

NO. 45378-9-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

ROBERT SUDAR, CHRIS DOUMIT, JOHN HANSON, MICHAEL
WULLGER AND JIM LONG,

Appellants,

v.

WASHINGTON FISH AND WILDLIFE COMMISSION,

Respondent.

APPELLANTS' REPLY BRIEF

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ARGUMENT

The Washington Fish and Wildlife Commission (“Commission”) and Intervenor Coastal Conservation Association (“CCA”) argue that because the Commission’s “Columbia River Basin Salmon Management” policy, POL C-3620 (the “Commission Action”), does not contain the legally enforceable constraints it envisions, it is not challengeable as a rule. For the following reasons, the Court should not adopt this position.

A. RAP 10.3(a)(4) Issue Statement

The Commission and CCA are correct that Appellants Robert Sudar, Chris Doumit, John Hanson, Michael Wullger, and Jim Long’s (collectively, “Sudar”) Opening Brief did not contain an issue statement as required by RAP 10.3(a)(4). Since this appeal involves essentially one issue, however, neither party was prejudiced by Sudar’s failure to provide an issue statement.¹ The following issue pertains to Sudar’s assignment of error:

1. Where the Commission has adopted a new policy that is being implemented through a series of emergency regulations, many of which

are in effect for only several days, and which conform to the vision set forth in the policy, is the policy challengeable as a rule under the Administrative Procedures Act (“APA”)?

B. The Cases Relied on by the Commission are Factually Distinguishable

The Commission relies on a number of cases in which an administrative agency provided its interpretation of an existing law to argue that the Commission Action is not a rule. In each case, however, the agency was merely interpreting a statute, not creating a framework under which new laws would be enacted.

For example, in *Budget Rent A Car Corp. v. Dep’t of Licensing*, 144 Wn.2d 889, 31 P.3d 1174 (2001), the Department of Licensing interpreted certain language in RCW 46.87 *et seq.* to determine the proper application of the statute. In determining the statute’s scope, the Department “did not create any new standard, formula or requirement, but simply applied and interpreted the . . . IRP.”²

¹ *Union Elevator & Warehouse Co. v. State*, 144 Wn. App. 593, 601, 183 P.3d 1097 (2008) (“A reviewing court will waive technical violations of the appellate rules to reach the merits when the briefing makes the nature of the challenge clear, the violation is minor, there is no prejudice to the opposing party, and there is minimal inconvenience to the appellate court.”); *see also* RAP 1.2(a) (“[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances....”)

² *Budget*, 144 Wn.2d at 896.

In *Teamsters Local Union No. 117 v. Human Rights Comm'n*, 157 Wn. App. 44, 235 P.3d 858 (2010), the Department of Corrections requested an opinion letter from the Human Rights Commission (“HRC”) as to whether certain staffing practices violated the Washington Law Against Discrimination (WLAD), RCW 49.60 *et seq.* The challenged opinion letter issued by the HRC merely interpreted existing law, and did not establish or provide for the adoption of new regulations.

Finally, in *Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n*, 150 Wn.2d 612, 80 P.3d 608 (2003), the Washington State Public Disclosure Commission (“PDC”) issued guidelines interpreting RCW 42.17.130. The Court held that the guidance document issued by the PDC was “meant only to aid and assist in compliance with the law and does not purport to have the effect of law or regulation.”³

Here, the Commission Action does not interpret an existing statute but essentially creates new law through the detailed regulatory framework it establishes. Instead of a backward looking guidance document that merely interprets an existing statute, the Commission Action is a decidedly forward looking document that lays out a comprehensive future plan for the Columbia River salmon fishery. Furthermore, the agencies in *Teamsters* and *Washington Education Association* did not seek to enforce

the laws they were interpreting; thus, any application of the agencies' actions was purely speculative.⁴ Here, by contrast, the Department of Fish and Wildlife has adopted numerous emergency regulations enforcing the provisions of the Commission Action. Thus, the Commission Action has already been applied and its effects are not hypothetical or speculative. This Court should look past the comparisons drawn by the Commission and hold that the Commission Action is challengeable as a rule.

C. Denying Sudar's Appeal Would Mean There is no Practical Avenue by Which to Challenge the Commission Action

The Commission argues that emergency rules are subject to judicial review in the same manner as permanent rules.⁵ In support of this position, the Commission cites to a case in which a permanent fishery rule was reviewable under RCW 34.05.570(2)(c) despite the fact that the challenged rule had already been replaced.⁶ In support of the same argument, the CCA cites to *Price v. Price*, 174 Wn.App. 894, 301 P.3d

³ *Wash. Educ. Ass'n*, 150 Wn.2d at 621.

⁴ *Teamsters*, 157 Wn. App. at 49 (“the opinion letter addresses only academic or hypothetical application of the law...”); *Wash. Educ. Ass'n*, 150 Wn.2d at 622 (“[t]he guidelines are advisory and do not purport to be anything more. Moreover, there is no evidence indicating that the PDC acted to enforce the guidelines or regulate the WEA in any manner.”)

⁵ Brief of Respondent Fish and Wildlife Commission, p. 22, Brief of Respondent Coastal Conservation Association, p. 12, fn. 9.

486 (2013), where the court held that review of an expired civil anti-harassment order was not moot.⁷ Neither the Commission nor CCA cite to a case in which an emergency rule was reviewed under RCW 34.05.570(2)(c), however, and nothing in either of the cases cited above provides that an emergency rule is reviewable on the same grounds as a permanent rule.

Even if full judicial review were available on the Commission's emergency rules, judicial economy favors ruling on the merits of the Commission Action now. The Commission has clearly acted in conformance with the directives of the Commission Action in implementing its emergency rules. There is therefore little practical difference between the Commission Action and its implementing rules, and it would make little sense to require Sudar to bring a legal challenge to each and every emergency rule as it is adopted by the Department of Fish and Wildlife ("Department") in accordance with the directives of the Commission Action.

⁶ Brief of Respondent Fish and Wildlife Commission, p. 23 (*citing Puget Sound Harvesters Ass'n v. Dep't of Fish and Wildlife*, 157 Wn.App. 935, 239 P.3d 1140 (2010)).

⁷ Brief of CCA, p. 12-13, fn. 9.

CONCLUSION

The trial court erred in ruling that the Commission Action is not a rule under the APA. The effects of the Commission Action have already been felt by Sudar through the Department's adoption of emergency regulations, which follow the provisions set forth in the Commission Action closely. Accordingly, a justiciable controversy exists. This Court should overturn the trial court's decision and allow for review of the Commission Action on the merits.

DATED this 13 day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2014, a copy of the foregoing **Appellants' Reply Brief** was delivered at the following address via U.S. Mail and email.

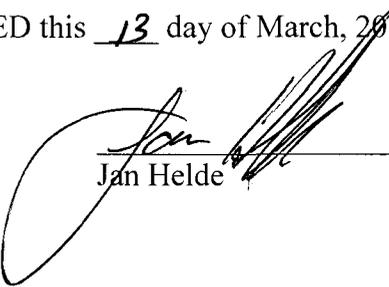
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