollment of persons under age nineteen. (1) For any individual health benefit plan offered after January 1, 2011, a carrier must conduct an open enrollment period for persons under age nineteen during two time periods each year. The first open enrollment period must occur from March 15th through April 30th of each year, and the second open enrollment period must occur from September 15th through October 31st.

(2) A carrier must use the same method to establish the effective date of coverage for persons under age nineteen enrolling during either one of the open enrollment periods or a special enrollment period set forth in this rule.

(3) A carrier must make a special enrollment period of not less than thirty-one days available to any person under age nineteen who experiences a qualifying event. A qualifying event means the occurrence of one of the following:

(a) The discontinuation for any reason of employer sponsored insurance coverage of a person under age nineteen or the person under whose policy they were enrolled;

(b) The loss of eligibility of person under age nineteen for medicaid or a public program providing health benefits;

(c) The loss of coverage for a person under age nineteen as the result of dissolution of marriage;

(d) The person under age nineteen or the person under whose policy they were enrolled changes residence, and the health plan under which they were covered does not provide coverage in that person's new service area;

(e) The person for whom coverage is sought was born, placed for adoption or adopted within sixty days of the application for enrollment. For newborns enrolled under an individual policy, coverage must be effective as of the moment of birth;

(f) Nothing in this rule is intended to alter or affect the application of RCW 48.43.517.

(4) During the enrollment periods described in subsections (1) through (3) of this section, or any other enrollment period, a carrier must not require a person under age nineteen applying for an individual health benefit plan to complete the standard health questionnaire designated under chapter 48.41 RCW or otherwise provide evidence of insurability.

(5) A carrier may offer enrollment in an individual health benefit plan outside the open or special enrollment period, but must not require any evidence of insurability or completion of the standard health questionnaire if the applicant is a person under age nineteen.

(6) A carrier must not limit the choice of individual plan for which a person under age nineteen may apply based on the applicant's age.

(7) A carrier must prominently display on its web site information about open enrollment periods and special enrollment periods for persons under age nineteen.

(a) If a carrier elects to limit enrollment for persons under nineteen to the open enrollment periods or a special enrollment period triggered by a qualifying event, the carrier must:

(i) Explain that fact on its web site;

(ii) Promptly make application packets available to interested persons upon request, even if the request is made outside the open enrollment periods; and

(iii) Provide contact information for the Washington state high risk pool and the federally sponsored preexisting condition insurance pool - Washington.

(b) The web site information about special enrollment periods must include providing the ability to access or request and receive an application packet for enrollment at any time. The displayed information must also include details written in plain language explaining what constitutes a qualifying event for special enrollment.

WSR 11-11-058

EMERGENCY RULES

DEPARTMENT OF

FISH AND WILDLIFE

[Order 11-98—Filed May 13, 2011, 2:28 p.m., effective May 16, 2011]

Effective Date of Rule: May 16, 2011.

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

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

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

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

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

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

Reasons for this Finding: Allows the sale of specific fish caught during test fisheries conducted with experimental gear that have been lawfully enacted by the Yakama or Umatilla tribes. Continues to allow the sale of platform and hook and line caught fish from mainstem tribal fisheries and the sale of fish caught in Yakama Nation tributary fisheries. Closes the tribal fishery downstream of Bonneville Dam as scheduled. Fisheries are consistent with the 2008-2017 management agreement and the associated biological opinion. Rule is consistent with action of the Columbia River compact on May 10 and May 11, 2011. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

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

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

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 1, Amended 0, Repealed 1.

