

WSR 08-14-014
EMERGENCY RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Aging and Disability Services Administration)
[Filed June 20, 2008, 10:21 a.m., effective June 21, 2008]

Effective Date of Rule: June 21, 2008.

Purpose: The department is combining three family support programs into one individual and family services program as directed by the legislature.

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

Other Authority: 2SSB 5467.

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: 2SSB 5467, as amended by the house, directs the department to create the individual and family services program for persons with developmental disabilities by July 1, 2007. A preproposal statement of inquiry (CR-101) was filed as WSR 07-10-018 on April 20, 2007. At that time, the department proposed amending chapter 388-825 WAC but has since decided that a new chapter is required, due to the length of the new rules. These emergency rules replace the emergency rules filed as WSR 08-06-019 while the department proceeds with permanent adoption of these rules. The CR-102 has been filed as WSR 08-11-095 and the hearing is scheduled for July 22, 2008.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 100, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 100, Amended 0, Repealed 0.

Date Adopted: June 10, 2008.

Stephanie E. Schiller
Rules Coordinator

Chapter 388-832 WAC

INDIVIDUAL AND FAMILY SERVICES PROGRAM

NEW SECTION

WAC 388-832-0001 What definitions apply to this chapter? The following definitions apply to this chapter:

"Agency Provider" means a licensed and/or ADSA certified business that is contracted with ADSA or a county to

provide DDD services (e.g., personal care, respite care, residential services, therapy, nursing, employment, etc.).

"Allocation" means an amount of funding available to the client and family for a maximum of twelve months, based upon assessed need.

"Authorization" means DDD approval of funding for a service as identified in the individual support plan or evidence of payment of a service.

"Back-up Caregiver" is a person who has been identified as an informal caregiver and is available to provide assistance as an informal caregiver when other caregivers are unavailable.

"Client" means a person who has a developmental disability as defined in RCW 71A.10.020(3) who also has been determined eligible to receive services by the division under chapter 71A.16 RCW.

"DDD" means the division of developmental disabilities, a division within the aging and disability services administration (ADSA), department of social and health services (DSHS).

"Department" means the department of social and health services (DSHS).

"Emergency" means the client's health or safety is in jeopardy.

"Family" means individuals, of any age, living together in the same household and related by blood, marriage, adoption or as a result of sharing legal custody of a minor child.

"Family Home" means the residence where you and your relatives live.

"Formal Caregiver" is a person/agency who receives payment from DDD to provide a service.

"Individual Provider" means an individual who is contracted with DDD to provide medicaid or waiver personal care, respite care, or attendant care services.

"Individual Support Plan" or **"ISP"** is a document that authorizes the DDD paid services to meet a client's needs identified in the DDD Assessment.

"Informal Caregiver" is a person who provides supports without payment from DDD for a service.

"Legal Guardian" means a person/agency, appointed by a court, which is authorized to make some or all decisions for a person determined by the court to be incapacitated. In the absence of court intervention, parents remain the legal guardian for their child until the child reaches the age of eighteen.

"Parent family support contract" means a contract between DDD and the parent to reimburse the parent for the purchase of goods and services paid for by the parent.

"Pass through contract" means a contract between DDD and a third party to reimburse the third party for the purchase of goods and services paid for by the third party.

"Primary Caregiver" is the formal or informal caregiver who provides the most support.

"Residential Habilitation Center" or **"RHC"** is a state operated facility certified to provide ICF/MR and/or nursing facility level of care for persons with developmental disabilities per chapter 71A.20 RCW.

"Significant change" means changes in your medical condition, caregiver status, behavior, living situation or employment status.

"State funded services" means services that are funded entirely with state dollars.

"State supplementary payment" or "SSP" means a state paid cash assistance program for certain DDD clients eligible for supplemental security income per chapter 388-827 WAC.

"You" means the client.

DESCRIPTION

NEW SECTION

WAC 388-832-0005 What is the individual and family services program? The "individual and family services program" (IFS Program) is a state-only funded program that:

- (1) Provides an array of services to families to help maintain and stabilize the family unit; and
- (2) Replaces WAC 388-825-200 through 388-825-242 (the family support opportunity program), WAC 388-825-252 through 388-825-256 (the traditional family support program), WAC 388-825-500 through 388-825-595, (the flexible family support pilot program), and WAC 388-825-244 through 388-825-250 (other family support rules).

NEW SECTION

WAC 388-832-0007 What is the purpose of the individual and family services (IFS) program? The purpose of the IFS program is to have one DDD family support program that will:

- (1) Form a partnership between the state and families to help support families who have a client of DDD living in the family home; and
- (2) Provide families with a choice of services and allow families more control over the resources allocated to them.

ELIGIBILITY

NEW SECTION

WAC 388-832-0015 Am I eligible to participate in the IFS program? (1) You are eligible to be considered for the IFS program if you meet the following criteria:

- (a) You are currently an eligible client of DDD;
 - (b) You live in your family home;
 - (c) You are not enrolled in a DDD home and community based services waiver defined in chapter 388-845 WAC;
 - (d) You are currently enrolled in traditional family support, family support opportunity or the family support pilot or funding has been approved for you to receive IFS program services;
 - (e) You are age three or older as of July 1, 2007;
 - (f) You have been assessed as having a need for IFS program services as listed in WAC 388-832-0140; and
 - (g) You are not receiving a DDD residential service.
- (2) If you are a parent, you are eligible to receive IFS program services in order to promote the integrity of the family unit, provided:

- (a) You meet the criteria in subsections (1)(a) through (f) above; and

- (b) Your child who lives in your home is at risk of being placed up for adoption or into foster care.

NEW SECTION

WAC 388-832-0020 Will I be authorized to receive IFS services if I meet the eligibility criteria in WAC 388-832-0015? Meeting eligibility criteria for the IFS program does not ensure access to or receipt of the IFS program services.

- (1) Receipt of IFS services is limited by availability of funding and your assessed need.

- (2) WAC 388-832-0085 through 388-832-0090 describes how DDD will determine who will be approved to receive funding.

NEW SECTION

WAC 388-832-0022 What determines the allocation of funds available to me to purchase IFS services? The allocation of funds is based upon the IFS assessment described in chapter 388-828 WAC. The DDD assessment will determine your service level based on your assessed need.

NEW SECTION

WAC 388-832-0023 If I qualify for another DDD service, will my IFS program be reduced or terminated? Since your IFS amount is based on the assessed need, if your needs change, the dollar amount will be impacted. However, if you are qualified for another DDD service, you can still receive IFS as long as you continue to have an assessed need and have met the eligibility criteria for the IFS Program.

NEW SECTION

WAC 388-832-0024 If I participate in the IFS program, will I be eligible for services through the DDD home and community based services (HCBS) waiver? (1) If you participate in the IFS program you may not participate in the DDD HCBS waiver at the same time.

- (2) You may request enrollment in a DDD HCBS waiver at any time per WAC 388-845-0050.

- (3) Participation in the IFS program will not affect your potential waiver eligibility.

NEW SECTION

WAC 388-832-0025 Am I eligible for the IFS program if I currently receive other DDD paid services? If you receive other non-waiver DDD funded services, you may be eligible for the IFS program.

NEW SECTION

WAC 388-832-0045 What if there are two or more family members who are eligible for the IFS program? If there are two or more family members who are eligible for the IFS program, each family member will be assessed to

determine their IFS program allocation based on their individual need.

NEW SECTION

WAC 388-832-0050 How do I request IFS program services? You may contact your DDD case/resource manager at any time to request IFS program services. You will receive written notice of DDD's approval or denial along with your administrative hearing rights.

NEW SECTION

WAC 388-832-0055 How long do I remain eligible for the IFS program? To remain eligible for the IFS program you must be reassessed at least every twelve months or sooner if there is a significant change in your needs per WAC 388-828-1500 and you must meet all eligibility criteria described in WAC 388-832-0015.

NEW SECTION

WAC 388-832-0060 Can DDD terminate my eligibility for the IFS program? You may be terminated from the IFS program for any of the following reasons:

- (1) You no longer meet DDD eligibility per WAC 388-823-0010 through 388-823-0170;
- (2) You no longer meet the eligibility criteria for the IFS program per WAC 388-832-0015;
- (3) You have not used an IFS program service during the last twelve calendar months;
- (4) You cannot be located or do not make yourself available for the annual DDD assessment;
- (5) You refuse to participate with DDD in service planning; and/or
- (6) You begin to receive a DDD residential service.

NEW SECTION

WAC 388-832-0065 If I go into a temporary out of home placement, will I be eligible for IFS upon my return home? You can apply for the IFS program once you return home from placement by contacting your DDD case manager, if your out of home placement does not exceed twelve months. Your case manager will schedule an assessment with you and, if you meet all the eligibility criteria described in WAC 388-832-0015, have an assessed need, and funding is available, you will receive an IFS program allocation.

NEW SECTION

WAC 388-832-0067 If I am a parent with a developmental disability and a client of DDD, are my children eligible for IFS program services? If you are a parent with a developmental disability and a client of DDD, your children may be eligible for IFS program services if funding is available and your children:

- (1) Are ages birth through twenty-one years of age;
- (2) Are at risk of out of home placement; and
- (3) Live with you.

INDIVIDUAL AND FAMILY SERVICES PROGRAM WAIT LIST

NEW SECTION

WAC 388-832-0070 What is the IFS program wait list? The IFS wait list is a list of clients who live with their family and the family has requested family support services. At the time of the family's request for IFS program services, funding was not available; therefore these clients were placed on the IFS program wait list effective on the date of their request.

NEW SECTION

WAC 388-832-0072 Who is eligible to be on the IFS program wait list? To be on the IFS wait list you must live in your family home and remain eligible for DDD services.

NEW SECTION

WAC 388-832-0075 Do I have to have a DDD assessment before I can be added to the IFS wait list? You do not have to have a DDD assessment prior to your name being added to the IFS wait list.

- (1) Your name and request date will be added to the wait list.
- (2) A notice will be sent to you to let you know your name has been added to the IFS wait list.

NEW SECTION

WAC 388-832-0080 How or when am I taken off the IFS wait list? You are taken off the wait list if:

- (1) You no longer live in your family home;
- (2) You are no longer eligible for DDD services;
- (3) You request your name to be removed from the IFS wait list;
- (4) You do not respond to IFS notification to schedule the DDD assessment;
- (5) You are offered IFS services and accept or refuse services;
- (6) You are on the HCBS waiver; or
- (7) Your DDD assessment determines you are not eligible for the IFS program.

NEW SECTION

WAC 388-832-0082 If the DDD assessment determines I am not eligible for the IFS program, may I remain on the IFS wait list? If the DDD assessment determines you are not eligible for the IFS program, you may remain on the wait list; however, your request date will change to the date of your current assessment.

NEW SECTION

WAC 388-832-0085 When there is state funding available to enroll new clients in the IFS program, how will DDD select from the clients on the IFS program wait list? When there is state funding available for new IFS partic-

ipants, DDD may enroll participants based on the following considerations:

(1) Clients who have requested residential habilitation center (RHC) respite, emergency services, or residential placement, prior to June 30, 2007.

(2) Clients with the highest scores in caregiver and behavior status on the mini assessment.

(3) Clients who have been on the IFS program wait list the longest.

NEW SECTION

WAC 388-832-0087 What happens next if I am selected from the IFS program wait list? If you are selected from the IFS program wait list:

(1) Your DDD case/resource manager will contact you, and determine if you meet the eligibility criteria for IFS program per WAC 388-832-0015 (1) through (6);

(2) If you meet the criteria per (1) above, your case/resource manager will schedule an appointment to complete your DDD assessment or reassessment.

(3) If you have not been receiving any DDD paid services, your DDD eligibility will need to be reviewed per WAC 388-823-1010(3)

(4) Your DDD eligibility must be completed prior to completing the DDD assessment.

NEW SECTION

WAC 388-832-0090 If I currently receive funding from the traditional family support program, the family support opportunity program or the family support pilot program, will I qualify for the IFS program? If you currently receive funding from the traditional family support program, the family support opportunity program or the family support pilot program, you qualify for the IFS program if you meet the eligibility criteria in WAC 388-832-0015.

NEW SECTION

WAC 388-832-0091 If I currently receive funding from the traditional family support program, the family support opportunity program or the family support pilot program, will that funding continue until my next assessment? If you currently receive funding from the traditional family support (TFS) program, the family support opportunity (FSO) program or the family support pilot (FSP) program, you will continue to receive funding under the TFS, FSO, or the FSP program until your next DDD assessment.

NEW SECTION

WAC 388-832-0095 What happens if DDD finds me ineligible for the IFS program? If you do not meet the criteria for the IFS program, DDD will terminate your individual and family services eligibility and funding. You will receive written notice of this decision along with your administrative hearing rights.

ASSESSMENT

NEW SECTION

WAC 388-832-0100 What assessment will DDD use to assess my need? The DDD assessment will be used to assess your need. The DDD assessment is an assessment tool designed to measure the support needs of persons with developmental disabilities, and is described in chapter 388-828 WAC.

