

NO. 45378-9

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

ROBERT SUDAR, a Washington resident; CHRIS DOUMIT, a
Washington resident; JOHN HANSON, a Washington resident;
MICHAEL WULLGER, a Washington resident; and JIM LONG, a
Washington resident,

Appellants,

v.

WASHINGTON FISH AND WILDLIFE COMMISSION,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR AND ISSUE STATEMENTS.....2

III. COUNTERSTATEMENT OF THE CASE3

IV. STANDARD OF REVIEW.....8

V. SUMMARY OF THE STATE’S ARGUMENT.....8

VI. ARGUMENT9

 A. The Commission Has Separate Policy and Rule-Making Functions.....10

 1. The Commission Has Policy Development Authority10

 2. The Commission Has Separate Rule-Making Authority That Is Often Delegated to the Director and Agency Staff.....11

 3. Rules Are Used to Implement Policy Where There Is a Need to Regulate the Conduct of Individual Citizens Outside the Agency11

 B. The Commission’s New Policy Is Not a Rule as That Term Is Defined in RCW 34.05.010(16); Accordingly, Policy C-3620 Is Not Reviewable Under the Provisions of RCW 34.05.570(2)14

 1. The Commission’s Policy Does Not Meet the APA Definition of What Constitutes a “Rule”14

 a. The Policy Does Not Establish, Alter, or Revoke Any Benefit Conferred by Law on Gillnetters.....15

 b. The Fact That Policy C-3620 Will Help Shape Implementing Rules That Ultimately Regulate

Gillnetters' Use of Salmon Harvesting Licenses Does Not Make the Policy a Rule	16
c. Case Law Supports the Conclusion That Agency Policy Is Not a Rule Where It Simply Guides Future Agency Action and Has No Legally Binding Regulatory Effect on Any Person Outside the Agency	18
C. Implementing Regulations Are Not Insulated From Review	22
VII. CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Budget Rent A Car Corp. v. Dep't of Licensing,</i> 144 Wn.2d 889, 31 P.3d 1174 (2001).....	19, 20
<i>Failor's Pharmacy v. Dep't of Soc. & Health Servs.,</i> 125 Wn.2d 488, 886 P.2d 147 (1994).....	19
<i>McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.,</i> 142 Wn.2d 316, 12 P.3d 144 (2000).....	20
<i>Puget Sound Harvesters Ass'n v. Wash. Dep't of Fish & Wildlife,</i> 157 Wn. App. 935, 239 P.3d 1140 (2010).....	11, 23
<i>Salmon For All v. Dep't of Fisheries,</i> 118 Wn.2d 270, 821 P.2d 1211 (1992).....	10
<i>State v. Straka,</i> 116 Wn.2d 859, 810 P.2d 888 (1991).....	18
<i>Tacoma News, Inc. v. Cayce,</i> 172 Wn.2d 58, 256 P.3d 1179 (2011).....	23
<i>Teamsters Local Union No. 117 v. Human Rights Comm'n.,</i> 157 Wn. App. 44, 235 P.3d 858 (2010).....	21
<i>Wash. Educ. Ass'n v. Pub. Disclosure Comm'n.,</i> 150 Wn.2d 612, 80 P.3d 608 (2003).....	9, 20, 21

Statutes

RCW 34.05	passim
RCW 34.05.010(16).....	8, 14, 19
RCW 34.05.010(16)(a)-(e).....	18
RCW 34.05.010(16)(e)	2

RCW 34.05.350(3).....	22
RCW 34.05.375	14
RCW 34.05.570(2).....	passim
RCW 34.05.570(2)(c)	2, 3, 22
RCW 77.04.012	17
RCW 77.04.013	10
RCW 77.04.020	10, 11
RCW 77.04.055(1).....	10
RCW 77.04.055(2).....	11
RCW 77.04.055(3).....	11
RCW 77.04.055(5).....	11
RCW 77.04.090	11
RCW 77.04.130	11
RCW 77.04.130(3).....	11