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

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

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

Date Adopted: May 13, 2011.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

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

1. Open Area: SMCRA 1F, 1G, 1H (Zone 6):
 - a. Season: Open until further notice.
 - b. Gear: Hoop nets, dip bag nets, and rod and reel with hook and line.
 - c. Allowable sale: Salmon, steelhead, shad, carp, catfish, walleye, bass, and yellow perch. Sturgeon between 38-54 inches in fork length in the Bonneville Pool and sturgeon between 43-54 inches in fork length in The Dalles and John Day pools may be retained for subsistence purposes. Live release of all oversize and under-size sturgeon is required.
 - d. River mouth sanctuaries (WAC 220-32-058) remain in effect, except the Spring Creek Hatchery sanctuary.
2. Open Area: SMCRA 1F, 1G, 1H (Zone 6):
 - a. Participants: Open under lawfully enacted regulations for experimental gear types as adopted by either the Yakama Nation or the Confederated Tribes of the Umatilla Indian Reservation.
 - b. Season: Immediately through July 31, 2011.
 - c. Gear: Experimental gear; are test fisheries.
 - d. Allowable sale: Shad, carp, catfish, walleye, bass, and yellow perch.
3. Columbia River Tributaries above Bonneville Dam
 - a. Season: Open until further notice, but only during those days and hours when the tributaries listed below are open under lawfully enacted Yakama Nation tribal subsistence fishery regulations for enrolled Yakama Nation members.
 - b. Area: Drano Lake, and the White Salmon, Klickitat, and Wind rivers.
 - c. Gear: Hoop nets, dip bag nets, and rod and reel with hook and line. Gill nets may only be used in Drano Lake.

Allowable Sales: Salmon, steelhead, shad, carp, catfish, walleye, bass, and yellow perch.
4. 24-hour quick reporting required for Washington wholesale dealers, WAC 220-69-240, for all areas.

REPEALER

The following section of the Washington Administrative Code is repealed effective May 16, 2011:

WAC 220-32-05100V Columbia River salmon seasons above Bonneville Dam. (11-92)

WSR 11-11-059
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-99—Filed May 13, 2011, 2:30 p.m., effective May 15, 2011]

Effective Date of Rule: May 15, 2011.

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

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

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

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

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

Reasons for this Finding: Reopens the spring chinook sport fishery for the remainder of the spring season in the area below Bonneville Dam. Harvestable fish remain available based on the inseason upriver spring chinook run size forecast and harvest guidelines. Stipulates that the hatchery adult chinook bag limit in Deep River is consistent with the adjacent Columbia River when both areas are open. Include rules that prohibit filleting of fish in the field and full removal of nonlegal fish from the water. Regulation is consistent with guidance from Washington fish and wildlife commission and director and joint state action of May 13, 2011. The fishery is consistent with the *U.S. v. Oregon* Management Agreement and the associated biological opinion. Conforms Washington state rules with Oregon state rules. There is insufficient time to adopt permanent rules.

Washington and Oregon jointly regulate Columbia River fisheries under the congressionally ratified Columbia River compact. Four Indian tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the tribes an opportunity to take a fair share of the available fish; and the states must manage other fisheries accordingly. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal ESA. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and nontreaty Columbia River fisheries governed by the 2008-2017 *U.S. v. Oregon* Management Agreement. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of nontreaty fisheries.

Columbia River nontreaty fisheries are monitored very closely to ensure compliance with federal court orders, the ESA, and commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington (WDFW) and Oregon (ODFW) departments of fish and wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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

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

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

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

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

Date Adopted: May 13, 2011.

Lori Preuss
for Philip Anderson
Director

NEW SECTION

WAC 232-28-61900M Exceptions to statewide rules—Columbia River. Notwithstanding the provisions of WAC 232-28-619, it is unlawful to violate the following provisions, provided that unless otherwise amended, all permanent rules remain in effect:

1. Columbia River:

i. From the Rocky Point/Tongue Point line upstream to Beacon Rock, defined as a line projected from a sign posted on a dock on the Oregon shoreline across to the exposed downstream end of Pierce Island, then across to a sign posted on the Washington shoreline at Beacon Rock: Effective May 15 through June 15, 2011, fishing for salmonids is open. Daily salmonid limit is 6 fish (hatchery Chinook or hatchery steelhead or sockeye), of which no more than 2 may be adults and no more than one may be an adult Chinook. Release all wild Chinook and wild steelhead. Sockeye count toward the daily adult salmonid limit. Salmon minimum size is 12-inches.