NEW SECTION

WAC 388-832-0110 Will DDD ask about my family's income? DDD is required to request family income information for:

(1) Families of children who are seventeen years of age or younger; and

(2) All individuals who are receiving state-only funded services.

NEW SECTION

WAC 388-832-0113 Will my IFS allocation be impacted by my income? The amount of services you receive will be solely based on your assessed needs. Your income will not affect your level of service.

NEW SECTION

WAC 388-832-0114 What is family income? Family income is defined as the total unadjusted, annual family (or household) income from all sources for the last calendar year as reported to the internal revenue service (IRS).

NEW SECTION

WAC 388-832-0115 How is an individual's access to DDD paid services affected if family income information is not provided? An individual's access to DDD paid services is not affected when families decline to provide DDD with family income information.

NEW SECTION

WAC 388-832-0120 Will my IFS allocation be impacted if I am eligible for Medicaid personal care services? If you meet financial and functional eligibility for Medicaid personal care services, your IFS allocation will be adjusted according to WAC 388-828-9100 through 388-828-9140.

NEW SECTION

WAC 388-832-0123 Will my IFS allocation be impacted if I am eligible for private duty nursing or the medically intensive program? If you meet eligibility for private duty nursing described in WAC 388-106-1000, or the medically intensive program described in WAC 388-551-3000, your IFS allocation will be adjusted according to WAC 388-828-9100 through 388-828-9140.

NEW SECTION

WAC 388-832-0125 Will my IFS allocation be impacted if I am eligible for COPEs? If you are eligible for COPEs, your IFS allocation will not be adjusted.

NEW SECTION

WAC 388-832-0127 What if I have assessed needs that cannot be met by the IFS program? If you complete the DDD assessment and are assessed to have an unmet need and there is no approved funding to support that need, DDD will offer you referral information for ICF/MR services. In addition, DDD may:

- (1) Provide information and referral for nonDDD community-based supports;
- (2) Add your name to the waiver data base, if you have requested enrollment in a DDD HCBS waiver per chapter 388-845 WAC; and
- (3) Request short term emergency services as an exception to rule (ETR) per WAC 388-440-0001. Approval is required by the director of DDD or designee.

NEW SECTION

WAC 388-832-0128 When is the individual support plan effective? (1) For an initial individual support plan, the plan is effective the date DDD signs and approves it after a signature or verbal consent is obtained.

(2) For a reassessment or review of the individual support plan, the plan is effective the date DDD signs and approves it after a signature or verbal consent is obtained.

ALLOCATIONNEW SECTION

WAC 388-832-0130 What is the amount of the IFS program allocation my family is going to receive? The DDD assessment, described in chapter 388-828 WAC, will determine your level of need. The IFS program annual allocations are as follows:

- (1) Level 1 - Up to \$2,000;
- (2) Level 2 - Up to \$3,000;
- (3) Level 3 - Up to \$4,000; and
- (4) Level 4 - Up to \$6,000.

NEW SECTION

WAC 388-832-0132 May I request to exceed the level at which I was assessed? (1) The DDD assessment was designed to measure the support needs of persons with developmental disabilities; therefore your level may not exceed the level at which you were assessed.

(2) If a significant change occurs, you may contact your DDD case manager for a possible reassessment of your support needs.

NEW SECTION

WAC 388-832-0135 How can my family use its IFS program allocation? Your IFS program allocation is avail-

able to pay for any of the services listed in WAC 388-832-0140 if:

- (1) The service need relates to and results from your developmental disability, and
- (2) The need is identified in your DDD assessment and identified on your ISP.

NEW SECTION

WAC 388-832-0136 If I have a family support reimbursement contract, can DDD ask me to verify my purchases through reviewing receipts? (1) If you have a family support reimbursement contract, you will first need prior approval from your DDD case manager and then DDD will ask you to verify your purchases through reviewing receipts.

(2) You need to submit receipts to your case manager whenever you are asking for reimbursement.

(3) Your request for reimbursement must be received within ninety days of the date that the service was received and no later than thirty days after the end of your allocation year.

NEW SECTION

WAC 388-832-0137 May I use my allocation over a two year period for large costly expenditures? (1) You may not use your allocation over a two year period for a large costly expenditure.

(2) Your annual allocation must be used during the twelve month period your assessed needs were determined.

(3) If you do not use all of your allocation, your remaining dollars do not carry over to next year's allocation.

(4) If at least some of your IFS program services are not used in the twelve month period, you will be terminated from the IFS program.

NEW SECTION

WAC 388-832-0139 If I have a significant change assessment, what happens to my allocation? If you have a significant change assessment, one of the following changes may occur under WAC 388-828-9000 through 388-828-9140:

(1) If the algorithm does not change your IFS program level, your funding will not change.

(2) If the algorithm changes your level to a higher IFS program level, the difference is added to your fiscal years allocation.

(3) If the algorithm changes your level to a lower IFS program level, your allocation will not be changed until your next annual assessment. At that time your allocation will be calculated with your current information.

SERVICESNEW SECTION

WAC 388-832-0140 What services are available through the IFS program? The services available in the IFS program are limited to the following:

- (1) Respite care (WAC 388-832-0143 through 388-832-0160);
- (2) Therapies (WAC 388-832-0170 through 388-832-0180):
 - (a) Physical therapy (PT);
 - (b) Occupational therapy (OT); and
 - (c) Speech, language and communication therapy.
- (3) Architectural and vehicular modifications (WAC 388-832-0185 through 388-832-0189);
- (4) Specialized medical equipment and supplies (WAC 388-832-0200 through 388-832-0210);
- (5) Specialized nutrition and clothing (WAC 388-832-0215 through 388-832-0225);
- (6) Excess medical costs not covered by another source (WAC 388-832-0165 through 388-832-0168);
- (7) Co-pays for medical and therapeutic services (WAC 388-832-0235 through 388-832-0245);
- (8) Transportation (WAC 388-832-0250 through 388-832-0260);
- (9) Training and counseling (WAC 388-832-0265 through 388-832-0275);
- (10) Behavior management (WAC 388-832-0280 through 388-832-0290);
- (11) Parent/sibling education (WAC 388-832-0300 through 388-832-0310);
- (12) Recreational opportunities (WAC 388-832-0315 through 388-832-0325); and
- (13) Community service grants (WAC 388-832-0370 through 388-832-0375).

NEW SECTION

WAC 388-832-0143 What is respite care? Respite care is short term intermittent relief for persons normally providing care for individuals receiving IFS program services.

NEW SECTION

WAC 388-832-0145 Who is eligible to receive respite care? You are eligible to receive respite care if you are approved for IFS program services and:

- (1) You live in your family home and no one living with you is paid to be your caregiver.
- (2) You live with a paid caregiver who is your natural, step, or adoptive parent.

NEW SECTION

WAC 388-832-0150 Where can respite care be provided? (1) Respite care can be provided in the following location(s):

- (a) Individual's family home; or
 - (b) Relative's home.
- (2) Respite care can be also be provided in the following location(s) but require a DDD agency respite contract:
- (a) Licensed children's foster home;
 - (b) Licensed, contracted and DDD certified group home;
 - (c) Licensed boarding home contracted as an adult residential center;
 - (d) Licensed and contracted adult family home;

- (e) Children's licensed group home, licensed staffed residential home, or licensed childcare center; or
 - (f) Adult day health.
- (3) Additionally, your respite care provider may take you into the community while providing respite care.

NEW SECTION

WAC 388-832-0155 Who are qualified providers of respite care? Providers of respite care can be any of the following individuals or agencies contracted with DDD for respite care:

- (1) Individuals meeting the provider qualifications under chapter 388-825 WAC;
 - (2) Homecare/home health agencies, licensed under WAC 246-335-012(1);
 - (3) Licensed and contracted group homes, foster homes, child placing agencies, staffed residential homes and foster group care homes;
 - (4) Licensed and contracted adult family home;
 - (5) Licensed and contracted adult residential care facility;
 - (6) Licensed and contracted adult residential rehabilitation center under WAC 246-325-012;
 - (7) Licensed childcare center under chapter 388-295 WAC;
 - (8) Licensed child daycare center under chapter 388-295 WAC;
 - (9) Adult day/health care centers contracted with DDD;
- or
- (10) Certified provider per chapter 388-101 WAC when respite is provided within the DDD contract for certified residential services.

NEW SECTION

WAC 388-832-0160 Are there limits to the respite care I receive? The following limitations apply to the respite care you can receive:

- (1) Respite cannot replace:
 - (a) Daycare, childcare or preschool while a parent or guardian is at work; and/or
 - (b) Personal care hours available to you. When determining your unmet need, DDD will first consider the personal care hours available to you.
- (2) Respite providers have the following limitations and requirements:
 - (a) If respite is provided in a private home, the home must be licensed unless it is the client's home or the home of a relative of specified degree per WAC 388-825-345;
 - (b) The respite provider cannot be the spouse of the caregiver receiving respite if the spouse and the caregiver reside in the same residence; and
 - (c) If you receive respite from a provider who requires licensure, the respite services are limited to those age-specific services contained in the provider's license.
 - (d) The respite care provider cannot be your natural, step or adoptive parent living with you.
- (3) Your caregiver will not be paid to provide DDD services for you or other persons at the same time you receive respite services.

(4) The need for respite must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

(5) If your personal care provider is your parent, your parent provider may not be paid to provide respite services to any client in the same month that you receive respite services.

NEW SECTION

WAC 388-832-0165 What are considered excess medical costs not covered by another source? Excess medical costs are medical expenses incurred by a client after medicaid or private insurance have been accessed or when the client does not have medical insurance. This may include the following:

- (1) Skilled nursing services (ventilation, catheterization, and insulin shots);
- (2) Psychiatric services;
- (3) Medical and dental services related to the person's disability and an allowable medicaid covered expense;
- (4) Prescriptions for medications; and/or
- (5) Co-pays and deductible limited to your IFS allocation.

NEW SECTION

WAC 388-832-0166 How are excess medical costs paid? (1) Excess medical costs are reimbursed to a family member who has a family support contract with the division of developmental disabilities and receipts are received within thirty days from the date of service.

(2) Skilled nursing services are paid to the DSHS contracted nurse directly.

NEW SECTION

WAC 388-832-0168 Are there limits to excess medical costs? There are limits to excess medical costs.

(1) The payment must be of direct medical or remedial benefit to the individual and necessary as a result of the individual's disability;

(2) Medical and dental premiums are excluded for family members other than the DDD eligible clients; and

(3) The need for excess medical costs must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

(4) Prior approval by regional administrator or designee is required.

NEW SECTION

WAC 388-832-0170 What therapies can I receive? The therapies you can receive are:

- (1) Physical therapy;
- (2) Occupational therapy; and/or
- (3) Speech, hearing and language therapy.

NEW SECTION

WAC 388-832-0175 Who is a qualified therapist? Providers must be certified, registered or licensed therapists

as required by law and contracted with DDD for the therapy they are providing.

NEW SECTION

WAC 388-832-0180 Are there limits to the therapy I can receive? The following limitations apply to therapy you may receive:

(1) Additional therapy may be authorized as a service only after you have accessed what is available to you under medicaid and any other private health insurance plan or school;

(2) DDD does not pay for treatment determined by DSHS to be experimental;

(3) DDD and the treating professional determine the need for and amount of service you can receive;

(a) DDD may require a second opinion from a DDD selected provider.

(b) DDD will require evidence that you have accessed your full benefits through medicaid, private insurance and the school before authorizing this service.

(4) The need for therapies must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocations.

(5) Prior approval by the regional administrator or designee is required.

NEW SECTION

WAC 388-832-0185 What are architectural and vehicular modifications? (1) Architectural and vehicular modifications are physical adaptations to the home and vehicle of the individual to:

(a) Ensure the health, welfare and safety of the client and or caregiver; or

(b) Enable a client who would otherwise require a more restrictive environment to function with greater independence in the home or in the community.

(2) Architectural modifications include the following:

(a) Installation of ramps and grab bars;

(b) Widening of doorways;

(c) Modification of bathroom facilities; or

(d) Installing specialized electrical and/or plumbing systems necessary to accommodate the medical equipment and supplies that are necessary for the welfare of the individual.

(3) Vehicular modifications include the following:

(a) Wheel chair lifts;

(b) Strap downs; or

(c) Other access modifications.

NEW SECTION

WAC 388-832-0190 Who is a qualified provider for architectural and vehicular modifications? The provider making these architectural and vehicular modifications must be a registered contractor per chapter 18.27 RCW and contracted with DDD.

