



RULE-MAKING ORDER

CR-103E (July 2011)
(Implements RCW 34.05.350)

Agency: Washington Department of Fish and Wildlife

Emergency Rule Only

Effective date of rule:

Emergency Rules 11-285

- Immediately upon filing.
- Later (specify) 6:00 p.m. October 26, 2011

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Repealed: WAC 220-32-05700D, WAC 220-32-05700E
 Amended: WAC 220-32-057
 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 year 2009, 2010, 2011, 2012, or 2013, 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: October 24, 2011

NAME (TYPE OR PRINT)

Philip Anderson

SIGNATURE

TITLE

Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: October 24, 2011

TIME: 4:34 PM

WSR 11-22-021

**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	<u>1</u>	Amended	_____	Repealed	<u>2</u>
Federal rules or standards:	New	<u>1</u>	Amended	_____	Repealed	<u>2</u>
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

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

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	<u>1</u>	Amended	_____	Repealed	<u>2</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	_____	Repealed	_____
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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	_____

NEW SECTION

WAC 220-32-05700E Columbia River sturgeon seasons above Bonneville Dam.

Notwithstanding the provisions of WAC 220-32-057, effective immediately, it is unlawful to take, fish for or possess sturgeon for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas 1F, 1G, and 1H, except that those individuals possessing treaty fishing rights under the Yakama, Warm Springs, Umatilla, and Nez Perce treaties may fish for sturgeon with set-line gear under the following provisions:

1. **Open period:** 6:00 p.m. October 26 through 6:00 p.m. October 31, 2011.
2. **Area:** SMCRA 1G, 1H
3. **Gear:** Set-lines. Fishers are encouraged to use circle hooks and avoid J-hooks. It is unlawful to use setline gear with more than 100 hooks per set-line, with hooks less than the minimum size of 9/0, with treble hooks, without visible buoys attached, and with buoys that do not specify operator and tribal identification.
Traditional platform and hook and line gear is also allowed, which includes hoop nets, dip bag nets, and rod and reel with hook and line gear.
4. **Allowable Sales:** Sturgeon caught in SMCRA 1G and 1H that are between 43 and 54 inches in fork length. Sturgeon within the size limits stated above, and caught in platform and hook and line fishery may be sold if caught during the open periods and area of the set-line fishery.
5. **Sanctuaries:** Standard sanctuaries applicable to these gear types. No Spring Cr. Sanctuary.
6. **Additional Regulations:** 24-hour quick reporting required for Washington wholesale dealers, pursuant to WAC 220-69-240.
7. **Miscellaneous:** It is unlawful to sell, barter, or attempt to sell or barter sturgeon eggs that have been removed from the body cavity of a sturgeon prior to sale of the sturgeon to a wholesale dealer licensed under chapter 75.28 RCW, or to sell or barter sturgeon eggs at retail. It is unlawful to deliver to a wholesale dealer licensed under chapter 75.28 RCW any sturgeon that are not in the round with the head and tail intact.

REPEALERS

The following section of the Washington Administrative Code is repealed effective 6:00 p.m. October 26, 2011:

WAC 220-32-05700D Columbia River sturgeon seasons above Bonneville.

The following section of the Washington Administrative Code is repealed effective 6:01 p.m. October 31, 2011:

WAC 220-32-05700E Columbia River sturgeon seasons above Bonneville.

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: Closes Bonneville Pool (SMCRA 1F) in the sturgeon set-line commercial treaty fishery in Zone 6, effective 6:00 p.m. October 26, as harvest is nearing the guideline for that area. SMCRA 1G and 1H remain open as scheduled through 6:00 p.m. October 31. Allows sales only of sturgeon, (including platform and hook and line). Sturgeon remain available for harvest based on the 2011 sturgeon guidelines. Conforms state rules to tribal rules. Consistent with Compact Action of October 24, 2011. There is insufficient time to promulgate permanent rules.

The Yakama, Warm Springs, Umatilla, and Nez Perce Indian Tribes have treaty fishing rights in the Columbia River and inherent sovereign authority to regulate their fisheries. Washington and Oregon also have some authority to regulate fishing by treaty Indians in the Columbia River, authority that the states exercise jointly under the Congressionally-ratified Columbia River Compact. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

The Tribes and the States adopt parallel regulations for Treaty Indian fisheries under the supervision of the federal courts. A court order sets the current parameters. *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 *United States v. Oregon Management Agreement* (Aug. 12, 2008) (Doc. No. 2546). Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal Endangered Species Act. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allow for some incidental take of these species in the fisheries as described in the 2008-2017 *U.S. v. Oregon Management Agreement*. Columbia River fisheries are monitored very closely to ensure consistency with court orders and 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.

(11-285, 10/24/2011)