Rules

CR 12(b)(6).....	8
OAR 635-500-6765	4
RAP 10.3(a)(4).....	2

Regulations

WAC 232-28-619.....	6
WAC 232-28-61900U.....	6

WSR 13-16-055	6
WSR 13-17-010	3
WSR 13-20-021	6

I. INTRODUCTION

Appellants (hereinafter “Gillnetters”) seek review of a superior court decision dismissing their petition for declaratory relief challenging a policy adopted by the Washington Fish and Wildlife Commission. Policy C-3620¹ guides the Department’s adoption of rules that regulate harvesting of Columbia River salmon. While Gillnetters assert their appeal stems from the “*implementation* of a new regulatory scheme for the harvest of salmon” (emphasis supplied), Appellants’ Brief, page 1, they did not seek review of any implementing regulation. Instead, they challenged only the policy guidance of the Commission. The policy is Commission direction to the agency Director and staff to consider outlined objectives and implement them progressively over time as facts develop, with room for adaption to deal with an uncertain future.

The vision set forth in the Commission’s policy is admittedly bold and signals a new direction for Columbia River salmon harvest. Gillnetters clearly dislike the new policy direction. But rather than waiting to see how the policy will be implemented with actual rules that affect them with seasons and other legally binding constraints on their fishing activity, they characterized the policy as a “rule” and sought to have it invalidated as arbitrary and capricious agency rule-making

¹ Policy C-3620 is attached as Appendix A; *see also* CP 27-42.

pursuant to RCW 34.05.570(2) of the Administrative Procedures Act (APA) which facilitates review of agency rules.

The superior court dismissed Gillnetters' rule-making challenge because the APA does not provide for judicial review of agency policies. This Court should affirm for the same reason.

II. ASSIGNMENT OF ERROR AND ISSUE STATEMENTS

Gillnetters assign error to the superior court's conclusion of law that Policy C-3620 is not a reviewable "rule" for purposes of RCW 34.05.570(2)(c). Gillnetters provide no corresponding issue statement(s) as required by RAP 10.3(a)(4). The following issues pertain to the assignment of error:

1. When an agency adopts a policy that articulates a vision for future management of state fishery resources, directs agency staff to implement this policy over time with future regulations, and further specifies that adaptive management should be employed so that implementing actions, including rules, are based upon emerging facts critical to the attainment of stated policy objectives, is that policy itself a "rule" as contemplated by RCW 34.05.010(16)(e)?

2. When an agency adopts a policy with no binding regulatory effect on any individual citizen, is there a justiciable controversy pursuant

to RCW 34.05.570(2)(c) which provides only for judicial review of agency rule-making?

III. COUNTERSTATEMENT OF THE CASE

On January 12, 2013, the Commission adopted a policy entitled “Columbia River Basin Salmon Management” (designated as “Policy Number C-3620”) (App. A).² The policy was not adopted using rule-making procedures. It was filed with the Code Reviser as a policy statement. *See* WSR 13-17-010 (App. A).

Policy C-3620 reflects a new vision for salmon management on the Columbia River. The policy is the Commission’s written guidance to the Director of the Department of Fish and Wildlife and agency staff who undertake the actual management of Columbia River salmon. It replaces two prior policy statements adopted in 2009 and 2011.³

The Commission’s policy was developed after a series of public meetings by the Commission, preceded by public meetings of a working group of representatives from both the Commission and its counterpart in Oregon.⁴ It is undisputed that the Gillnetters had the opportunity to participate in these public processes. The working group made recommendations to both state commissions on November 21, 2012.

² CP 27-42.

³ The superseded policies are found at Appendix B; CP 63-67.

⁴ http://wdfw.wa.gov/conservation/fisheries/lower_columbia. Last visited February 14, 2014.

Oregon adopted the working group’s policy recommendations with a set of implementing regulations.⁵ Washington followed a different path consistent with its usual practice of providing policy guidance to the Director. The Director then works with agency staff to implement outlined policy objectives through Washington’s rule-making process based upon facts and circumstances that exist at the time each new implementing rule is adopted.⁶

Washington’s Policy C-3620 sets a presumptive path forward for future salmon management, in some cases with identified targets. The policy identifies evolving allocation objectives for various runs of salmon,⁷ provides direction to move commercial gillnets out of the main stem of the Columbia River into side channel areas⁸ and focus recreation fishing in the main stem river,⁹ calls for the enhancement of commercial fishing opportunities in side channel river areas,¹⁰ and instructs staff to explore the use of alternate forms of commercial gear,¹¹ together with other broad objectives.

⁵ OAR 635-500-6765.