NEW SECTION

WAC 388-832-0195 What limits apply to architectural and vehicular modifications? The following service limitations apply to architectural and vehicular modifications are in addition to any limitations in other rules governing this service:

- (1) Prior approval by the regional administrator or designee is required.
- (2) Architectural and vehicular modifications to the home and vehicle are excluded if they are of general utility without direct medical or remedial benefit to the individual, such as floor covering (e.g., carpeting, linoleum, tile, hard wood flooring, decking), roof repair, central air conditioning, fencing for the yard, etc.
- (3) Architectural modifications cannot add to the square footage of the home.
- (4) DDD will require evidence that you accessed your full benefits through medicaid, private insurance and the division of vocational rehabilitation (DVR) before authorizing this service.
- (5) Architectural and vehicular modifications must be the most cost effective modification based upon a comparison of contractor bids as determined by DDD.
- (6) Architectural and vehicular modifications will be prorated by the number of other members in the household who use these modifications.
- (7) The need for architectural and vehicular modifications must be identified in your ISP and, in combination with other IFS services, cannot exceed your annual IFS allocation.

NEW SECTION

WAC 388-832-0200 What are specialized medical equipment and supplies? (1) Specialized medical equipment and supplies are durable and nondurable medical equipment not available through Medicaid or the state plan which enables individuals to:

- (a) Increase their abilities to perform their activities of daily living; or
 - (b) Perceive, control or communicate with the environment in which they live.
- (2) Durable and nondurable medical equipment are defined in WAC 388-543-1000 and 388-543-2800 respectively.
- (3) Also included are items necessary for life support and ancillary supplies and equipment necessary to the proper functioning of the equipment and supplies described in subsection (1) above.

NEW SECTION

WAC 388-832-0205 Who are qualified providers of specialized medical equipment and supplies? The provider of specialized medical equipment and supplies must be a medical equipment supplier contracted with DDD (or a parent who has a contract with DDD or the pass through contract).

NEW SECTION

WAC 388-832-0210 Are there limitations to my receipt of specialized medical equipment and supplies? The following limitations apply to your receipt of specialized medical equipment and supplies:

- (1) Specialized medical equipment and supplies require prior approval by the DDD regional administrator or designee for each authorization.
- (2) DDD reserves the right to require a second opinion by a department-selected provider.
- (3) Items reimbursed with state funds shall be in addition to any medical equipment and supplies furnished under medicaid or private insurance.
- (4) Items must be of direct medical or remedial benefit to the individual and necessary as a result of the individual's disability.
- (5) Medications, prescribed or nonprescribed, and vitamins are excluded.
- (6) The need for specialized medical equipment and supplies must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

NEW SECTION

WAC 388-832-0215 What are specialized nutrition and specialized clothing? (1) Specialized nutrition is specialized formulas or specially prepared foods for which a written recommendation has been provided by a qualified and appropriate professional and when it constitutes fifty percent or more of the person's caloric intake (e.g., licensed physician or registered dietician).

- (2) Specialized clothing is clothing adapted for a physical disability, excessive wear clothing, or specialized footwear for which a written recommendation has been provided by a qualified and appropriate professional (e.g., a podiatrist, physical therapist, or behavior specialist).

NEW SECTION

WAC 388-832-0220 How do I pay for specialized nutrition and specialized clothing? Specialized nutrition and specialized clothing can be a reimbursable expense through the parent family support contract and the pass through contract.

NEW SECTION

WAC 388-832-0225 Are there limits for specialized nutrition and specialized clothing? (1) The need for specialized nutrition and specialized clothing must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

- (2) Prior approval by regional administrator or designee is required.

NEW SECTION

WAC 388-832-0235 What are co-pays for medical and therapeutic services? Co-pays for medical and therapeutic services are for disability related services you may

have received that were not covered by your private insurance or medicaid.

NEW SECTION

WAC 388-832-0240 How do I pay for medical and therapeutic co-pays? Medical and therapeutic co-pays can be a reimbursable expense through the parent family support contract and the pass through contract.

NEW SECTION

WAC 388-832-0245 Are there limits to medical and therapeutic co-pays? (1) Medical and therapeutic co-pays must be identified as a need in your ISP and, in combination with other IFS services, cannot exceed your IFS program allocation.

(2) The co-pays must be for your disability related medical or therapeutic needs.

(3) Prescribed or nonprescribed vitamins and supplements are excluded.

(4) Prior approval by regional administrator or designee is required.

NEW SECTION

WAC 388-832-0250 What are transportation services? Transportation services are reimbursements to a provider when the transportation is required and specified in the individual support plan. This service is available for all IFS program services if the cost and responsibility for transportation is not already included in your provider's contract and payment.

(1) Transportation provides you access to IFS program services specified by your individual support plan.

(2) Whenever possible you must use family, neighbors, friends, or community agencies that can provide this service without charge.

NEW SECTION

WAC 388-832-0255 Who is a qualified provider for transportation services? (1) The provider of transportation services can be an individual or agency contracted with DDD.

(2) Transportation services can be a reimbursable expense through the parent family support contract.

NEW SECTION

WAC 388-832-0260 Are there limitations to the transportation services I can receive? The following limitations apply to transportation services:

(1) Transportation to/from medical or medically related appointments is a Medicaid transportation service and is to be considered and used first.

(2) Transportation is offered in addition to medical transportation but cannot replace Medicaid transportation services.

(3) Transportation is limited to travel to and from an IFS program service.

(4) Transportation does not include the purchase of a bus pass.

(5) Reimbursement for provider mileage requires prior approval by DDD and is paid according to contract.

(6) This service does not cover the purchase or lease of vehicles.

(7) Reimbursement for provider travel time is not included in this service.

(8) Reimbursement to the provider is limited to transportation that occurs when you are with the provider.

(9) You are not eligible for transportation services if the cost and responsibility for transportation is already included in your provider's contract and payment.

(10) Transportation services require prior approval by the DDD regional administrator or designee.

(11) Per diem costs may be reimbursed with prior approval from DDD regional administrator or designee to access medical services if over one hundred fifty miles one way for client receiving medical services and one family member.

(12) Air ambulance costs due to an emergency may be reimbursed after insurance, deductibles, Medicaid and other resources have been exhausted not to exceed your annual IFS allocation.

(13) The need for transportation services must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

NEW SECTION

WAC 388-832-0265 What is training and counseling? Training and counseling is professional assistance provided to families to better meet the specific needs of the individual outlined in their ISP including:

(1) Health and medication monitoring;

(2) Positioning and transfer;

(3) Augmentative communication systems; and

(4) Family counseling.

NEW SECTION

WAC 388-832-0270 Who is a qualified provider for training and counseling? To provide training and counseling, a provider must be one of the following licensed, registered or certified professionals and be contracted with DDD for the service specified in the individual support plan:

(1) Audiologist;

(2) Licensed practical nurse;

(3) Marriage and family therapist;

(4) Mental health counselor;

(5) Occupational therapist;

(6) Physical therapist;

(7) Registered nurse;

(8) Sex offender treatment provider;

(9) Speech/language pathologist;

(10) Social worker;

(11) Psychologist;

(12) Certified American sign language instructor;

(13) Nutritionist;

(14) Registered counselor; or

(15) Certified dietician.

NEW SECTION

WAC 388-832-0275 Are there limitations to the training and counseling I can receive? (1) Expenses to the family for room and board or attendance, including registration fees for conferences are excluded as a service under family counseling and training.

(2) The need for training and counseling must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

(3) Prior approval by regional administrator or designee is required.

NEW SECTION

WAC 388-832-0280 What is behavior management? Behavior management is the development and implementation of programs designed to support the client using positive behavioral techniques. Behavior management programs help the client decrease aggressive, destructive, sexually inappropriate or other behaviors that compromises the client's ability to remain in the family home, and develop strategies for effectively relating to caregivers and other people in the client's life.

NEW SECTION

WAC 388-832-0285 Who is a qualified provider of behavior management? The provider of behavior management and consultation must be one of the following professionals contracted with DDD and duly licensed, registered or certified to provide this service:

- (1) Marriage and family therapist;
- (2) Mental health counselor;
- (3) Psychologist;
- (4) Sex offender treatment provider;
- (5) Social worker;
- (6) Registered nurse (RN) or licensed practical nurse (LPN);
- (7) Psychiatrist;
- (8) Psychiatric advanced registered nurse practitioner (ARNP);
- (9) Physician assistant working under the supervision of a psychiatrist;
- (10) Registered counselor; or
- (11) Polygrapher.

NEW SECTION

WAC 388-832-0290 Are there limits to behavior management? The following limits apply to your receipt of behavior management:

- (1) DDD and the treating professional will determine the need and amount of service you will receive.
- (2) DDD may require a second opinion from a DDD-selected provider.
- (3) Only scientifically proven, nonexperimental methods may be utilized.
- (4) Providers may not use methods that cause pain, threats, isolation or locked settings.

(5) The need for behavior management must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

(6) Psychological testing is not allowed.

(7) Behavior management services require prior approval by the regional administrator or designee.

NEW SECTION

WAC 388-832-0300 What is parent/sibling education? Parent/sibling education is class training for parents and siblings who have a family member with a developmental disability offering relevant topics. Examples of topics could be coping with family stress, addressing your child's behavior, managing the family's daily schedule or advocating for your child.

NEW SECTION

WAC 388-832-0305 Who are qualified providers for parent/sibling education? (1) The provider of parent/sibling education must be one of the following licensed, registered or certified professionals and be contracted with DDD for the service specified in the ISP:

- (a) Audiologist;
- (b) Licensed practical nurse;
- (c) Marriage and family therapist;
- (d) Mental health counselor;
- (e) Occupational therapist;
- (f) Physical therapist;
- (g) Registered nurse;
- (h) Sex offender treatment provider;
- (i) Speech/language pathologist;
- (j) Social worker;
- (k) Psychologist;
- (l) Certified American sign language instructor;
- (m) Nutritionist;
- (n) Registered counselor; or
- (o) Certified dietician.

(2) Along with these professional providers, the Arc, Parent to Parent, PAVE and Families Together may be utilized for parent/sibling education.

NEW SECTION

WAC 388-832-0308 How is parent/sibling education paid? Parent/sibling education may be a reimbursable expense through the parent family support contract, the pass through contract or directly to the contracted provider.

NEW SECTION

WAC 388-832-0310 Are there limitations to parent/sibling education? (1) Parent/sibling education does not include conference fees or lodging.

(2) Viewing of VHS or DVD at home by yourself does not meet the definition of parent or sibling education.

(3) The need for parent/sibling education must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

(4) Prior approval by regional administrator or designee is required.

NEW SECTION

WAC 388-832-0315 What are recreational opportunities? (1) Recreational opportunities are activities that may be available to children and adults with a developmental disability such as summer camps, YMCA activities, day trips or typical activities available in your community.

(2) Recreational opportunities may include memberships in civic groups, clubs, crafting classes, or classes outside of K-12 school curriculum or sport activities.

NEW SECTION

WAC 388-832-0320 How are recreational opportunities paid for? Recreational opportunities may be a reimbursable expense through the parent family support contract and the pass through contract.

NEW SECTION

WAC 388-832-0325 Are there limitations to recreation opportunities? (1) The recreational opportunities must occur in your community or the bordering states addressed in WAC 388-832-0331.

(2) The need for recreation opportunities must be identified in your ISP and, in combination with other IFS services, cannot exceed your IFS allocation.

(3) DDD does not pay for recreational opportunities that may pose a risk to individuals with disabilities or the community at large.

(4) Prior approval by regional administrator or designee is required.

NEW SECTION

WAC 388-832-0330 Does my family have a choice of IFS program services? In collaboration with your case manager and based upon your assessed need, you may choose the services available with this program.

NEW SECTION

WAC 388-832-0331 May I receive IFS program services out of state? You may receive IFS program services in a recognized out-of-state bordering city on the same basis as in-state services. The only recognized bordering cities are: Coeur d'Alene, Moscow, Sandpoint, Priest River and Lewiston Idaho; and Portland, The Dalles, Hermiston, Hood River, Rainier, Milton-Freewater, and Astoria Oregon.

NEW SECTION

WAC 388-832-0332 Will I have a choice of provider? You may choose a qualified individual, agency or licensed provider within the guidelines described in WAC 388-825-300 through 388-825-400. These WACs describe:

(1) Qualifications for individuals and agencies providing DDD services in the client's residence or the provider's residence or other settings; and

(2) Conditions under which DDD will pay for the services of an individual provider or a home care agency provider or other provider.

NEW SECTION

WAC 388-832-0333 What restrictions apply to the IFS program services? The following restrictions apply to the IFS program services:

(1) IFS program services are authorized only after you have accessed what is available to you under medicaid, including medicaid personal care, and any other private health insurance plan, school, or child development services.

(2) All IFS program service payments must be agreed to by DDD and you in your ISP.

(3) DDD will contract directly with a service provider or parent for the reimbursement of goods or services purchased by the family member.

(4) DDD will not pay for treatment determined by DSHS/MAA or private insurance to be experimental.

(5) Your choice of qualified providers and services may be limited to the most cost effective option that meets your assessed need.

(6) The IFS program will not pay for services provided after the death of the eligible client. Payment may occur after the date of death, but not the service.

(7) DDD's authorization period will start when you agree to be in the IFS program and have given written or verbal approval for your ISP. The period will last up to one year and may be renewed if you continue to need and utilize services. If you have not utilized the services within one year period you will be terminated from this program.

