# 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 10-106**
☐ Immediately upon filing.
☒ Later (specify) May 8, 2010

**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 recreational 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Repealed: WAC 232-28-61900C, WAC 232-28-61900W
Amended: WAC 232-28-619
Suspended:

**Statutory authority for adoption:** RCW 77.04.130, RCW 77.12.045 and RCW 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:** May 7, 2010

**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: May 07, 2010
TIME: 2:08 PM

**WSR 10-11-018**

**(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 232-28-61900W  Exceptions to statewide rules—Columbia River.**
Notwithstanding the provisions of WAC 232-28-619, it is unlawful to violate the following provisions, provided that unless otherwise amended, all permanent rules remain in effect:

1. **Columbia River:**

   i. From Tower Island power lines in Bonneville Pool upstream to McNary Dam, plus Washington bank between Bonneville Dam and the Tower Island power lines located approximately 6 miles below The Dalles Dam (except for those waters closed under permanent regulations): Effective immediately through May 9, 2010, daily salmonid limit 6 fish, (hatchery Chinook or hatchery steelhead), of which no more than 2 can be adult Chinook salmon or hatchery steelhead or one of each. Release all wild Chinook.

   ii. Effective immediately through May 9, 2010: For the mainstem Columbia River salmon and steelhead fishery from the Rocky Point/Tongue Point line upstream to McNary Dam, it is unlawful when fishing from vessels which are less than 30 feet in length, substantiated by Coast Guard documentation or Marine Board registration, to totally remove from the water any salmon or steelhead required to be released.

R E P E A L E R S

The following section of the Washington Administrative Code is repealed effective May 8, 2010:

WAC 232-28-61900C  Exceptions to statewide rules—Columbia River. (10-97)

The following section of the Washington Administrative Code is repealed effective May 10, 2010:

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

## EMERGENCY RULE ONLY

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: (a) 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.

9 (b) That state or federal law or federal rule a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

**Reasons for this finding:** 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.

Closes the recreational salmon fishery from Bonneville Dam to McNary Dam prior to the May 30 scheduled closure date. Catch of Chinook in this area has met expectation. Removes the closure for salmon fishing in Deep River; upriver Chinook are not expected to stray in this area at this point in the run. Fisheries are being managed conservatively so as not to exceed the preseason guidelines. Regulation is consistent with guidance from Washington Fish and Wildlife Commission and Director, and Compact/Joint State Action of May 7, 2010. The fishery is consistent with the *U.S. v Oregon* Management Agreement and the associated Biological Opinion. There is insufficient time to adopt permanent rules.
**(10-106, 5/7/2010)**

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## Reasons for this finding: