

**Personal Use Salmon during an Open Commercial Fishery**  
**Concise Explanatory Statement**



**March 28, 2018**

# Concise Explanatory Statement

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## Rules amended as part of this rulemaking:

WAC 220-354-030 Sale and purchase of commercial caught salmon.

## Rules repealed as part of this rulemaking:

None

## New rules as part of this rulemaking:

None

### 1. Background/Summary of Project:

Presently, commercial fisherman may take home a small part of their catch for personal consumption. Furthermore, all fish are accounted for on a commercial catch report, called a fish receiving ticket, regardless of how the catch is used (either sold or taken home for personal use). The information about fish taken for personal use is captured under a “take-home” provision printed on the fish receiving ticket itself. This is a sworn document.

Neither the current rule, nor the proposed amendment, change the commercial allocation of fishery resources between sectors. In other words, the normal commercial fishing season allocations, and regulation of time, place and manner of harvest, are unaffected by the take-home provision. Instead, the take-home provision simply acts to regulate the disposition of lawfully harvested commercial catch

During the summer of 2017, representatives of the commercial salmon troller industry asked the department for more clarification regarding the commercial

catch that can be possessed for personal use under the “take home” category. Confusion existed because the pre-existing regulation defined the amount of permissible take-home catch by reference to “one daily sport bag limit for the area being fished.” This would likely not be problematic if the commercial and recreational fisheries overlapped and were for the same species. Confusion arises where there is either no overlap in season, or recreational and commercial catch is for differing species. The take-home provision is intended only to regulate and define what portion of lawful commercial harvest may be possessed by a commercial harvester as “take-home.” It is not intended to modify what is permissible to harvest. Thus, under the rule as originally written, if a sport fishery was open for Chinook, a commercial harvester might think it was permissible to possess a take-home amount of Chinook salmon, even though commercial rules permitted only the harvest of coho salmon.

Long-standing confusion by officers and industry alike compelled the department to draft a regulation that would provide better guidance, so that individuals in the commercial fishing industry do not inadvertently violate the law. The proposal affects all commercial salmon sectors – trollers, gill netters, purse seiners, and reef net fishers and clarifies how many salmon, along with species type, that commercial fishers may take home for personal consumption during an open commercial fishery.

The current amendment to the rule reflected the department’s efforts to provide more clarity on a long-established industry practice. As amended, the rule makes clear that three salmon per landing and delivery may be possessed for take-home, clarifies that the take-home salmon must have been harvested consistent with the commercial fishery rules, specifies that the take-home limit applies to each crew member, and specifies that the take-home portion of the commercial harvest must be fully accounted for on a fish receiving ticket.

## **2. Reasons for adopting these rules:**

Based on requests from the commercial fishing industry and concerns within the Enforcement Program, the department needed to amend the rule to provide a more clear and concise rule related to this long-standing “take home” allowance. In addition, the new rule helps the department more

effectively enforce the regulation and provides commercial fishers a clear guideline to follow to avoid violating the rule.

### **3. Differences between the proposed rule and the rule as adopted:**

There were several slight and non-substantive differences between the proposed rules and the adopted rules, as follows:

- Change the word “retain” to “possess” at the beginning of (1)(a)
- Add the words “designated on the commercial fishing license” at the end of (1)(a)(i)
- Add the words “buyer or limited fish seller”, correct section “RCW 77.65.280” to “RCW 77.65.340”, add RCW section “77.15.510” and add word “buyers” in (1)(c)

### **4. Comments received during the official public comment period and as testimony received at the public hearing:**

Public comment was open until February 1, 2018. A public hearing was held on February 9, 2018 at the Natural Resource Building in Olympia, Washington where the public had been invited to comment based on the rule proposal filed on December 18, 2017.

Before the hearing, the department received a number of written comments in opposition to the rule. These comments focused on four arguments. The Department’s responses are summarized below:

1. Comment: Expressed belief that all fish caught in the course of a commercial fishery should be sold with none of the catch withheld for personal consumption.

Department response: Take-home of a portion of a fisherman’s catch is a long historical practice in the commercial fishing industry similar to a farmer taking food home. Similarly, the skipper of a commercial vessel has historically provided deck hands with a portion of the vessel catch as part of the payment for harvest work. Existing state statutes recognize that disposition of commercial harvest often involves “bartering” (here,

disposing of a portion of the catch for a crewmember's services). RCW 77.08.010(8) (definition of "commercial"); RCW 77.15.110 (Commercial conduct may include taking, delivering, selling, buying, or trading fish, seaweed, shellfish, or wildlife where there is present or future exchange of money, goods, or any valuable consideration.) The amendment simply clarifies an existing limit on this recognized and otherwise lawful practice.

2. Comment: Concern that industry members will get an unfair advantage in fish possession beyond what was allocated to the commercial fishery.

Department response: This measure does not increase or decrease harvest allocations for any sector. The portion of commercial harvest used for personal consumption is taken out of the commercial share. All fish must be recorded on commercial catch reports known as fish receiving tickets, even those taken home for personal consumption. .

3. Comment: Department lacks the statutory authority to pass the proposed rule, and/or that it violates constitutional principle, and thus has no authority to further amend or sustain it.

Department response: The rule amendment was reviewed by an Assistant Attorney General who concluded that the agency has the legal authority to create, enforce, and amend the rule. We summarize the legal evaluation as follows:

The constitutional claim was that the rule creates a special class of fishery participant or entitlement holder and is thus discriminatory. However, fishery rules often relate to specific classes of participants and regulate them in unique ways. So long as there is a rational basis for the different treatment of people, and no suspect class is involved, there is no constitutional problem with this. This regulation rationally limits the manner in which lawfully harvested salmon may be disposed.

The statutory claim is essentially that the regulation somehow impermissibly confuses personal use (e.g. sport or recreational) licensed fishing with commercial licensed fishing. It does not. The regulation simply limits the disposition of lawful commercial catch. Because there is no statutory limit on the disposition of commercial catch, absence of the

regulation would potentially allow unlimited take-home catch. Indeed, as noted above, existing statutes recognize that commercial disposition of catch often involves bartering – utilizing a portion of the catch in trade for services, such as the skipper or crewmembers’ harvest labor. While the regulation colloquially refers to the “personal” use of this take-home catch, that does not mean it was licensed or harvested as part of any personal use (recreational or sport) fishery. Indeed, the purpose of the regulatory amendment is to make clear that the take-home portion of commercial catch must have been lawfully harvested consistent with all commercial fishery regulations and licensing regimes.

4. Comment: The department should eliminate the “take home” provision all together to reduce controversy.

Department response: Crewmembers and operators in the commercial sector have been allowed to take home a limited amount of salmon for personal use for decades. Moreover, there is no statutory restriction on the manner in which a commercial harvester may dispose of lawful catch. Without the regulation in place, there would be no limit on take-home. Unlimited take-home could cause enforcement issues in terms of ensuring catch is accounted for properly and in terms of identifying whether large quantities of harvested fish that may be possessed in locations remote from a harvest vessel were lawfully harvested as part of a licensed commercial harvest operation.

Prior to amendment, the guiding rule was unclear relative amounts, species, and time, resulting in multiple interpretations.

At the public hearing on February 9, 2018, there were eight individuals at the hearing who offered support of the rule amendment. No testimony was offered in opposition.

On March 17, 2018, the Commission voted to adopt the amended rule including the revisions.