(8) IFS program will not pay for psychological evaluations or testing, or DNA testing.

(9) Supplies/materials related to community integration or recreational activities are the responsibility of the family.

ONE TIME AWARDS

NEW SECTION

WAC 388-832-0335 What is a one-time award? One time awards are payments to individuals and families who meet the IFS program eligibility requirements and have a one time unmet need not covered by any other sources for which they are eligible. One time awards can only be used for architectural/vehicular modifications, or specialized equipment.

NEW SECTION

WAC 388-832-0340 Who is eligible for a one-time award? You are eligible to be considered for a one-time award if:

(1) You are not currently authorized for IFS program services in your ISP.

(2) You meet the eligibility for the IFS program.

(3) The need is critical to the health or safety of you or your caregiver and you and your family have no other

resource to meet the need or your resources do not cover all of the expense.

NEW SECTION

WAC 388-832-0345 Are there limitations to one-time awards? (1) One time awards are limited to architectural/vehicular modifications or specialized equipment.

(2) One time awards cannot exceed six thousand dollars in a twenty-four month period.

(3) One time awards must be approved by the director of DDD or designee.

(4) Eligibility for a one-time award does not guarantee approval and authorization of the service by DDD. Services are based on availability of funding.

(5) One time awards will be prorated by the number of other members in the household who use these modifications or specialized equipment.

NEW SECTION

WAC 388-832-0350 How do I apply for the one-time award? If you have a need for a one-time award, you can make the request to your case manager.

NEW SECTION

WAC 388-832-0353 Do I need to have a DDD assessment before I receive a one-time award? You need to have a DDD assessment prior to receiving a one-time award.

EMERGENCY

NEW SECTION

WAC 388-832-0355 What is an emergency service? Emergency services are respite care, behavior management or nursing services in response to a single incident, situation or short term crisis.

NEW SECTION

WAC 388-832-0360 What situations qualify for emergency services? The following situations qualify as an emergency:

(1) You lose your family caregiver due to caregiver hospitalization, or death;

(2) There are changes in your caregiver's mental or physical status resulting in your family caregiver's inability to perform effectively for you; or

(3) There are significant changes in your emotional or physical condition that require emergency services.

NEW SECTION

WAC 388-832-0365 Who is a qualified provider of emergency services? The provider of the service you need to meet your emergency must meet the provider qualifications required to contract for that specific service per the following:

(1) Respite per WAC 388-832-0155.

(2) Behavior Management per WAC 388-832-0285.

(3) Nursing per WAC 388-845-1705.

NEW SECTION

WAC 388-832-0366 What limitations apply to emergency services? (1) Emergency services may be granted to individuals and families who are on the IFS wait list and have an emergent need.

(2) Funds are provided for a limited period not to exceed sixty days.

(3) All requests are reviewed and approved or denied by the regional administrator or designee.

NEW SECTION

WAC 388-832-0367 What if the client or family situation requires more than sixty days of emergency service?

(1) Emergency services are limited to sixty days.

(2) DDD will conduct an administrative review of other DDD services to determine if the need can be met through other services.

NEW SECTION

WAC 388-832-0369 Do I need to have a DDD assessment before I receive an emergency service? You do not need to have a DDD assessment prior to receiving an emergency service; however the regional manager/designee may request a DDD assessment for a client at any time.

GRANTS

NEW SECTION

WAC 388-832-0370 What are the IFS community service grants? Community service grants are grants to agencies or individuals funded by the IFS program to promote community oriented projects that benefit families. Community service grants may fund long-term or short-term projects that benefit children and/or adults.

NEW SECTION

WAC 388-832-0375 How does a proposed project qualify for funding? To qualify for funding, a proposed project must:

(1) Address one or more of the following topics:

(a) Provider support and development;

(b) Parent helping parent; or

(c) Community resource development for inclusion of all.

(2) Meet most of the following goals:

(a) Enable families to use generic resources which are integrated activities and/or resources community members typically have access to;

(b) Reflect geographic, cultural and other local differences;

(c) Support families in a variety of non crisis-oriented ways;

(d) Prioritize support for unserved families;

(e) Address the diverse needs of Native Americans, communities of color and limited or non-English speaking groups;

(f) Be family focused;

(g) Increase inclusion of persons with developmental disabilities;

(h) Benefit families who have children or adults eligible for services from DDD and who do not receive other DDD paid services; and

(i) Promote community collaboration, joint funding, planning and decision making.

HEARINGS AND APPEALS

NEW SECTION

WAC 388-832-0460 How will DDD notify me on their decisions? Your case resource manager will call you and send a written planned action notice per WAC 388-825-100.

NEW SECTION

WAC 388-832-0470 What are my appeal rights under the individual family services program? You have the appeal rights described in WAC 388-825-100 through 388-825-165.

WSR 08-15-001

EMERGENCY RULES

DEPARTMENT OF

FISH AND WILDLIFE

[Order 08-168—Filed July 2, 2008, 3:20 p.m., effective July 19, 2008]

Effective Date of Rule: July 19, 2008.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Amending WAC 220-52-071.

Statutory Authority for Adoption: RCW 77.12.047.

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

Reasons for this Finding: Harvestable amounts of sea cucumbers are available in the sea cucumber districts listed. Prohibition of all diving from licensed sea cucumber harvest vessels within one day of scheduled openings discourages the practice of fishing on closed days and hiding the unlawful catch underwater until the legal opening. There is insufficient time to promulgate 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: July 2, 2008.

J. P. Koenings

Director

NEW SECTION

WAC 220-52-07100R Sea cucumbers. Notwithstanding the provisions of WAC 220-52-071, effective July 19, 2008 until further notice, it is unlawful to take or possess sea cucumbers taken for commercial purposes except as provided for in this section:

(1) Sea cucumber harvest using shellfish diver gear is allowed in Sea Cucumber Districts 1, 2 and 3 on Monday, Tuesday and Wednesday of each week.

(2) Sea cucumber harvest using shellfish diver gear is allowed in Sea Cucumber District 5 on Monday through Friday of each week.

(3) It is unlawful to dive for any purpose from a commercially licensed sea cucumber fishing vessel on Saturday and Sunday of each week, except by written permission from the Director.

WSR 08-15-005

EMERGENCY RULES

DEPARTMENT OF

FISH AND WILDLIFE

[Order 08-169—Filed July 3, 2008, 2:21 p.m., effective July 7, 2008, 7:00 p.m.]

Effective Date of Rule: July 7, 2008, 7:00 p.m.

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

Citation of Existing Rules Affected by this Order: Repealing WAC 220-33-01000M; 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 2005-2007 Interim Management Agreement For Upriver Chinook, Sockeye, Steelhead, Coho & White Sturgeon (May 11, 2005) (Doc. No. 2407); *Northwest Gillnetters Ass'n v. Sandison*, 95 Wn.2d 638, 628 P.2d 800 (1981); Washington fish and wildlife com-

mission 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 third fishing period for summer chinook. The [there] are about three hundred fish remaining on the allocation below Priest Rapids Dam, based on a run size of fifty-seven thousand. Season is consistent with the 2008-2017 management agreement, and associated biological opinion. Regulation is consistent with compact action of July 3, 2008. 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 2005-2007 Interim Management Agreement For Upriver Chinook, Sockeye, Steelhead, Coho & White Sturgeon (May 11, 2005) (Doc. No. 2407).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal Endangered Species Act. The National Marine Fisheries Service has issued biological opinions under 16 U.S.C. § 1536 that allow for some incidental take of these species in treaty and nontreaty Columbia River fisheries. The Washington and Oregon fish and wildlife commissions have developed policies to guide the implementation of these 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 Endangered Species Act, 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 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: July 3, 2008.

Loreva M. Preuss
for Jeff Koenings
Director

NEW SECTION

WAC 220-33-01000M Columbia River season below Bonneville. Notwithstanding the provisions of WAC 220-33-010 and WAC 220-33-020, it is unlawful for a person to take or possess salmon or sturgeon for commercial purposes from Columbia River Salmon Management and Catch Reporting Areas (SMCRA) 1A, 1B, 1C, 1D, and 1E, except as provided in the following subsections:

AREA: SMCRA 1A, 1B, 1C, 1D, and 1E.

SEASON: 7:00 p.m. Monday July 7 to 5:00 a.m. Tuesday July 8, 2008

GEAR: Eight-inch minimum mesh and 9-3/4 inch maximum mesh. Multiple Net Rule: It is permissible to have onboard a commercial vessel more than one net, provided the nets are of mesh size legal 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 specifically authorized for use in this fishery may be onboard the 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.

ALLOWABLE SALE: Chinook, sockeye, shad, and white sturgeon. All steelhead and green sturgeon must be released immediately. 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. The sturgeon possession/sales limit applies only to mainstem fisheries. (Sturgeon retention in Select Area fisheries is prohibited).

SANCTUARIES: Grays River, Elokomin-A, Cowlitz River, Kalama-A, Lewis-A, Washougal and Sandy Rivers.

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

REPEALER

The following section of the Washington Administrative Code is repealed, effective 5:01 a.m. July 8, 2008:

WAC 220-33-01000M Columbia River season below Bonneville.

WSR 08-15-019
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 08-167—Filed July 8, 2008, 9:07 a.m., effective July 8, 2008, 9:07 a.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-05100W; and amending WAC 220-52-051.

Statutory Authority for Adoption: RCW 77.12.047.

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 2008 state/tribal shrimp harvest management plans for the Strait of Juan de Fuca and North Puget Sound require adoption of harvest seasons and the prohibition on night time fishing contained in this emergency rule. This emergency rule closes the pot fishery season for spot shrimp in Shrimp Management Area 2E and for all shrimp species in Catch Area 23AE because the spot shrimp quotas have been harvested in those areas. There is insufficient time to promulgate 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: July 8, 2008.

J. P. Koenings
 Director

NEW SECTION

WAC 220-52-05100X Puget Sound shrimp pot and beam trawl fishery—Season. Notwithstanding the provisions of WAC 220-52-051, effective immediately until further notice, it is unlawful to fish for shrimp for commercial purposes in Puget Sound except as provided for in this section:

(1) Shrimp pot gear:

(a) All waters of Shrimp Management Areas 1A, 1C, 2E, 2W, 3, 4, and 6 are open to the harvest of all shrimp species effective immediately, until further notice, except as provided for in this section:

(i) All waters of the Discovery Bay Shrimp District are closed.

(ii) Effective 6:00 p.m., July 11, 2008, all waters of Shrimp Management Area 2E are closed to the harvest of spot shrimp.

(iii) Effective 6:00 p.m., July 11, 2008, all waters of Marine Fish-Shellfish Management and Catch Reporting Area 23AE are closed to the harvest of all shrimp species.

(b) The shrimp accounting week is Monday through Sunday.

(c) Effective immediately, it is unlawful for the combined total harvest of spot shrimp by a fisher and/or the fisher's alternate operator to exceed 400 pounds in Marine Fish-Shellfish Management and Catch Reporting Area 23AE, or to exceed 500 lbs in Shrimp Management Area 2E.

(d) Effective immediately, until further notice, it is unlawful for the combined total harvest of spot shrimp by a fisher and/or the fisher's alternate operator to exceed 600 pounds per week, except that any fisher whose weekly shrimp harvest activity is exclusively limited to Marine Fish-Shellfish Catch and Reporting Area 29 shall not be subject to the weekly spot shrimp trip limit for that week. It is unlawful to fish for any shrimp while in possession, on board the fishing vessel, of any

(a) spot shrimp from any previous accounting week.

(e) It is unlawful to fish for shrimp for commercial purposes in Puget Sound using shellfish pot gear in more than one Marine Fish-Shellfish Management and Catch Reporting Area per day. Fishers may move all of their shellfish pot gear from one Marine Fish-Shellfish Management and Catch Reporting Area to another Marine Fish-Shellfish Management and Catch Reporting Area if a harvest report is made before the shellfish pot gear is moved. The harvest activity report must be made consistent with the provisions of WAC 220-52-075 and must also include the following additional information:

(i) The number of pots being moved to a new area, and the Marine Fish-Shellfish Management and Catch Reporting Area that the pots are being moved to.

(f) It is unlawful to set or pull shellfish pots in one Marine Fish-Shellfish Management and Catch Reporting Area while in possession of shrimp harvested from another Marine Fish-Shellfish Management and Catch Reporting Area, except shellfish pots may be set in a new fishing area subsequent to making a report as indicated in Section 1(e) above.

(2) Shrimp beam trawl gear:

(a) Shrimp Management Area 3 (outside of the Discovery Bay shrimp district, Sequim Bay and Catch Area 23D) is open immediately, until further notice. Sequim Bay includes those waters of Catch Area 25A south of a line projected west from Travis Spit on the Miller Peninsula.

(b) That portion of Catch Area 22A within Shrimp Management Area 1B is open immediately, until further notice.

