RULE-MAKING ORDER

CR-103E (May 2009)
(Implements RCW 34.05.360)

Agency: Washington Department of Fish and Wildlife

Emergency Rule Only

Effective date of rule:
Emergency Rules 09-221
☒ Immediately upon filing.
☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☒ No If Yes, explain:

Purpose: The purpose of this rule-making is to allow non-treaty commercial fishing opportunity in the Columbia River while protecting fish 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:
Repealed: WAC 220-33-01000N, WAC 220-33-01000P
Amended: WAC 220-33-010
Suspended:

Statutory authority for adoption: RCW 77.04.130, 77.12.045, and 77.12.047

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

EMERGENCY RULE

Under RCW 34.05.350 the agency for good cause finds:

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

☒ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

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

Reasons for this finding: (See Attachment)

Date adopted: September 24, 2009

NAME (TYPE OR PRINT)
Philip Anderson

SIGNATURE

Lori Preuss

TITLE
Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: September 24, 2009
TIME: 2:58 PM

WSR 09-20-008

(COMPLETE REVERSE SIDE)

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	1	Amended	_____	Repealed	2
Federal rules or standards:	New	1	Amended	_____	Repealed	2
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____

The number of sections adopted in the agency's own initiative:

New	1	Amended	_____	Repealed	2

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	_____	Repealed	_____

The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

N E W S E C T I O N

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

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

1. **Mainstem Columbia River**

    a. SEASON #1: 9 PM September 24 to 5 AM September 25, 2009 and
    9 PM September 28 to 5 AM September 29, 2009

    b. AREA: SMCRA 1D, and 1E (Zones 4 - 5)

    c. GEAR: 8-inch minimum mesh size. Drift gillnets only. Monofilament gear is allowed. 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.

    d. SANCTUARIES: Lewis-B, Sandy, and Washougal rivers.

    e. ALLOWABLE SALES: Salmon and white sturgeon (43-54 inch fork length). A maximum of five (5) 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 to mainstem fisheries only. Select Area fishing sights remain closed for sturgeon harvest. It is unlawful to fail to return immediately to the water any sturgeon taken in excess of any commercial catch or possession limits prescribed by department rule.

2. **Mainstem Columbia River**

    a. SEASON #2: 6 AM – 6 PM September 28, 2009 and
    6 AM – 6 PM September 30, 2009

    b. AREA: SMCRA 1A, 1B and 1C (Zones 1 - 3)

    c. GEAR: 6-inch maximum mesh size. Unslackened floater gillnet. Drift gillnets only. Monofilament gear is allowed. 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.

    d. SANCTUARIES: Elokomin-B, Abernathy, Cowlitz, Kalama-B, Lewis-B

    e. ALLOWABLE SALES: Salmon and white sturgeon (43-54 inch fork length). A maximum of five (5) 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 to mainstem fisheries only. Select Area fishing sights remain closed for sturgeon harvest. It is unlawful to fail to return immediately to The water any sturgeon taken in excess of any commercial catch or possession limits prescribed by department rule.

3. **Mainstem Columbia River**

   a. SEASON #3: 6 AM – 6 PM Tuesday, September 29, 2009

   b. AREA: SMCRA 1A, 1B, 1C, 1D and 1E (Zones 1 - 5)

   c. GEAR: 9-inch minimum mesh size. Drift gillnets only. Monofilament gear is allowed. 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.

   d. SANCTUARIES: Elokomin-B, Abernathy, Cowlitz, Kalama-B, Lewis-B, Sandy, and Washougal rivers.

   e. ALLOWABLE SALES: Salmon and white sturgeon (43-54 inch fork length). A maximum of five (5) 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 to mainstem fisheries only. Select Area fishing sights remain closed for sturgeon harvest. It is unlawful to fail to return immediately to the water any sturgeon taken in excess of any commercial catch or possession limits prescribed by department rule.

4. **Blind Slough/Knappa Slough Select Area**.

   a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2009.

      Open hours are 6 PM - 8 AM.

   b. AREA: Blind Slough and Knappa Slough. An area closure of an approximately 100-foot radius at the mouth of Big Creek is defined by markers. Concurrent jurisdiction waters include all areas in Knappa Slough and downstream of the Railroad Bridge in Blind Slough.

   c. GEAR: 9 3/4-inch maximum mesh size. Gillnet. Monofilament gear is allowed. Maximum net length of 100 fathoms. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed. 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.

   d. ALLOWABLE SALES: Salmon.

5. **Tongue Point/South Channel Select Area**.
    a. SEASON: Monday, Tuesday, Wednesday, and Thursday nights immediately through October 30, 2009. Open hours 4 PM – 8 AM.
    b. AREA: Tongue Point and South Channel. All waters in this fishing area are concurrent jurisdiction waters.
    c. GEAR: 6-inch maximum mesh. Gillnet. Monofilament gear is allowed. In the Tongue Point area: Net length maximum of 250 fathoms. Weight not to exceed two pounds on any one fathom on the lead line. Participants in the Tongue Point fishery may have stored onboard their boats gill nets of legal mesh size but with leadline in excess of two pounds per any one fathom. South Channel area: Net length maximum of 100 fathoms. No weight restriction on lead line. Use of additional weights or anchors attached directly to the lead line is allowed.
    d. ALLOWABLE SALES: Salmon.
6. **Deep River Select Area**.
    a. SEASON: Monday, Tuesday, Wednesday and Thursday nights immediately through October 31, 2009. Open hours 7 PM – 9 AM.
    b. AREA: The Deep River Select Area. Concurrent jurisdiction waters extend downstream of the Highway 4 Bridge.
    c. GEAR: 6-inch maximum mesh. Gill net. Monofilament gear is allowed. Net length maximum of 100 fathoms and no weight restriction on the lead line. Use of additional weights or anchors attached directly to the lead line is allowed. Nets may not be tied off to stationary structures. Nets may not fully cross the navigation channel.
    d. ALLOWABLE SALES: Salmon.
7. **Quick Report:** 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240. When quick reporting is required, Columbia River reports must be submitted within 24 hours of the closure of each fishing period. This quick report requirement applies to all seasons described above (Columbia River and Select Areas).

R E P E A L E R S

The following section of the Washington Administrative Code is repealed:

WAC 220-33-01000N Columbia River season below Bonneville (09-209)

The following section of the Washington Administrative Code is repealed effective November 1, 2009:

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

Reasons for this finding: Sets the initial fishing periods for the late fall non-treaty commercial season. Impacts remain available for upriver brights and harvestable coho, Chinook and sturgeon are available. The seasons are consistent with the 2008-2017 *US v Oregon* Management Agreement, the 2009 Non-Indian Salmon Allocation Agreement, and the 2006-2009 Sturgeon Accord. The regulation is consistent with Compact Action of September 22, 2009. There is insufficient time to promulgate permanent rules.

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

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

Columbia River non-treaty 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 and Oregon 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. There is insufficient time to adopt permanent rules.