⁶ App. A, Policy at 3-5; CP 29-31.

⁷ Seven runs of fish are discussed in pages 5 to 10 of the new policy (Appendix A), with the presumptive allocation objectives summarized in Tables A through E. CP 31-36; CP 38-42.

⁸ *See, e.g.*, App. A, Guiding Principles 7 & 8 on page 2 of the policy; CP 28.

⁹ *Id.*

¹⁰ *See, e.g.*, App. A, Guiding Principle 10 on page 3 of the policy; CP 29.

¹¹ *See, e.g.*, App. A, Guiding Principle 9 on page 2-3 of the policy; CP 28-29.

Policy C-3620 expressly contemplates that its management vision will become manifest only with future implementing regulations. It delegates to the Director and agency staff the authority and responsibility to adopt such implementing regulations.¹²

The policy also recognizes that the presumptive path forward, and future development of implementing regulations, depend upon future factors that, while anticipated, must be evaluated going forward (the success of alternate gear types and the success of side channel enhancement projects, to name just a few). This uncertainty is acknowledged by Policy C-3620¹³ and accommodated by an Adaptive Management section.¹⁴ These portions of the policy envision that future implementing regulations may need to deviate from the presumptive path based upon information that is developed over time. The policy envisions that agency staff may need to come back to the Commission for a review of options prior to adopting implementing rules that set seasons and otherwise constrain fishing activity by licensed harvesters.¹⁵

The process used by the Department to develop fishing rules that implement Commission policies for Columbia River salmon management is described in the Declaration of Jim Scott – Assistant Director for Fish

¹² App. A, Policy at 11; CP 37.

¹³ App. A, Policy at 1; CP 27.

¹⁴ App. A, Policy at 10-11; CP 36-37.

¹⁵ *Id.*

Programs.¹⁶ In summary, Columbia River salmon fisheries are regulated by a series of emergency and permanent rules adopted each year in consultation with the State of Oregon, tribal co-managers, and federal fishery managers.¹⁷ Given the many complexities of managing a resource that is unpredictable, available for harvest for only a short time, and subject to multiple management jurisdictions, the rules regulating both commercial and recreational harvesting activity are often short-term emergency rules.¹⁸ However, some aspects of the policy – for example the barbless hook initiative and some seasons set for recreational harvest – are implemented with “permanent” rules.¹⁹

Nevertheless, the rule-making process is intensive with substantial input from harvest groups and other interested parties. The interstate Compact between Oregon and Washington, ratified by Congress in 1918, provides a forum in which to coordinate and consider rule adoption for Columbia River fisheries (the Compact Process).²⁰

This use of both permanent and emergency rules, vetted through the Compact Process and promulgated via APA rule-making procedures,

¹⁶ Scott Decl. at 5-7; CP 370-72.

¹⁷ Scott Decl. at 2-4; CP 367-69.

¹⁸ Scott Decl. at 8-10; CP 373-75.

¹⁹ The barbless hook initiative described on page 5 of Policy C-3620 (Appendix A; *see also* CP 31) was adopted as a regulatory requirement with binding effect on recreational harvesters first as an emergency rule, WSR 13-16-055, WAC 232-28-61900U, and then as a “permanent” regulation in WSR 13-20-021, amending WAC 232-28-619. Scott Decl. at 2; CP 367.

²⁰ Scott Decl. at 3-6; CP 368-71.

is the same regulatory framework that was used to implement preceding Columbia River salmon management policies of the Commission.²¹ It is the manner in which Policy C-3620 will be implemented,²² and there is nothing new in this regard.

Gillnetters did not identify and challenge any implementing rule in their petition seeking declaratory relief.²³ Rather, in response to the Commission's motion to dismiss their rule-making challenge, Gillnetters asserted that Policy C-3620 is affecting them "through binding rules adopted by the WDFW in accordance with the [policy]."²⁴ They referred to "Action Notices" and "Fact Sheets" that "implement [the policy's] guidance."²⁵ Those documents are pre-decisional briefing papers presented to fishery managers during the Compact Process.²⁶ Promulgated rules, developed using APA rule-making procedures, follow from management decisions made during the Compact Process, informed by the "Action Notices," "Fact Sheets," and public deliberations that provide a rule-making record.²⁷

²¹ See, e.g., App. B, preceding Policy C-3617 at 2, CP 64; Scott Decl. at 2, CP 367.