(c) That portion of Catch Area 21A within Shrimp Management Area 1B is open immediately, until further notice.

(3) It is unlawful to set or pull shrimp beam trawl gear from one hour after official sunset to one hour before official sunrise.

(4) All shrimp taken under this section must be sold to licensed Washington wholesale fish dealers.

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

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-52-05100W Puget Sound shrimp pot and beam trawl fishery. (08-147)

WSR 08-15-020
EMERGENCY RULES
DEPARTMENT OF ECOLOGY

[Order 08-11—Filed July 8, 2008, 10:51 a.m., effective July 8, 2008, 10:51 a.m.]

Effective Date of Rule: Immediately.

Purpose: This emergency rule establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington, for the purpose of implementing a memorandum of agreement (MOA) entered into with Kittitas County on April 7, 2008. The partial withdrawal and restrictions are designed to minimize the potential for a new use of water that negatively affect flows in the Yakima River and its tributaries and does this in a way that minimizes effects on economic development.

Statutory Authority for Adoption: RCW 90.54.050.

Other Authority: Chapter 43.27A RCW.

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

Reasons for this Finding: The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, including the town of Roslyn's municipal supply. Water supply in the Yakima Basin is limited and over-appropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

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

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

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

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

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

Date Adopted: July 8, 2008.

Jay J. Manning
Director

Chapter 173-539A WAC

UPPER KITTITAS EMERGENCY GROUND WATER RULE

NEW SECTION

WAC 173-539A-010 Purpose. This chapter establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington for purpose of implementing a memorandum of agreement (MOA) entered with Kittitas County on April 7, 2008. The partial withdrawal and associated restrictions are designed to minimize the potential for new uses of water to negatively affect flows in the Yakima River and its tributaries but do so in a way that minimizes effects on economic development. Based on technical investigations comprising the hydrologic investigation and characterization report, the potential for impairment of existing water rights can be considered during Kittitas County's review of certain land use applications along with any other environmental impacts. Mitigation or other risk management techniques can also be considered.

NEW SECTION

WAC 173-539A-020 Authority. RCW 90.54.050 provides that when sufficient information and data are lacking to allow for the making of sound decisions, the department of ecology (ecology) may withdraw various waters of the state from additional appropriations until such data and information are available after consulting with the appropriate standing committees of the legislature. In 2007, a private organization in Kittitas County, Aqua Permanente, submitted a petition requesting that ecology unconditionally withdraw all unappropriated ground water in Kittitas County until sufficient information is known about potential effects from such wells on senior water rights and stream flows. Ecology consulted with standing committees of the house of representatives and senate of the Washington state legislature with respect to the petition and proposed withdrawal. Subsequently, ecology rejected the proposed unconditional withdrawal, and alternatively, entered into the MOA with Kittitas County, which this partial withdrawal is intended to implement.

NEW SECTION

WAC 173-539A-030 Definitions. "Adjacent" means all lots or parcels that:

- (a) Have any common boundary;
- (b) Are separated only by roads, easements, or parcels in common ownership; or

(c) Are within five hundred feet at the closest boundaries.

"Application" means a request for approval by Kittitas County as required for a subdivision, short subdivision, large lot subdivision, administrative segregation, one time split, binding site plan, boundary line adjustment, performance based cluster plat, or use of intervening ownership.

"Common ownership" means any type of ownership interest held by an applicant for a new residential development in the adjacent lands or the lands in question or a contractual arrangement between the applicant and any owner of adjacent lands with respect to the joint development of such lands and that of the new residential development. A contractual arrangement for joint development includes contracts providing for shared use of services for permitting, engineering, architecture, environmental review, land clearing or preparation, or building of roads, structures, or common water or sewer infrastructure.

"Exemption" or **"ground water exemption"** means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"Group use" means use of the ground water exemption for two or more lots that are part of a proposed new residential development. A group use also includes use of the exemption for all lots or parcels that are adjacent and held in common ownership with the proposed new residential development if use of the exemption has commenced or is planned to commence on the adjacent lands within five years before or after the date the current application was filed. The term "group use" is referred in the MOA between Kittitas County and ecology by the term "development."

"Hydrologic investigation and characterization report" means the report prepared by a licensed hydrogeologist addressing the elements identified in WAC 173-539A-060.

"Lands" refers to both singular "land" and plural "lands."

"New residential development" means any division of land involving an application that vested after the effective date of this rule.

"New use of the ground water exemption" means a use commenced on or after the effective date of this rule.

"Upper Kittitas County" is the area of Kittitas County delineated in WAC 173-539A-990.

NEW SECTION

WAC 173-539A-050 Interim management measures.

(1) New residential development within upper Kittitas County relying in part or whole on a new use of the ground water exemption for authority to withdraw public ground water must not use more than a maximum of 5,000 gallons per day (gpd) from the ground water exemption for domestic and irrigation purposes associated with all lots and lands that are part of the proposed development or a larger group use. At the time of filing an application for a new residential development, the applicant shall file a sworn statement with ecology and Kittitas County, which shall be recorded against the lands in question, declaring as to whether the applicant has commenced or plans to commence use of the exemption

on any adjacent lands in common ownership within the five years before or after the filing of the application. If the sworn statement declares that no use of the exemption will occur on such lands within the next five years, no use of the exemption for domestic or irrigation purposes shall occur on such lands within that period.

(2) In determining compliance with the 5,000 gpd exemption limit for a new residential development, each lot will be assumed to use a minimum of 1,250 gpd for domestic and irrigation purposes, unless a condition is recorded as a covenant to use a lesser amount. If the exemption will not be used to provide water for irrigation, each lot will be assumed to use a minimum of 350 gpd for domestic purposes.

(3) New residential structures on parcels less than ten acres that were created after March 28, 2002, within upper Kittitas County and that will rely on a new use of the ground water exemption shall be limited to 1,250 gpd of water for all domestic and irrigation uses from the exemption. However, such use shall be further restricted if more stringent limits are contained in conditions on water use placed on the plat that created the lot or specified in the permit/approval of the public water system that is intended to serve the lot. This provision does not restrict an owner from using water from another lawful water right for additional quantities.

(4) New residential structures on parcels that were created on or before March 28, 2002, within upper Kittitas County and that will rely on a new use of the ground water exemption shall be limited to 5,000 gpd for all exempt domestic and irrigation uses. However, such use shall be further restricted if more stringent limits are contained in conditions on water use placed on the plat that created the lot or specified in the permit/approval of the public water system that is intended to serve the lot or if other limitations of law restrict such use.

NEW SECTION

WAC 173-539A-060 Hydrogeologic assessment. If required by Kittitas County for a new residential development relying in whole or part on a new use of the ground water exemption, a hydrogeologic assessment, signed by a licensed hydrologist, based on existing, available information, unless new information is required by Kittitas County, shall be presented to Kittitas County and ecology in the form of a written report. The report shall be submitted at such time to enable it to be used in connection with review under the State Environmental Policy Act. The required elements of the report are as follows:

(1) Scope of the proposal including the location, proposed water source(s), water use amounts and the timing of the proposed use.

(2) General description including the local geologic, hydrogeologic, and hydrologic setting, identification of surface water and ground water features, water sources, recharge/discharge characteristics and surface water and ground water interactions.

(3) Site-specific description.

(4) Inventory and description of all state issued ground water rights, claims, and exempt wells located within a one year and five years area of pumping influence.

(5) Inventory and description of all state issued surface water rights and surface water claims located within a one year and five years area of pumping influence.

(6) Identification and description of existing surface water or ground water rights which may be adversely affected as a result of the ground water withdrawals by the proposed project well(s).

(7) The licensed hydrogeologist must include a professional opinion responding to the potential of the proposal to create impacts to the natural and built environment including, but not limited to, any reduction of surface water flows.

(8) A statement of the limitations regarding the intended use of the report, including scope, extent, and available data.

NEW SECTION

WAC 173-539A-070 Measurement and reporting of water use. (1) Each source of water within upper Kittitas County for a new use of the ground water exemption for residential purposes shall be equipped with a meter in accordance with WAC 173-173-100 and as prescribed by Kittitas County. "Residential purposes" includes all domestic use and irrigation associated with the parcel in question.

(2) Metering data must be recorded on the last day of each reporting period and then reported within thirty days to Kittitas County and ecology. The following table shows the reporting periods and the due dates for each metering report:

Reporting Period	Report Due
October 1 - March 31	April 30
April 1 - June 30	July 30
July 1 - July 31	August 30
August 1 - August 31	Sept. 30
Sept. 1 - Sept. 30	October 30

NEW SECTION

WAC 173-539A-080 Expedited processing of pilot water bank transactions. (1) Trust water right applications and associated surface water or ground water applications may receive priority processing to meet the general needs of the public for domestic, group domestic and municipal purposes of use within the Yakima River basin.

(2) An application for a new surface water right, or a ground water right hydraulically related to the Yakima River, may be processed when accompanied by a trust water rights transaction that represents the same consumptive use impact during the irrigation season, as measured at Yakima River at Parker. Applications will be processed in accordance with PRO-1000, Chapter 1, supplemented by the following additional requirements:

Ecology may process an application for a new surface or ground water permit when it is accompanied by conveyance of a pre-1905 water right to ecology to create a trust water right.

(a) If accepted into the trust water right program, ecology may then assign the trust water right established under chapters 90.38 and 90.42 RCW to serve as mitigation for impacts to "total water supply available (TWSA)."

(b) The application must request the full amount of the intended diversion or withdrawal amount. Assignment of a portion of a trust water right must, at a minimum, represent the estimated consumptive use for the use(s) requested on the application.

(c) The application to withdraw ground water must be reviewed to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(d) If the trust water right is not located in the same sub-basin as the source described on the new application, or if it is located downstream from the source described on the new application, the permit shall be conditioned to ensure that existing surface water rights, including instream flow water rights, and ground water rights within the subbasin are not impaired. If impairment would result, the application must be modified, the permit conditioned to prevent impairment, or the permit denied.

(e) Each permit must be conditioned to ensure that the relationship to the trust water right is clear and that any limitations in the trust water right are accurately reflected.

NEW SECTION

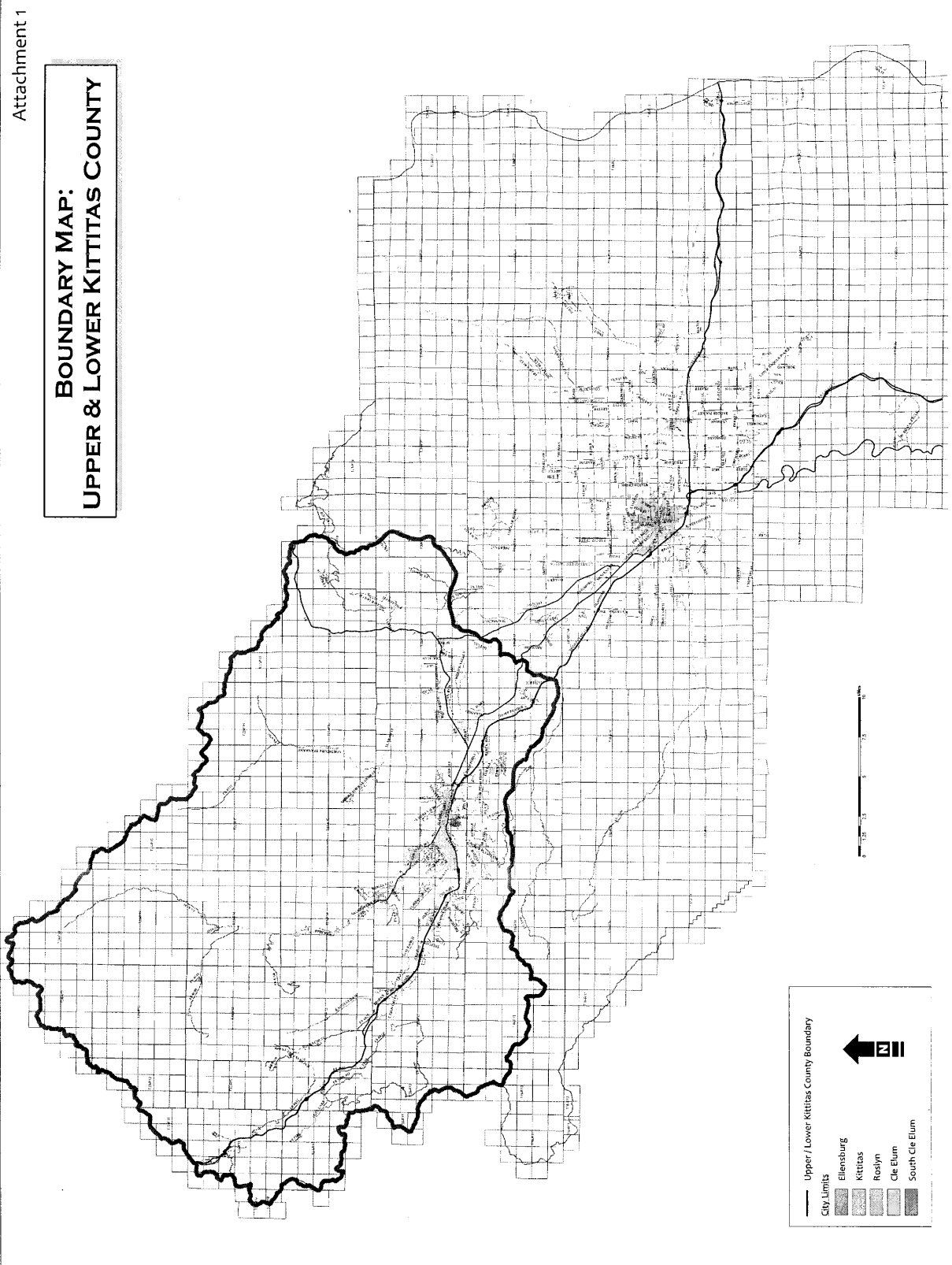
WAC 173-539A-090 Technical assistance and enforcement. (1) To obtain compliance with this chapter, ecology and Kittitas County may prepare and distribute technical and educational information regarding the scope and requirements of this chapter to the public. This is intended to assist the public in complying with the requirements of their water rights and applicable water laws.

