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 10-237
☒ 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 provide for Treaty Indian 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 and federal law governing Washington's relationship with Oregon.

Citation of existing rules affected by this order:
Repealed: WAC 220-32-05100N
Amended: WAC 220-32-051
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); *Puget Sound Gillnetters Ass'n v. Moos,* 92 Wn.2d 939, 603 P.2d 819 (1979); State v. James, 72 Wn.2d 746, 435 P.2d 521 (1967); 40 Stat. 515 (Columbia River Compact).

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 10, 2010

NAME (TYPE OR PRINT)
Philip Anderson

SIGNATURE

TITLE
Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: September 10, 2010
TIME: 12:29 PM

WSR 10-19-038

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Federal rules or standards:	New	1	Amended	_____	Repealed	1
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

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

New	1	Amended	_____	Repealed	1

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

New	_____	Amended	_____	Repealed	_____

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 220-32-05100P Columbia River salmon seasons above Bonneville Dam. Notwithstanding the provisions of WAC 220-32-050, WAC 220-32-051, WAC 220-32-052, and WAC 220-32-058, effective immediately until further notice, it is unlawful for a person to take or possess salmon, steelhead, sturgeon, shad, walleye, carp, yellow perch, catfish or bass for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas (SMCRA) 1E, 1F, 1G, and 1H, and in the White Salmon River, Klickitat River, and Drano Lake, except as provided in the following subsections, and except that individuals possessing treaty fishing rights under the Yakama, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, walleye, shad, yellow perch, bass carp, or sturgeon under the following provisions, pursuant to lawfully enacted tribal rules and MOUs:

1. **Mainstem Columbia River above Bonneville Dam**
   a) SEASON: Immediately through 6:00 PM Saturday, September 11, 2010; and 6:00 AM September 13 to 6:00 PM September 17, 2010:

   b) AREA: Zone 6 (SMCRA 1F, 1G, 1H).
   c) SANCTUARIES: Small Spring Creek sanctuary (150-ft radius around the hatchery ladder).
   d) GEAR: Gillnets. No mesh restriction.

2. **Mainstem Columbia River above Bonneville Dam**
   a) SEASON: Immediately until further notice.
   b) AREA: Zone 6 (SMCRA 1F, 1G, 1H).
   c) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line.

3. **Columbia River Tributaries above Bonneville Dam**
   a) SEASON: Immediately until further notice, but only during those days and hours when the tributaries listed below are open under lawfully enacted Yakama Nation tribal subsistence fishery regulations for enrolled Yakama Nation members, and have openings or allow platform gear and sales of fish in Zone 6 (SMCRA 1F, 1G, 1H).

   b) AREA: Drano Lake, and White Salmon and Klickitat rivers.

   c) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line. Gill nets may only be used in Drano Lake (no mesh restriction, 150-foot length restriction).

4. **Mainstem Columbia River below Bonneville Dam**
   a) PARTICIPANTS: Tribal members may participate under the conditions described in the 2007 Memo of Agreement (MOA) with the Yakama Nation (YN), in the 2010 MOU (Memo of Understanding) with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the 2010 MOU with the Confederated Tribes of the Warm Spring Reservation (CTWS). Tribal members fishing below Bonneville Dam must carry an official tribal enrollment card.

   b) SEASON: Immediately until further notice, except closed Thursdays through Saturdays for the CTUIR and the CTWS when non-tribal salmon fishing is open in the MOU area. Sales allowed when platform gear and sales of fish are allowed in Zone 6 (SMCRA 1F, 1G, 1H).

c) AREA: SMCRA 1E, Yakama Nation MOA: 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). Umatilla and Warm Springs MOU: Covers the banks of the Columbia River bounded by a deadline marker on the Oregon bank approximately four miles downstream of Bonneville Dam Powerhouse #1 in a straight line thorough the western tip of Pierce Island, to a deadline marker on the Washington bank at Beacon Rock, up the river to a point 600 feet below the Bonneville Dam, but excluding the following four areas:

1. Between the markers located 150 feet upstream and 450 feet downstream from the mouth of Tanner Creek, out to the center of the Columbia river, during the period from August 16, 2010, until further notice.

2. Inside the south navigation lock at Bonneville Dam from a marker on the western-most tip of Robins Island to a marker on the Oregon mainland shore.

3. From Bradford Island below Bonneville Dam from the south shore between the dam and a line perpendicular to the shore marker at the west end of riprap.

4. From the north shore between the fishway entrance and a line perpendicular to the shoreline marker 850 feet downstream. From Robins Island below Bonneville Dam downstream to a line perpendicular to the shoreline marker on the mooring cell.

d) GEAR: Hoop nets, dip bag nets, and rod and reel with hook-and-line, consistent with tribal regulations.

5. SANCTUARIES: Standard river mouth and dam sanctuaries are applicable to these gear types, except that the small Spring Creek Hatchery sanctuary is in effect (150 ft radius around hatchery ladder).

6. ALLOWABLE SALES: Salmon, steelhead, walleye, shad, yellow perch, bass and carp. Sturgeon may not be sold. Sturgeon between 43-54 inches in fork length in The Dalles and John Day pools (SMCRA 1G, 1H) may be retained for subsistence. Sturgeon between 38-54 inches in fork length in the Bonneville pool (SMCRA 1F) may also be retained for subsistence. **Sturgeon caught below Bonneville Dam may NOT be retained and may NOT be sold.** Fish may not be sold on USACE Property below Bonneville Dam, but may be caught and transported off USACE Property for sale.

7. ADDITIONAL REGULATIONS: 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240.

R E P E A L E R

The following section of the Washington Administrative Code is repealed:

WAC 220-32-05100N	Columbia River salmon seasons above Bonneville Dam. (10-212)

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

(x) 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: Extends the weekly fishing period currently in place for 24 additional hours (through Sept. 11, 2010). Sets the fourth weekly commercial fishing period for fall season treaty gillnet fisheries. Continues to allow sales of fish caught in areas above and below Bonneville Dam with platform hook and line gear. Continues to allow sales of fish from Yakama Nation tributary fisheries. Based on current forecasts, adult fall Chinook and steelhead remain available for treaty Indian harvest. Impact limits to ESA-listed salmonids remain available for treaty Indian fisheries. Harvest is 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 10 and September 9, 2010. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

Regulations include fisheries that are described in the MOA between Washington State and the Yakama Nation. Regulations also include fisheries that are described in individual MOUs between Washington State and the Umatilla and Warm Springs tribes. 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 and Oregon 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 adopt permanent rules.

(10-237, 9/10/2010)