²² App. A, Policy at 11; CP 37.

²³ Gillnetters' Petition for Judicial Review of Administrative Rules (hereinafter "Petition"); CP 4-9.

²⁴ *Id.*

²⁵ Gillnetters' Resp. Br. at 2; CP 89.

²⁶ Scott Decl. at 5-6; CP 370-71.

²⁷ *Id.*

Mr. Scott's declaration describes the various implementing regulations that had been promulgated by Washington State at the time of the Commission's motion to dismiss Gillnetters' rule challenge.²⁸

None of those implementing rules were challenged by Gillnetters' petition for declaratory relief seeking invalidation of Policy C-3620.²⁹

IV. STANDARD OF REVIEW

This Court reviews *de novo* a superior court's order granting a motion to dismiss pursuant to CR 12(b)(6).

V. SUMMARY OF THE STATE'S ARGUMENT

The APA defines what constitutes a rule and does so in the context of agency actions that produce legally enforceable consequences. *See* RCW 34.05.010(16). It also provides for judicial review of agency *rules*. *See* RCW 34.05.570(2). Gillnetters are not entitled to judicial review of Policy C-3620 pursuant to RCW 34.05.570(2) because that policy is not a rule under the plain language of the statute – the policy provides guidance to the Department but has no independent regulatory effect on individual licensed salmon harvesters, either commercial or recreational.

In this regard, Washington's courts have been clear that there is no justiciable controversy over the formulation of policy objectives outside of

²⁸ Scott Decl. at 7-10 (CP 372-75), together with the actual implementing rules provided as attachments (CP 376-435).

²⁹ Petition; CP 4-9.

the context of a specific rule because policy statements alone “have no legal or regulatory effect.” *Wash. Educ. Ass’n v. Pub. Disclosure Comm’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003).

Gillnetters now acknowledge that Policy C-3620 is being implemented through promulgated rules – “the vision outlined in the Commission Action has been given legally binding effect through a series of emergency regulations promulgated by the [Department].” Appellants’ Br. at 2. This characterization of the Department’s policy and rule-making activity tacitly concedes the reasoning of the Superior Court in its dismissal of their rule-making challenge – rules have legal binding effects on a regulated community of individuals; policy statements do not.

Gillnetters’ fallback position asserts that the regulatory effects they will ultimately experience through implementing regulations will be unreviewable because transitory emergency rules are often utilized. On that basis, they argue the policy should be considered a rule to facilitate review pursuant to RCW 34.05.570(2). Aside from constituting an impermissible re-write of the APA, this position fails because emergency rules are *not* exempt from judicial review under the APA.

VI. ARGUMENT

This brief begins with a description of the separate policy and rule-making functions performed by the Department through the Commission,

its Director, and agency staff. The brief then explains why Policy C-3620 is not a “rule” as that term is identified in the APA – the policy describes and guides future management but has no regulatory effect. Accordingly, it is not subject to judicial review as a “rule” pursuant to RCW 34.05.570(2). Finally, the brief refutes Gillnetters’ assertion that it would be appropriate to re-characterize Policy C-3620 as a “rule” because some of the Department’s implementing rules – e.g., emergency rules establishing commercial seasons – are transitory. Emergency rules are fully capable of being reviewed pursuant to RCW 34.05.570(2).

A. The Commission Has Separate Policy and Rule-Making Functions

The Washington State Department of Fish and Wildlife is comprised of a nine-member Commission and an agency Director. RCW 77.04.020.

1. The Commission Has Policy Development Authority

One of the functions of the Commission is to develop policies that will guide the Department in its management of state resources. *See* RCW 77.04.013 and RCW 77.04.055(1). For example, aside from the policy at issue here, the Commission adopted the North of Falcon (NOF) policy that guides the agency’s work in establishing the non-Indian share of fish available for harvest by license holders like Gillnetters. *See, e.g., Salmon For All v. Dep’t of Fisheries*, 118 Wn.2d 270, 274, 821 P.2d 1211 (1992) (describing the NOF process and resulting rules for Columbia

fisheries that flow from this process); *Puget Sound Harvesters Ass'n v. Wash. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 938, 239 P.3d 1140 (2010). Like the policy at issue here, the NOF policy was not adopted as a rule because its sole function is to guide Department staff in their management of state resources.³⁰ And like the policy at issue here, any impact ultimately felt by licensed harvesters occurs through implementing fishery regulations. The same was true for the preceding Columbia River salmon management policies superseded by Policy C-3620.³¹