ii. From Beacon Rock, defined as a line projected from a sign posted on a dock on the Oregon shoreline across to the exposed downstream end of Pierce Island, then across to a sign posted on the Washington shoreline at Beacon Rock upstream to 600 feet below the fish ladder at the new Bonneville Dam powerhouse: Effective May 15 through June 15, 2011: Open to fishing for salmonids from the bank only. Closed to fishing for salmonids from boats. Daily salmonid limit is 6 fish (hatchery Chinook or hatchery steelhead or sockeye), of which no more than 2 may be adults and no more than 1 may be an adult Chinook. Release all wild Chinook and wild steelhead. Sockeye count toward the daily adult salmonid limit. Salmon minimum size is 12-inches.

iii. Effective May 15 through June 15, 2011: For the mainstem Columbia River salmon and steelhead fishery from the Rocky Point/Tongue Point line upstream to Oregon/Washington border, it is unlawful when fishing from vessels which are less than 30 feet in length, substantiated by Coast Guard documentation or Marine Board registration, to totally remove from the water any salmon or steelhead required to be released.

iv. Effective immediately until further notice: On the mainstem Columbia River below Bonneville Dam, anglers may not possess in the field fish mutilated so that size, species or fin clip cannot be determined until anglers have reached their automobile or principle means of land transportation and have completed their daily angling.

2. Deep River (Wahkiakum Co.): Effective May 15 through June 15, 2011: the hatchery adult Chinook daily limit will be the same as the adjacent mainstem Columbia River during those days when the mainstem Columbia River is open for adult Chinook retention. When the adjacent mainstem Columbia River is closed for adult Chinook retention, the salmon daily limit will revert to permanent rules for Deep River.

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

REPEALER

The following section of the Washington Administrative Code is repealed effective May 15, 2011:

WAC 232-28-61900G Exceptions to statewide rules—Columbia River. (11-84)

WSR 11-11-066

EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-97—Filed May 16, 2011, 1:59 p.m., effective May 16, 2011, 1:59 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: The majority of the wild winter steelhead run has passed. Opening of this fishery will not have significant impact on the run and will provide additional recreational fishing opportunity. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 16, 2011.

Lori Preuss
for Philip Anderson
Director

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 232-28-61900U Exceptions to statewide rules. (11-09)

WSR 11-11-075
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-102—Filed May 17, 2011, 11:24 a.m., effective May 20, 2011, 9:00 p.m.]

Effective Date of Rule: May 20, 2011, 9:00 p.m.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: Returns of spring chinook to Ringold Springs Rearing Facility (RSRF) in 2011 have failed to meet expectations. No spring chinook have been observed in the hatchery trap, and very few RSRF age five (brood year 2006) chinook have been observed in the sport harvest since the fishery opened on May 1. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 17, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900U Exceptions to statewide rules—Columbia River. Notwithstanding the provisions of WAC 232-28-619, effective 9:00 p.m. May 20, 2011, until further notice, it is unlawful to fish for salmon in those waters of the Columbia River adjacent to Ringold Springs Rearing Facility (in Franklin County), from the Washington Department of Fish and Wildlife markers 1/4 mile downstream of the Ringold irrigation wasteway outlet, to the markers 1/2 mile upstream of Ringold Springs Creek.

WSR 11-11-076
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-101—Filed May 17, 2011, 11:24 a.m., effective May 21, 2011]

Effective Date of Rule: May 21, 2011.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: In-season run analyses predict that over nine thousand salmon (six thousand adults, three thousand five hundred jacks) will return to the Icicle River. Although upper Columbia River spring chinook have been listed as endangered under the Endangered Species Act (ESA), the salmon returning to the Icicle River are Carson stock and not listed under the ESA. About one thousand salmon are needed to meet hatchery broodstock. The 2011 return ensures that the hatchery will meet its escapement needs; the remaining fish will be available for harvest. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 17, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900S Exceptions to statewide rules—Icicle River (Chelan Co.) Notwithstanding the provisions of WAC 232-28-619, effective May 21 through July 31, 2011, a person may fish for salmon in those waters of the Icicle River from the closure signs located 800 feet upstream of the mouth to 500 feet downstream of the Leavenworth National Fish Hatchery Rack. Daily limit, three salmon; minimum size, 12 inches. Night closure in effect. All fish with one or more round holes punched in the tail must be released.