(2) When ecology determines that a violation of this rule has occurred, it shall first attempt to achieve voluntary compliance. An approach to achieving this is to offer information and technical assistance to the person, in writing, identifying one or more means to accomplish the person's purposes within the framework of the law.

(3) To obtain compliance and enforce this chapter, ecology may impose such sanctions as appropriate under authorities vested in it, including, but not limited to, issuing regulatory orders under RCW 43.27A.190; and imposing civil penalties under RCW 43.83B.336, 90.03.400, 90.03.410, 90.03.600, 90.44.120 and 90.44.130.

NEW SECTION

WAC 173-539A-990 Appendix 1—Map of upper Kittitas County boundaries.



WSR 08-15-036
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 08-170—Filed July 9, 2008, 1:07 p.m., effective July 12, 2008, 12:01 a.m.]

Effective Date of Rule: July 12, 2008, 12:01 a.m.

Purpose: Amend fishing rules.

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

Statutory Authority for Adoption: RCW 77.12.047.

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 cutoff date for retention of sturgeon was adopted because Washington and Oregon fish managers estimate that the harvest guideline of seven hundred fish was exceeded on July 6. There is insufficient time to promulgate 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: July 9, 2008.

J. P. Koenings
 Director

NEW SECTION

WAC 232-28-61900M Exceptions to statewide rules—Columbia River sturgeon. Notwithstanding the provisions of WAC 232-28-619:

(1) Effective 12:01 a.m. July 12, through July 31, 2008, it is unlawful to retain sturgeon caught in those waters of the Columbia River and tributaries from Bonneville Dam upstream to The Dalles Dam.

(2) Effective immediately through July 31, 2008, it is unlawful to retain sturgeon caught in those waters of the Columbia River and tributaries from The Dalles Dam upstream to McNary Dam.

REPEALER

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. July 12, 2008:

WAC 232-28-61900K Exceptions to statewide rules—Columbia River sturgeon. (08-50)

The following section of the Washington Administrative Code is repealed effective 12:01 a.m. August 1, 2008:

WAC 232-28-61900M Exceptions to statewide rules—Columbia River sturgeon.

WSR 08-15-042
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 08-164—Filed July 11, 2008, 8:54 a.m., effective July 15, 2008, 6:00 a.m.]

Effective Date of Rule: July 15, 2008, 6:00 a.m.

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

Citation of Existing Rules Affected by this Order: Repealing WAC 220-32-05100X; 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 2005-2007 Interim Management Agreement For Upriver Chinook, Sockeye, Steelhead, Coho & White Sturgeon (May 11, 2005) (Doc. No. 2407); *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979); 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 fifth and sixth weekly commercial fishing periods for treaty tribes. The escapement goals for both summer chinook and sockeye will be achieved. Harvestable numbers of fish are available under the ESA guideline. The fishery catches are expected to remain within the allocation and guidelines of the 2008-2017 management agreement. Rule is consistent with action of the Columbia River compact on June 19, June 27, and July 10, 2008. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

New regulations for 2008 include fisheries that are described in the MOA between Washington state and

Yakama Nation. Yakama Nation tribal members will be allowed to fish for subsistence purposes within a specific area of the Washington shoreline below Bonneville Dam when open for enrolled Yakama Nation members under lawfully enacted Yakama Nation tribal subsistence fisheries. Sales will be allowed when the open fishery is concurrent with either commercial gillnet openings or platform gear in Zone 6 (SMCRA 1F, 1G, 1H). Sales of fish caught in this fishery are consistent with mainstem Zone 6 (SMCRA 1F, 1G, 1H) allowable sales, with the exception of sturgeon (which may not be sold or kept for subsistence purposes).

The Yakama, Warm Springs, Umatilla, and Nez Perce Indian tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the congressionally ratified Columbia River compact. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The tribes and the states adopt parallel regulations for treaty Indian fisheries under the supervision of the federal courts. Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal Endangered Species Act.

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

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 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: July 11, 2008.

J. P. Koenings
Director

NEW SECTION

WAC 220-32-05100Y Columbia River salmon seasons above Bonneville Dam. Notwithstanding the provisions of WAC 220-32-050, WAC 220-32-051, WAC 220-32-052, and WAC 220-32-058, effective immediately until fur-

ther notice, it is unlawful for a person to take or possess salmon, steelhead, shad, carp, walleye or sturgeon for commercial purposes in Columbia River Salmon Management Catch Reporting Areas (SMCRA) 1E, 1F, 1G, and 1H, (except as provided in the following subsections) and the Wind River, White Salmon River, Klickitat River, and Drano Lake, except that individuals possessing treaty fishing rights under the Yakima, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, shad, carp, or sturgeon under the following provisions, pursuant to lawfully enacted tribal rules:

1. Open Periods: 6:00 a.m. Tuesday, July 15 to 6:00 p.m. Thursday, July 17, 2008

6:00 a.m. Tuesday, July 22 to 6:00 p.m. Thursday, July 24, 2008

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

b) Gear: No minimum mesh-size restriction.

2. Open Periods: Immediately until further notice.

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

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

3. Open Periods: Immediately 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, and have either commercial gillnet openings or allow platform gear in Zone 6. (SMCRA 1F, 1G, 1H).

a) Open Areas: Wind, White Salmon, and Klickitat rivers.

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

4. Open Periods: Immediately until further notice, and only under lawfully enacted Yakama Nation tribal subsistence fisheries regulations and under the conditions in the Memo of Agreement (MOA) titled "2007 Memorandum of Agreement Between the Yakama Nation and Washington Department of Fish and Wildlife Regarding Tribal Fishing Below Bonneville Dam." Is open for enrolled Yakama Nation members under lawfully enacted Yakama Nation tribal subsistence fisheries and only when it's concurrent with either commercial gillnet openings or platform gear fisheries in Zone 6 (SMCRA 1F, 1G, 1H).

a) Open Areas: (SMCRA) 1E On the Washington shoreline from 600 feet below the fish ladder at the Bonneville Dam North shore powerhouse, downstream to Beacon Rock (bank fishing only).

b) Gear: hoop nets, dip bag nets, and rod and reel with hook-and-line, consistent with Yakama Nation regulations.

5. Allowable sale includes: Chinook, sockeye, coho, steelhead, walleye, shad, and carp. Sturgeon may not be sold. Sturgeon between 42 inches and 60 inches in length may be retained in the Bonneville Pool (SMCRA 1F) for subsistence purposes only. Sturgeon between 4 feet and 5 feet in length may be retained in The Dalles and John Day pools (SMCRA 1G, 1H) for subsistence purposes only. Sturgeon below Bonneville Dam may not be retained.

6. **24 hour** quick reporting required for Washington wholesale dealers, WAC 220-69-240.

7. There will be no sanctuary in effect at Spring Creek National Fish Hatchery.

8. Notwithstanding the provisions of WAC 220-32-058, the closed area at the mouth of:

a) **Hood River** are those waters along the Oregon side of the Columbia River, and they extend to mid-stream at right angles to the thread of the Columbia River between markers located approximately 0.85 miles downriver from the west bank at the end of the break wall at the west end of the port of Hood River, and 1/2-mile upriver from the east bank.

b) **Herman Creek** are those waters upstream from a line between deadline markers near the mouth. One marker is located on the east bank piling, and the other is located on the west bank to the north of the boat ramp.

c) **Deschutes River** are those waters of the Columbia River extending to midstream at right angles to the thread of the Columbia River between points 1/2-mile upstream from the eastern shoreline to one mile downstream from the western shoreline.

d) **Umatilla River** are those waters of the Columbia River extending to midstream at right angles to the thread of the Columbia River between points 1/2-mile upstream from the eastern shoreline to one mile downstream from the western shoreline.

e) **Big White Salmon River** are those waters of the Columbia River extending to midstream at right angles to the thread of the Columbia River between a marker located 1/2-mile downstream from the west bank, upstream to Light "35."

f) **Wind River** are those waters of the Columbia River extending to midstream at right angles to the thread of the Columbia River between markers located 1-1/4 miles downstream from the west bank and 1/2-mile upstream from the east bank.

g) **Klickitat River** are those waters of the Columbia River extending to midstream at right angles to the thread of the Columbia River between the downstream margin of Lyle Landing, downstream to a marker located near the railroad tunnel approximately 1/8-miles downstream from the west bank.

h) **Little White Salmon River** are those waters of the Columbia River extending to midstream at right angles to the thread of the Columbia River between Light "27," upstream to a marker located approximately 1/2-mile upstream from the eastern shoreline.

9. Notwithstanding the provisions of WAC 220-22-010, during the open periods described above:

a) **Area 1F** (Bonneville Pool) includes those waters of the Columbia River upstream from the Bridge of the Gods, and downstream from the west end of the 3 Mile Rapids located approximately 1.8 miles below the Dalles Dam.

b) **Area 1G** includes those waters of the Columbia River upstream from a line drawn between a deadline marker on the Oregon shore located approximately 3/4 miles above The Dalles Dam fishway exit, thence at a right angle to the thread of the river to a point in mid-river, then downstream to Light "1" on the Washington shore, and downstream from Preacher's Eddy Light below John Day Dam.

c) **Area 1H** includes those waters of the Columbia River upstream from a fishing boundary marker approximately 1/2-mile above the John Day River, Oregon, extending at a right angle across the thread of the river to a point in mid-river, then downstream to a fishing boundary marker on the Wash-

ington shore approximately opposite the mouth of the John Day River, and downstream from a line at a right angle across the thread of the river one mile downstream from McNary Dam.

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

REPEALER

The following section of the Washington Administrative Code is repealed effective 6:00 a.m. July 15, 2008:

WAC 220-32-05100X	Columbia River salmon seasons above Bonneville Dam. (08-161)
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WSR 08-15-046

EMERGENCY RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Management Services Administration)

[Filed July 11, 2008, 1:00 p.m., effective July 11, 2008, 1:00 p.m.]

Effective Date of Rule: Immediately.

Purpose: The purpose of the emergency filing of amended chapter 388-06 WAC, Background checks, is to comply with chapter 387, Laws of 2007 (ESSB 5774) and chapter 410, Laws of 2007 (SHB 1333), impacting background check requirements for certain child care providers and children returning to their home; and to comply with the federal Adam Walsh Act of 2006.

Citation of Existing Rules Affected by this Order: Amending WAC 388-06-0110, 388-06-0150, and 388-06-0160.

Statutory Authority for Adoption: RCW 43.43.832, 26.33.190, 26.44.030, 74.15.030.

Other Authority: Chapter 387, Laws of 2007; Adam Walsh Act of 2006.

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

Reasons for this Finding: Amendments to chapter 388-06 WAC, Background checks, are needed due changes in federal requirements and state statute. Permanent rule making could not be completed by the effective date of the federal requirements, July 1, 2007.

A notice to adopt permanent rules on this subject has been filed as WSR 07-11-097. The department met with stakeholders to finalize WAC language for permanent adoption. The department is proceeding with permanent adoption of this rule and plans to file a CR-102 in fall of 2008. This filing extends the emergency rule filed as WSR 08-07-042.

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 3, 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 3, Repealed 0.

Date Adopted: July 3, 2008.