2. The Commission Has Separate Rule-Making Authority That Is Often Delegated to the Director and Agency Staff

Separate from its policy development authority, the Commission has authority to adopt rules regulating the harvest of fish and wildlife resources. *See* RCW 77.04.055(2), (3), and (5). Commission rules must be adopted pursuant to the provisions of the APA – RCW 77.04.130 – and require the approval of a majority of the Commissioners – RCW 77.04.090. The Commission may also delegate its rule-making function to the Director pursuant to RCW 77.04.020, or to Department employees pursuant to RCW 77.04.130(3).

3. Rules Are Used to Implement Policy Where There Is a Need to Regulate the Conduct of Individual Citizens Outside the Agency

These distinct rule- and policy-making functions work in a complementary manner. Policy sets a general management direction for

³⁰ App. B, NOF Policy C-3608; CP 60-61.

³¹ App. B, Policies C-3617 and C-3618; CP 63-67.

the agency; it is a vision statement for management of the fishery resource. Rule adoption is the tool used to implement policy objectives where there is a need to regulate the conduct of persons outside the agency with binding effect.

With respect to Policy C-3620, the implementation of its objectives occurs in two ways. The policy acts as a guide for Department staff to dedicate agency resources necessary to the attainment of objectives that do not necessarily require implementing rules (e.g., directing Department staff to “[c]ontinue leadership on fish recovery actions,” or work with Columbia River tribes to meet “subsistence and ceremonial needs” – App. A, Policy at 2).

Future salmon harvest by licensed harvesters will also be shaped by the policy (e.g., “transition gill net use to off-channel areas” – App. A, Policy at 2). However, the exact manner in which that shaping will occur remains uncertain because factors critical to the implementation of the policy are a work in progress and need to be considered as they develop. This is reflected in the adaptive management principles that allow for deviations in the implementation of Policy C-3620. Most importantly, actual control of salmon harvest by licensed fishers can only be undertaken through implementing regulations – both permanent and emergency – that govern the time, place, manner, and/or amount of fishing, with sanctions for any violation of those rules.

Policy C-3620 was not adopted as a regulation under the rule-making provisions of the APA – RCW 34.05, Part III – because it is not

intended to act as a directive of general applicability with binding regulatory effect on individual licensed harvesters, either commercial or recreational. Instead, Policy C-3620 outlines a long-term vision for management of Columbia River salmon. It delegates to the Director and his staff the task of implementing that vision with rules that do have binding effect. Gillnetters now acknowledge this reality – that any legally binding effect on fishers comes only with the adoption of implementing regulations. Appellants’ Br. at 2.

This approach reflects the Commission’s determination that its new vision for Columbia River salmon management needs to be implemented gradually with room for flexibility, rather than mandating objectives by rule from the outset. For example, the opening General Policy Statement makes clear that the policy “provides the Department a cohesive set of guiding principles and a *progressive series of actions* to improve management of salmon in the Columbia River Basin.” App. A, Policy at 1 (emphasis supplied). The envisioned policy objectives “will be evaluated and, as appropriate, progressively implemented in a transitional period occurring from 2013 through 2016.” *Id.*

Furthermore, while Policy C-3620 sets a presumptive path forward for the management of Columbia River salmon fisheries, it recognizes uncertainty about that path forward. This uncertainty is acknowledged in the General Policy Statement, page 1, and accommodated by an Adaptive Management section – App. A, Policy at 10-11. Policy C-3620 envisions that future implementing regulations may need to deviate from the

presumptive path based upon information that is developed over time. In that case, the policy anticipates that agency staff may come back to the Commission for a review of options prior to adopting implementing rules.

These elements of Policy C-3620 are important to the legal issue at stake here because they lie at the core of what distinguishes rule-making activity and policy formulation. Policy statements may describe a vision of future management but they do not produce binding constraints on a regulated community.