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. August 1, 2011:

WAC 232-28-61900S Exceptions to statewide
rules—Icicle River (Chelan
Co.)

WSR 11-11-082
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-103—Filed May 17, 2011, 4:13 p.m., effective May 19, 2011]

Effective Date of Rule: May 19, 2011.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

Reasons for this Finding: Drano Lake: When the hatchery ladder was opened for a single day between May 12 and 13, a total of 1,662 spring chinook entered Little White Salmon National Fish Hatchery. The hatchery escapement goal is 1,000 fish. Surplus hatchery fish, including jacks, are available for harvest. Wind River: The hatchery is expected to meet its escapement goal, and surplus hatchery origin fish are available for harvest. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 17, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900W Exceptions to statewide rules—Drano Lake and Wind River. Notwithstanding the provisions of WAC 232-28-619:

(1) Drano Lake - Effective May 19 through July 31, 2011, a person may fish in waters downstream of markers on the point of land downstream and across from Little White Salmon National Fish Hatchery and upstream of the Hwy. 14 Bridge. Daily limit six fish; up to four may be adults, of which no more than two may be hatchery steelhead. Release all salmon other than hatchery Chinook. Release wild Chinook and wild steelhead. Release all trout other than steelhead. Minimum size 12 inches for salmon and 20 inches for steelhead. Night closure, bank fishing only area near the outlet, and Wednesday closures will remain in effect through June 30, 2011.

(2) Wind River - Effective May 19 through July 31, 2011, a person may fish in waters from mouth (boundary line/markers) to 400 feet below Shipherd Falls; from 100 feet above Shipherd Falls to 400 feet below the coffer dam; and from 100 feet above the coffer dam to 800 yards downstream of Carson National Fish Hatchery. Daily limit six fish; up to four may be adults, of which no more than two may be hatchery steelhead. Release wild steelhead and all other game fish. Release all salmon other than Chinook. Release wild Chinook downstream from Shipherd Falls. Minimum size 12 inches for salmon and 20 inches for steelhead. Night closure will remain in effect. In addition, the anti-snagging rule remains in effect from the Burlington Northern Railroad Bridge upstream. Only fish hooked inside the mouth may be retained.

REPEALER

The following section of the Washington Administrative Code is repealed effective August 1, 2011:

WAC 232-28-61900W Exceptions to statewide
rules—Drano Lake and Wind
River.

WSR 11-11-095
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 11-100—Filed May 18, 2011, 10:14 a.m., effective May 21, 2011]

Effective Date of Rule: May 21, 2011.

Purpose: Amend personal use fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047 and 77.04.020.

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

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

Reasons for this Finding: Hatchery summer run steelhead are released into the South Fork Toutle and Green rivers. These fish are not needed for broodstock. Opening the lower portions of the South Fork Toutle and Green rivers two weeks early will allow additional opportunity to harvest surplus hatchery steelhead, which are returning to other Columbia River tributaries in strong early numbers. There is insufficient time to adopt permanent rules.

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

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

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

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

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

Date Adopted: May 18, 2011.

Philip Anderson
Director

NEW SECTION

WAC 232-28-61900N Exceptions to statewide rules—South Fork Toutle and Green rivers. Notwithstanding the provisions of WAC 232-28-619:

(1) Effective May 21 through June 3, 2011, a person may fish for steelhead in waters of the South Fork Toutle River from the mouth to the 4700 Road Bridge. Daily limit of two hatchery steelhead; release wild steelhead and all other game fish. Selective gear rules are in effect.

(2) Effective May 21 through June 3, 2011, a person may fish for steelhead in waters of the Green River from the mouth to 400 feet below the water intake at the upper end of the hatchery. Daily limit of two hatchery steelhead; release wild steelhead and all other game fish. Selective gear rules are in effect.

REPEALER

The following section of the Washington Administrative Code is repealed effective June 4, 2011:

WAC 232-28-61900N Exceptions to statewide rules.