Stephanie E. Schiller
Rules Coordinator

AMENDATORY SECTION (Amending WSR 01-18-025, filed 8/27/01, effective 10/1/01)

WAC 388-06-0110 Who must have background checks? The department requires background checks on individuals who will have unsupervised access to children or to individuals with a developmental disability in homes, facilities, or operations licensed, relicensed, or contracted by the department to provide care as required under chapter 74.15 RCW. The department requires background checks on the following people:

(1) A person licensed, certified, or contracted by us to care for children (chapter 74.15 RCW and RCW 43.43.832);

(2) A prospective or current employee for a licensed care provider or a person or entity contracting with us;

(3) A volunteer or intern with regular or unsupervised access to children who is in a home or facility that offers licensed care to children;

(4) A person who is at least sixteen years old, is residing in a foster home, relatives home, or child care home and is not a foster child;

(5) A person not related to the child who the court has approved placement as allowed in RCW 13.34.130;

(6) A relative other than a parent who may be caring for a child or an individual with a developmental disability;

~~((6))~~ (7) A person who regularly has unsupervised access to a child or an individual with a developmental disability;

~~((7))~~ (8) A provider who has unsupervised access to a child or individual with a developmental disability in the home of the child or individual with a developmental disability; and

~~((8))~~ (9) Prospective adoptive parents as defined in RCW 26.33.020.

AMENDATORY SECTION (Amending WSR 01-18-025, filed 8/27/01, effective 10/1/01)

WAC 388-06-0150 What does the background check cover? (1) The department must review the following records:

(a) Criminal convictions and pending charges based on identifying information provided by you. However, if you have lived in Washington State for less than three years prior to the check, the department must conduct a fingerprint based background check for you to have unsupervised access to children or to individuals with developmental disabilities.

~~(b) ((For children's administration, child protective service case file information (CAMIS) for founded reports of child abuse or neglect; and))~~ If the background check is being conducted for Children's Administration, it must also include:

(i) A review of child protective services case files information (CAMIS) or other applicable information system.

(ii) Administrative hearing decisions related to any DRL license that has been revoked, suspended, or denied.

~~(c) ((For children's administration, administrative hearing decisions related to any DLR license that has been revoked, suspended or denied))~~ If the background check is being conducted by Children's Administration for placement of a child in out-of-home care, including foster homes, adoptive homes, relative placements, and placement with other suitable persons under chapter 13.34 RCW, the department must check the following in addition to the requirements above for each person over eighteen years of age residing in the home:

(i) Child abuse and neglect registries in each state a person has lived in the five years prior to conducting the background check.

(ii) Washington state patrol (WSP) and federal bureau of investigation (FBI) fingerprint based background checks regardless of how long you have resided in Washington.

(2) The department may also review:

(a) Any civil judgment, determination or disciplinary board final decisions of child abuse or neglect.

(b) Law enforcement records of convictions and pending charges in other states or locations if:

(i) You have lived in another state.

(ii) Reports from other credible sources indicating a need to investigate another state's records.

~~((3) The department may review law enforcement records of convictions and pending charges in other states or locations if:~~

~~(a) You have lived in another state; and~~

~~(b) Reports from credible community sources indicate a need to investigate another state's records.~~

~~(4) If you have lived in Washington state less than three years immediately prior to your application to have unsupervised access to children or to individuals with a developmental disability, the department requires that you be fingerprinted for a background check with the Washington state patrol (WSP) and the Federal Bureau of Investigation (FBI); as mandated by chapter 74.15 RCW.)~~

AMENDATORY SECTION (Amending WSR 01-18-025, filed 8/27/01, effective 10/1/01)

WAC 388-06-0160 Who pays for the background check? (1) Children's administration (CA) pays (~~for~~) the DSHS general administrative costs for background checks for foster home applicants, CA relative and other suitable caregivers, and CA adoptive home applicants.

(2) Children's administration pays (~~for fingerprinting expenses~~) the WSP and FBI-fingerprint processing fees for (~~those~~) foster home applicants (~~and relatives~~), CA relative and other suitable caregivers, CA adoptive home applicants, and other adults in the home who require fingerprinting under chapter 13.34 RCW.

(3) Children's administration does not pay (~~for~~) fingerprinting fees or expenses for employees, contractors, or volunteers associated with any other type of home or facility.

(4) The division of developmental disabilities pays for background checks for individuals seeking authorization to provide services to their clients.

WSR 08-15-047

EMERGENCY RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Management Services Administration)

[Filed July 11, 2008, 1:01 p.m., effective July 11, 2008, 1:01 p.m.]

Effective Date of Rule: Immediately.

Purpose: The purpose of the emergency filing of new rules of chapter 388-06 WAC, Background checks, is to comply with chapter 387, Laws of 2007 (ESSB 5774), relating to DSHS employee background check rules. Chapter 387, Laws of 2007 (ESSB 5774) repeals the department of personnel (DOP) statute that requires DOP to adopt DSHS employee background check rules. DOP repealed DSHS employee rules effective July 22, 2007. This filing includes new WAC 388-06-0600, 388-06-0605, 388-06-0610, 388-06-0615, 388-06-0620, 388-06-0625, 388-06-0630, 388-06-0635 and 388-06-0640, and amended WAC 388-06-0010.

Citation of Existing Rules Affected by this Order: Amending WAC 388-06-0010.

Statutory Authority for Adoption: RCW 43.43.832, chapter 387, Laws of 2007 (ESSB 5774).

Other Authority: RCW 43.20A.710, 43.43.830, 43.43.-842.

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: Amendments to chapter 388-06 WAC, Background checks, are needed due to changes in statute. Permanent rule making could not be completed in time to ensure that DSHS employee background checks are conducted by July 22, 2007. A notice to adopt permanent rules on this subject has been filed as WSR 07-11-097. The department met with stakeholders and assistant attorneys

general to finalize WAC language for permanent adoption. The department is proceeding with permanent adoption of this rule and plans to file a CR-102 in fall of 2008. This filing extends the emergency rule filed as WSR 08-07-043.

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 9, Amended 1, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 9, Amended 1, Repealed 0.

Date Adopted: July 3, 2008.

Stephanie E. Schiller
Rules Coordinator

AMENDATORY SECTION (Amending WSR 01-18-025, filed 8/27/01, effective 10/1/01)

WAC 388-06-0010 What is the purpose of this chapter? (1) The purpose of this chapter is to establish rules for background checks conducted by children's administration (CA), and the division of developmental disabilities (DDD) at the department of social and health services (DSHS). The department does background checks on individuals who are licensed, certified, contracted, or authorized to care for or have unsupervised access to children and to individuals with a developmental disability. Background checks are conducted to find and evaluate any history of criminal convictions and child abuse or neglect.

(2) This chapter also defines when the one hundred twenty-day provisional hire is allowed by DSHS. WAC 388-06-0500 through 388-06-0540 apply to all DSHS administrations

(3) This chapter includes the background check requirements for DSHS employees and applicants seeking, working or serving in a covered position.

NEW SECTION

WAC 388-06-0600 Must the DSHS secretary or designee conduct background checks on all employees in covered positions and applicants under consideration for a covered position? (1) The secretary of the department of social and health services (DSHS) or designee must conduct a background check, which may include fingerprinting as authorized by statute, on all employees in covered positions and applicants under final consideration for a covered position.

(2) The requirement to conduct a background check must include the following:

(a) Any employee seeking a covered position because of a layoff, reallocation, transfer, promotion or demotion or otherwise requesting a move to a covered position.

(b) Any applicant prior to appointment to a covered position, except when appointment is made on a conditional basis in accordance with agency procedures authorized by WAC 388-06-0635.

(3) Applicant means any person who has applied for work or serves in a covered position, including current employees requesting transfer, promotion, demotion, or otherwise requesting a move to a covered position.

NEW SECTION

WAC 388-06-0605 What is a covered position? A covered position is one in which a person will or may have unsupervised access to vulnerable adults, juveniles or children.

NEW SECTION

WAC 388-06-0610 Who are vulnerable adults, juveniles or children? (1) Vulnerable adult means a person who is a client of DSHS and/or is:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself;

(b) Found incapacitated under chapter 11.88 RCW;

(c) Developmental disabled as defined under RCW 71A.10.020;

(d) Admitted to any facility that is operated by DSHS;

(e) Receiving services from a DSHS contracted, authorized, certified, licensed or individual provider, including those certified under chapter 70.96A RCW;

(f) Receiving services through home health, hospice, or home care agencies required to be licensed under chapter 70.127 RCW; or

(g) Admitted to detoxification in a certified chemical dependency treatment facility in accordance with chapter 70.96A RCW.

(2) Juvenile means a person under the age of twenty-one under the juvenile rehabilitation administration's (JRA) jurisdiction, or under the department of corrections's jurisdiction while placed in a JRA facility.

(3) Child or children means any person under eighteen years of age.

NEW SECTION

WAC 388-06-0615 What is unsupervised access? Unsupervised access means a DSHS employee, volunteer or student intern who:

(1) Works or serves in a setting, such as an institution, that provides residential services to vulnerable adults, juveniles and children;

(2) Works or serves in a position where, during the course of his or her employment, the employee may transport, or visit the residence of, a vulnerable adult, juvenile or child; or

(3) Works or serves in a position, other than one described in (1) and (2) above, where the employee may be left alone with a vulnerable adult, juvenile or child. "Left

alone" does not include the possibility of a public encounter, or public interaction.

NEW SECTION

WAC 388-06-0620 What information is considered in a background check conducted by DSHS and what are the results of the background check used for? (1) The background check information considered by the DSHS secretary will include but is not limited to conviction records, pending charges, and civil adjudications as defined in RCW 43.43.830.

(2) The background information must be used by DSHS to determine the character, competence, and suitability of the applicant and/or employee to have unsupervised access to vulnerable adults, juveniles and children.

NEW SECTION

WAC 388-06-0625 Must an employee and/or applicant authorize the secretary of the department of social and health services or designee to conduct a background check and what happens if the employee or applicant does not provide authorization? (1) An employee and/or applicant applying for or being considered for retention in a covered position must authorize the secretary of DSHS or designee to conduct a background check which may include fingerprinting.

(2) Failure to authorize the DSHS secretary or designee to conduct a background check disqualifies an employee or applicant from consideration for any covered position including their current covered position.

NEW SECTION

WAC 388-06-0630 What happens when a permanent DSHS employee is disqualified because of a background check or failure to authorize a background check? (1) A permanent employee with a background check disqualification or who fails to authorize a background check may be subject to any of the following actions in no specific order:

(a) Demotion;

(b) Job restructuring;

(c) Job reassignment;

(d) Non-disciplinary separation for non-represented employees;

(e) Disciplinary action in accordance with Just Cause for represented employees; or

(f) The employee may voluntarily resign.

(2) An appointing authority may use the following interim measures while deciding which action to take (not to exceed thirty calendar days except in cases where there are investigations of pending charges):

(a) Voluntary use of accrued vacation, exchange, and/or compensatory time;

(b) Authorized leave without pay, if there is no paid leave available, or if the employee chooses not to use paid leave; and/or

(c) Reassignment to another work location to present unsupervised access.

(d) When considering the above actions, the agency will consider the least restrictive means necessary to prevent unsupervised access.

(3) Before a permanent employee may be separated or discharged due to a background check disqualification, the search for a non-covered position will occur over a period of thirty calendar days.

NEW SECTION

WAC 388-06-0635 What are the DSHS secretary's responsibilities in carrying out the requirements to conduct background checks? (1) The DSHS secretary or designee will:

(a) Notify employees and applicants that a background check is required for covered positions;

(b) Develop procedures specifying when employees and applicants may be hired on a conditional basis pending the results of a background check; and

(c) Develop policies and procedures pertaining to background checks.

(d) Use information contained in a background check for the purpose of determining the character, competence, and suitability of the applicant and/or employee to have unsupervised access to vulnerable adults, juveniles and children.

(2) The DSHS secretary or designee will not further disseminate background check information unless authorized or required by law to do so. In addition, results of a background check may be discoverable pursuant to the rules of civil discovery, or subject to disclosure pursuant to a public records request.

NEW SECTION

WAC 388-06-0640 Does a DSHS permanent employee who is disqualified from a covered position as a result of a background check have the right to request a review of the disqualification? A DSHS permanent employee who is disqualified from a covered position as a result of a background check has the right to present the DSHS secretary or designee evidence that may mitigate the disqualifying background information identified by the department. The permanent employee may present additional information for consideration that includes, but is not limited to:

(1) The employee's background check authorization and disclosure form;

(2) The employee's age at the time of conviction, charge, or disciplinary board final decision;

(3) The nature and severity of the conviction, charge, or disciplinary board final decision;

(4) The length of time since the conviction, charge, or disciplinary board final decision;

(5) The nature and number of previous offenses;

(6) Vulnerability of the child, vulnerable adult, or individual with mental illness or developmental disabilities to which the employee will or may have unsupervised access; and

(7) The relationship between the potentially disqualifying event and the duties of the employee.

**WSR 08-15-050
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 08-171—Filed July 11, 2008, 2:23 p.m., effective July 11, 2008, 2:23 p.m.]

Effective Date of Rule: Immediately.

Purpose: Amend fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-56-25500J; and amending WAC 220-56-255.

Statutory Authority for Adoption: RCW 77.12.047.

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 conforms to federal action taken by Pacific Fisheries Management Council. There is insufficient time to promulgate 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: July 11, 2008.