B. The Commission’s New Policy Is Not a Rule as That Term Is Defined in RCW 34.05.010(16); Accordingly, Policy C-3620 Is Not Reviewable Under the Provisions of RCW 34.05.570(2)

Gillnetters’ characterization of Policy C-3620 as a “rule” and/or “regulation” fails because it does not meet the APA definition of a “rule” and has no binding regulatory effect on any member of the public.³²

1. The Commission’s Policy Does Not Meet the APA Definition of What Constitutes a “Rule”

The APA provides a specific set of parameters that must be present in order for an agency’s directives to be considered a “rule.” RCW 34.05.010(16) provides that:

“Rule” means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which

³² The Commission concedes that the policy was not adopted as a rule pursuant to the rule-making procedures of the APA. Indeed, if the agency is incorrect in its position that the policy is a not rule, the policy/rule would be invalid on its face without regard to the infirmities alleged by Gillnetters because all “rules” must be adopted in substantial compliance with the formal rule-making procedures of the APA. *See* RCW 34.05.375.

establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

Thus, in order for Gillnetters' petition to state a cause of action for judicial review of administrative rule-making pursuant to RCW 34.05.570(2), the challenged policy would have to be a pronouncement of general applicability and produce one of the five listed regulatory outcomes. Policy C-3620 meets none of these criteria. The policy is a directive to agency staff, not the public. Furthermore, the policy has none of the regulatory effects enumerated in the definition of a "rule."

a. The Policy Does Not Establish, Alter, or Revoke Any Benefit Conferred by Law on Gillnetters

Gillnetters claim that Policy C-3620 establishes, alters, or revokes qualifications or requirements relating to the enjoyment of benefits or privileges conferred by law – specially that it affects their licenses to harvest salmon. While Gillnetters may have salmon harvesting licenses, nothing in Policy C-3620 precludes their continued use of those licenses.

The policy is simply a guidance document for agency staff tasked with the promulgation of future rules that will regulate licensed harvesters

in the future when engaged in harvesting activity. Gillnetters acknowledge as much when they concede that regulations implementing the policy are what produce any regulatory effect. Appellants' Br. at 2.

b. The Fact That Policy C-3620 Will Help Shape Implementing Rules That Ultimately Regulate Gillnetters' Use of Salmon Harvesting Licenses Does Not Make the Policy a Rule

Gillnetters argue that Policy C-3620 provides direction to agency staff who will promulgate implementing rules and that this direction will ultimately affect their interests. That may be true, but the fact remains that it is the implementing rules, not the policy, that produce a regulatory effect. Moreover, even in this attenuated sense of producing some effect, the policy statements and its objectives cannot be said to produce *certain* regulatory outcomes.

First, and most significantly, the policy itself has no legally enforceable regulatory effect on Gillnetters. Second, because implementation of the envisioned policy is dependent upon future facts, the policy embraces flexible and adaptive approaches to the promulgation of any implementing regulations. The policy describes a path forward (including elements that address preferred gear, places of fishing, and harvest allocations), but the policy is very clear that it describes only a presumptive path and delegates to staff the task of adopting implementing rules as needed, informed by future fact-finding.

Moreover, the policy makes clear that implementation of the preferred path is uncertain and dependent upon future facts. The policy

expressly allows for deviations from the presumptive path via adaptive management as these future facts develop. Indeed, the declaration of Jim Scott describes ways in which the implementing regulations have already deviated from the policy's presumptive path.³³

Accordingly, Gillnetters simply cannot say what the policy will definitively produce outside of the context of an implementing regulation that is actually promulgated. The Commission's policy is a "vision," a term even Gillnetters use when describing Policy C-3620. Appellants' Br. at 2. Without implementing regulations, the policy itself imposes no concrete qualifications on any resource utilization expectation Gillnetters envision they may obtain through the use of a fishing license.

The significance of this point becomes clear by examining the basis upon which Gillnetters sought to challenge Policy C-3620 as an invalid "rule." In their petition for declaratory relief, Gillnetters alleged that the "Commission exceeded its statutory authority under RCW 77.04.012 by adopting a rule that conflicts with the Commission's statutory mandate to maintain a stable fishing industry in the state."³⁴ One of their claims is that the anticipated economic effects of moving commercial harvesters into side channels does not square with the mandate in RCW 77.04.012 to "maintain the economic well being and stability of the fishing industry." But that kind of claim is not appropriately evaluated based solely upon a management vision without

³³ Scott Decl. at 7-9; CP 372-74.

