



RULE-MAKING ORDER EMERGENCY RULE ONLY

CR-103E (December 2017) (Implements RCW 34.05.350 and 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: July 25, 2019

TIME: 4:12 PM

WSR 19-16-016

Agency: Department of Fish and Wildlife (Order 19-167)

Effective date of rule:

Emergency Rules

- Immediately upon filing.
- Later (specify) 6 a.m. July 26, 2019

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 rules affected by this order:

- New:
- Repealed: WAC 220-359-02000I
- Amended: WAC 220-359-020
- Suspended:

Statutory authority for adoption: RCW 77.04.012, 77.04.020, 77.12.045 and 77.12.047

Other authority: *United States v. Oregon*, Civil No. 68-513-KI (D. Or.), Order Adopting 2018-2027 United States v. Oregon Management Agreement (February 26, 2018) (Doc. No. 2607-1). *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.

Reasons for this finding: This rule opens the tribal commercial setline fishery in John Day Pool. This rule is consistent with actions of the Columbia River Compact on June 12, June 27, and July 25, 2019. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

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 2018-2027 United States v. Oregon Management Agreement (February 26, 2018) (Doc. No. 2607-1). Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal Endangered Species Act. On February 23, 2018, 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 the fisheries as described in the 2018-2027 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. Sohapp, 302 F. Supp. at 912. WDFW and ODFW then adopt regulations reflecting agreements reached.

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	Amended	___	Repealed	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	Amended	___	Repealed	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

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

New	___	Amended	___	Repealed	___
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The number of sections adopted on the agency's own initiative:

New	<u>1</u>	Amended	___	Repealed	<u>1</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	___

Date Adopted: July 25, 2019

Name: Kelly Susewind

Title: Director

Signature:



NEW SECTION

WAC 220-359-02000J Columbia River salmon seasons above Bonneville Dam.

Notwithstanding the provisions of WAC 220-359-010, WAC 220-359-020, WAC 220-359-030, and WAC 220-359-090, it is unlawful for a person to take or possess salmon, steelhead, sturgeon, shad, carp, catfish, walleye, bass, or yellow perch taken for commercial purposes in Columbia River Salmon Management and Catch Reporting Areas 1F, 1G, and 1H. However, those individuals possessing treaty fishing rights under the Yakima, Warm Springs, Umatilla, and Nez Perce treaties may fish for salmon, steelhead, sturgeon, shad, carp, catfish, walleye, bass, or yellow perch under the following provisions:

(1) Open Areas: Zone 6 tributary fisheries

- (a) Season: 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
- (b) Gear: Hoop nets/bag nets, dip nets, and rod and reel with hook and line. Gillnets may be used only in Drano Lake
- (c) Allowable sale: Salmon (any species), steelhead, shad, carp, catfish, walleye, bass, and yellow perch. Sturgeon from 38 to 54 inches fork length in the Bonneville Pool may be kept for subsistence. Sales of fish are allowed after the open period concludes, as long as the fish were landed during the open period.

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

- (a) Season: Immediately through 11:59 PM July 31, 2019
- (b) Gear: Hoop nets/bag nets, dip nets, and rod and reel with hook and line.
- (c) Allowable sale: Salmon (any species), steelhead may be sold or kept for subsistence. Shad, yellow perch, bass, walleye, catfish and carp may also be sold or retained for subsistence. Sturgeon may not be sold, but sturgeon from 38 to 54 inches fork length in the Bonneville Pool and sturgeon from 43 to 54 inches fork length in The Dalles and John Day Pools and may be kept for subsistence purposes. Fish landed during the open periods are allowed to be sold after the period concludes.
- (d) Standard sanctuaries in place for this gear type, except the Spring Creek Hatchery sanctuary is not in effect.

(3) Open Area: SMCRA 1H (John Day Pool only)

- (a) Season: 6 AM Friday July 26 to 6 PM Saturday, August 17, 2019
- (b) Gear: Setline Gear. 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.
- (c) Allowable sale: Sturgeon from 43 to 54 inches fork length in the John Day Pool may be sold or kept for subsistence purposes. Sturgeon within the legal size limit and caught in the platform and hook and line fishery may only be sold if caught during the open period and open area of the set line fishery. Fish landed during the open periods are allowed to be sold after the period concludes.
- (d) Standard sanctuaries in place for this gear type.

(4) 24-hour quick reporting is required for Washington wholesale dealers for all areas as provided in WAC 220-352-315, except that all landings from treaty fisheries described above must be reported within 24-hours of completing the fish ticket (not 24-hours after the period concludes).

(5) Fish caught during the open period may be sold after the period concludes.

REPEALER

The following section of the Washington Administrative Code is repealed effective 6:00 a.m. July 26, 2019:

WAC 220-359-02000I Columbia River salmon seasons above Bonneville Dam. (19-146)

Reasons for this finding: This rule opens the tribal commercial setline fishery in John Day Pool. This rule is consistent with actions of the Columbia River Compact on June 12, June 27, and July 25, 2019. Conforms state rules with tribal rules. There is insufficient time to promulgate permanent regulations.

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 2018-2027 United States v. Oregon Management Agreement (February 26, 2018) (Doc. No. 2607-1). Some salmon and steelhead stocks in the Columbia River are listed as threatened or endangered under the federal Endangered Species Act. On February 23, 2018, 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 the fisheries as described in the 2018-2027 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. **(19-167, 7/25/2019)**