J. P. Koenings
Director

NEW SECTION

WAC 220-56-25500K Halibut—Seasons—Daily and possession limits. (1) Notwithstanding the provisions of WAC 220-56-255, effective immediately until further notice, it is unlawful to fish for or possess halibut taken for personal use, except as provided in this section:

(a) Catch Record Area 1 - Open 12:01 a.m. August 1 through 11:59 p.m. August 2, 2008. It is unlawful during any vessel trip to bring into port or land bottomfish except sablefish or Pacific Cod if the vessel has brought halibut into port or landed halibut during that trip.

(b) Catch Record Card Area 2 - Closed - except waters from 47°25.00'N. latitude (Queets River) south to 46°58.00'N latitude and east of 124°30.00'W longitude, open until further notice, 12:01 a.m. through 11:59 p.m., Fridays and Saturdays.

(c) Catch Record Card Areas 3 and 4 - Open only 12:01 a.m. through 11:59 p.m. July 26, 2008, except Area 3 and 4

seaward of a line approximating 30 fathoms from the Bonilla-Tatoosh line, south to the Queets River as described by the following coordinates:

48°24.79'N.lat.;124°44.07'W.long.;
 48°24.80'N.lat.;124°44.74'W.long.;
 48°23.94'N.lat.;124°44.70'W.long.;
 48°23.51'N.lat.;124°45.01'W.long.;
 48°22.59'N.lat.;124°44.97'W.long.;
 48°21.75'N.lat.;124°45.26'W.long.;
 48°21.23'N.lat.;124°47.78'W.long.;
 48°20.32'N.lat.;124°49.53'W.long.;
 48°16.72'N.lat.;124°51.58'W.long.;
 48°10.00'N.lat.;124°52.58'W.long.;
 48°05.63'N.lat.;124°52.91'W.long.;
 47°56.25'N.lat.;124°52.57'W.long.;
 47°40.28'N.lat.;124°40.07'W.long.;
 47°31.70'N.lat.;124°37.03'W.long.;

(d) Catch Record Card Area 5 - Open through July 21, 2008, 12:01 a.m. through 11:59 p.m., Thursdays through Mondays only.

(e) Daily limit one halibut. The possession limit is two daily limits of halibut in any form, except the possession limit aboard the fishing vessel is one daily limit.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-56-25500J Halibut—Seasons—Daily and possession limits. (08-156)

WSR 08-15-051 EMERGENCY RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed July 11, 2008, 2:35 p.m., effective July 11, 2008, 2:35 p.m.]

Effective Date of Rule: Immediately.

Purpose: On June 19, 2008, the Supreme Court of Washington overturned the court of appeals, holding that the list of good cause reasons for voluntarily leaving work in RCW 50.20.050 (2)(b) is not exclusive. Instead, the department has the authority to consider whether other reasons constitute good cause for leaving work under RCW 50.20.050 (2)(a) for the purpose of eligibility for unemployment benefits. The emergency rule is intended to implement the court's decision.

Citation of Existing Rules Affected by this Order: Repealing WAC 192-16-009.

Statutory Authority for Adoption: RCW 50.12.010, 50.12.040, 50.20.010.

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 court's ruling was effective immediately. The department's existing regulations were adopted with the understanding that the eleven reasons for quitting work enumerated in RCW 50.20.050 (2)(b) was an exclusive list. An emergency rule is needed to implement the court's decision that other factors may constitute good cause for voluntarily leaving work while permanent rules are developed in conjunction with stakeholders.

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

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

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

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

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

Date Adopted: July 11, 2008.

Karen T. Lee
Commissioner

NEW SECTION

WAC 192-150-170 Meaning of good cause—RCW 50.20.050(2). (1) **General.** RCW 50.20.050(2) provides that you will not be disqualified from receiving unemployment benefits when you voluntarily leave work for good cause. The Washington Supreme Court in *Spain v. Employment Security Department* held that the factors listed in RCW 50.20.050 (2)(b) are not the only circumstances in which an individual has good cause for voluntarily leaving work. While these are considered *per se* or stand alone good cause reasons, the court held that the department is required under RCW 50.20.050 (2)(a) to consider whether other circumstances constitute good cause for voluntarily leaving work.

(a) **Stand alone good cause factors—RCW 50.20.050 (2)(b).** The following circumstances are sufficient alone to establish good cause for voluntarily leaving work. They are:

(i) Accepting a bona fide offer of work (see WAC 192-150-050);

(ii) Due to your illness or disability or the death, illness, or disability of a member of your immediate family (see WAC 192-150-055 and WAC 192-150-060);

(iii) Moving to accompany your transferred military spouse (see WAC 192-150-110);

(iv) Protecting yourself or a member of your immediate family from domestic violence or stalking (see WAC 192-150-112 and WAC 192-150-113);

(v) A reduction in your pay of twenty-five percent or more (see WAC 192-150-115);

(vi) A reduction in your hours of twenty-five percent or more (see WAC 192-150-120);

(vii) A change in your worksite resulting in increased distance or difficulty of travel (see WAC 192-150-125);

(viii) Unsafe working conditions which your employer has failed to remedy (see WAC 192-150-130);

(ix) Illegal activities at the worksite which your employer has failed to correct (see WAC 192-150-135);

(x) Changes in your usual work that violate your sincere religious or moral beliefs (see WAC 192-150-140); and

(xi) Entering an approved apprenticeship training program (see WAC 192-150-160).

(b) **Other factors constituting good cause—RCW 50.20.050 (2)(a).** In addition to the factors above, the department may also determine that you had good cause to leave work voluntarily for reasons other than those listed in RCW 50.20.050 (2)(b).

(i) For separations under subsections (ii) and (iv) below, all of the following conditions must be met to establish good cause for voluntarily leaving work:

(A) You left work primarily for reasons connected with your employment; and

(B) These work-connected reasons were of such a compelling nature they would have caused a reasonably prudent person to leave work; and

(C) You first exhausted all reasonable alternatives before you quit work, unless you are able to show that pursuing reasonable alternatives would have been futile.

(ii) **Substantial involuntary deterioration of the work.** As determined by the legislature, RCW 50.20.050 (2)(b), subsections (v) through (x), represent changes to employment that constitute a substantial involuntary deterioration of the work.

(iii) **Other changes in working conditions.** Changes to your working conditions other than those included in RCW 50.20.050 (2)(b)(v)-(x) will be evaluated under WAC 192-150-150 to determine if they constitute a refusal of an offer of new work.

(iv) **Unreasonable hardship.** Other work-connected circumstances may constitute good cause if you can show that continuing in your employment would work an unreasonable hardship on you. "Unreasonable hardship" means a result not due to your voluntary action that would cause a reasonable person to leave that employment. The circumstances must be based on existing facts, not conjecture, and the reasons for leaving work must be significant.

Examples of work-connected unreasonable hardship circumstances that may constitute good cause include, but are not limited to, those where:

(A) Repeated behavior by your employer or co-workers creates an abusive working environment.

(B) You show that your health or physical condition or the requirements of the job have changed so that your health would be adversely affected by continuing in that employment.

(2) **Commissioner Approved Training.** After you have been approved by the department for Commissioner Approved Training, you may leave a temporary job you have taken during training breaks or terms, or outside scheduled training hours, or pending the start date of training, if you can

show that continuing with the work will interfere with your approved training.

(3) **Redetermination.** Decisions issued by the department on or before the effective date of this rule that are denials for voluntarily leaving work without good cause and pending appeal at the Office of Administrative Hearings or pending review at the Commissioner's Review Office shall be returned to the department for redetermination under this rule.

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 192-16-009	Disqualification for leaving work voluntarily—Meaning of good cause for claims with an effective date prior to January 4, 2004—RCW 50.20.-050(1).
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**WSR 08-15-092
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE**

[Order 08-174—Filed July 17, 2008, 11:27 a.m., effective July 17, 2008, 11:27 a.m.]

Effective Date of Rule: Immediately.

Purpose: Amend commercial fishing rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 220-52-05100X; and amending WAC 220-52-051.

Statutory Authority for Adoption: RCW 77.12.047.

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 2008 state/tribal shrimp harvest management plans for the Strait of Juan de Fuca and North Puget Sound require adoption of harvest seasons and the prohibition on night time fishing contained in this emergency rule. This emergency rule closes the pot fishery season for spot shrimp in Shrimp Management Area 2W because the spot shrimp quota have been harvested in that area. There is insufficient time to promulgate 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: July 17, 2008.

J. P. Koenings
Director

NEW SECTION

WAC 220-52-05100Y Puget Sound shrimp pot and beam trawl fishery—Season. Notwithstanding the provisions of WAC 220-52-051, effective immediately until further notice, it is unlawful to fish for shrimp for commercial purposes in Puget Sound except as provided for in this section:

(1) Shrimp pot gear:

(a) All waters of Shrimp Management Areas 1A, 1C, 2E, 2W, 3, 4, and 6 are open to the harvest of all shrimp species effective immediately, until further notice, except as provided for in this section:

(i) All waters of Shrimp Management Area 23AE and the Discovery Bay Shrimp District are closed.

(ii) All waters of Shrimp Management Area 2E are closed to the harvest of spot shrimp.

(iii) Effective 6:00 p.m., July 23, 2008, all waters of Shrimp Management Area 2W are closed to the harvest of spot shrimp.

(b) The shrimp accounting week is Monday through Sunday.

(c) Effective 12:01 a.m., July 20, 2008, it is unlawful for the combined total harvest of spot shrimp by a fisher and/or the fisher's alternate operator to exceed 200 pounds in Shrimp Management Area 2W.

(d) Effective immediately, until further notice, it is unlawful for the combined total harvest of spot shrimp by a fisher and/or the fisher's alternate operator to exceed 600 pounds per week, except that any fisher whose weekly shrimp harvest activity is exclusively limited to Marine Fish-Shellfish Catch and Reporting Area 29 shall not be subject to the weekly spot shrimp trip limit for that week. It is unlawful to fish for any shrimp while in possession, on board the fishing vessel, of any spot shrimp from any previous accounting week.

(e) It is unlawful to fish for shrimp for commercial purposes in Puget Sound using shellfish pot gear in more than one Marine Fish-Shellfish Management and Catch Reporting Area per day. Fishers may move all of their shellfish pot gear from one Marine Fish-Shellfish Management and Catch Reporting Area to another Marine Fish-Shellfish Management and Catch Reporting Area if a harvest report is made before the shellfish pot gear is moved. The harvest activity report must be made consistent with the provisions of WAC 220-52-075 and must also include the following additional information:

(i) The number of pots being moved to a new area, and the Marine Fish-Shellfish Management and Catch Reporting Area that the pots are being moved to.

(f) It is unlawful to set or pull shellfish pots in one Marine Fish-Shellfish Management and Catch Reporting Area while in possession of shrimp harvested from another Marine Fish-Shellfish Management and Catch Reporting Area, except shellfish pots may be set in a new fishing area subsequent to making a report as indicated in Section 1(e) above.

(2) Shrimp beam trawl gear:

(a) Shrimp Management Area 3 (outside of the Discovery Bay shrimp district, Sequim Bay and Catch Area 23D) is open immediately, until further notice. Sequim Bay includes those waters of Catch Area 25A south of a line projected west from Travis Spit on the Miller Peninsula.

(b) That portion of Catch Area 22A within Shrimp Management Area 1B is open immediately, until further notice.

(c) That portion of Catch Area 21A within Shrimp Management Area 1B is open immediately, until further notice.

(3) It is unlawful to set or pull shrimp beam trawl gear from one hour after official sunset to one hour before official sunrise.

(4) All shrimp taken under this section must be sold to licensed Washington wholesale fish dealers.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 220-52-05100X Puget Sound shrimp pot and beam trawl fishery. (08-167)

WSR 08-15-115

EMERGENCY RULES DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed July 21, 2008, 8:22 a.m., effective July 21, 2008]

Effective Date of Rule: Immediately.

Purpose: The department is creating WAC 388-828-9000, 388-828-9020, 388-828-9040, 388-828-9060, 388-828-9100, 388-828-9120, and 388-828-9140 to combine three family support programs into one individual and family services program as directed by the legislature.

Statutory Authority for Adoption: RCW 71A.12.030.

Other Authority: Chapter 283, Laws of 2007 (SSSB 5467 [2SSB 5467]).

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: Chapter 283, Laws of 2007 (SSSB 5467 [2SSB 5467]), as amended by the house, directs the department to create the individual and family services program for persons with developmental disabilities by July 1, 2007. The department of developmental disabilities

(DDD) must incorporate rules for the algorithm used to determine a personal award amount into chapter 388-828 WAC. An initial public notice was filed June 29, 2007, as WSR 07-14-081. This emergency rule extends the emergency rule filed March 26, 2008, as WSR 08-08-039. These rules have been proposed for permanent adoption as WSR 08-11-095 but the rules will not become permanent prior to the expiration of the current emergency rules as the public hearing is scheduled for July 22, 2008.

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 7, 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 7, Amended 0, Repealed 0.

Date Adopted: July 9, 2008.

Stephanie E. Schiller
Rules Coordinator

Reviser's note: The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the 08-16 issue of the Register.