³⁴ Petition at 4; CP 7.

the benefit of implementing regulations. Indeed, the policy envisions that implementing regulations need to be promulgated based upon an evaluation of steps actually undertaken to put into place all of the pieces that may be necessary and based upon future economic conditions as they develop. Simply put, it isn't possible to definitively gauge the effect that a flexible and adaptive salmon management vision will have on a group of fishers outside the context of an actual rule implementing that policy – a rule promulgated based upon contemporary facts that are evaluated and discussed in the rule-making process.

c. Case Law Supports the Conclusion That Agency Policy Is Not a Rule Where It Simply Guides Future Agency Action and Has No Legally Binding Regulatory Effect on Any Person Outside the Agency

An agency order or directive will only be considered a “rule” if it clearly fits within one of the five categories of agency action specified in RCW 34.05.010(16)(a)-(e). *See State v. Straka*, 116 Wn.2d 859, 868, 810 P.2d 888 (1991) (rejecting a claim that the APA definition of what constitutes a rule can be liberally construed beyond the plain meaning in the statutory definition). Agency directives that express a policy determination, but that do not subject any person to sanctions, do not condition the ability to obtain a legally conferred benefit, and do not condition the ability to obtain or hold a commercial license, are not rules. *Id.* Accordingly, such agency policies are not subject to challenge under RCW 34.05.570(2).

Washington’s courts have affirmed that policy disputes are not justiciable as a rule challenge pursuant to RCW 34.05.570(2). *See Budget Rent A Car Corp. v. Dep’t of Licensing*, 144 Wn.2d 889, 895-96, 31 P.3d 1174 (2001) (reaffirming that an agency directive will only be considered a “rule” if it meets one of the five criteria established in the APA’s definition of a rule – RCW 34.05.010(16)).

Budget Rent A Car is helpful here because it distinguishes between agency actions that simply reflect policy determination (for which rule-making is not required under the APA) and those determinations that have the effect of a rule even if not characterized as such by the agency. The *Budget Rent A Car* court considered whether an agency policy – establishing a standard used to identify the percentage of a rental car company’s fleet of vehicles that must be registered pursuant to a state law requiring such registration – constituted actual rule-making activity. Because the agency’s directive did not add any qualifications to the statutory basis for ascertaining required registrations, it did not constitute a rule. *Id.* at 896-98.

In reaching this conclusion, the *Budget Rent A Car* court examined prior case law distinguishing between those cases where the adoption of a policy goes too far and constitutes invalid covert rule-making (*see, e.g., Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994)) and those cases where the agency policy has no regulatory effect, is not a rule, and thus not subject to a rule-making challenge (*see, e.g., McGee Guest Home, Inc. v. Dep’t of Soc. & Health*

Servs., 142 Wn.2d 316, 12 P.3d 144 (2000)). *Budget Rent A Car* makes clear that an agency's policy, adopted without any rule-making, is subject to challenge only when it imposes some independent regulatory mechanism that operates with the force of law. *Id.* at 897-98.

Here the Commission's policy has no regulatory effect of general applicability to members of the public, including Gillnetters. It does not regulate the time, manner, and method of fishing and it does not subject anyone to sanctions for failing to fish in any particular manner. Those kinds of time, manner, and place restrictions that provide and govern actual fishing opportunity are matters left to the Department staff charged with promulgating rules based upon facts that develop over time. Nor does the policy qualify or restrict any benefit conferred by law or the ability to hold or obtain a commercial fishing license. While the policy identifies a presumptive path for the management of fishing activity on the Columbia River, the implementing regulations that are developed for each future fishing season may vary from this presumptive path based upon the evaluation of facts relevant to attainment of the policy's objectives as they develop over time.

In *Washington Education Association*, the Supreme Court concluded that policy statements establishing how an agency will interpret and apply the law when taking action on matters that come before the agency are not a rule. *Wash. Educ. Ass'n*, 150 Wn.2d at 619-20. The opinion in *Washington Education Association* dealt with a policy directing the agency's interpretation and application of law rather than the

management of natural resources. Nevertheless, the basis for the court's holding applies with equal force where a policy simply acts to guide the agency in its resource management, rather than imposing new regulatory burdens on the public. In those circumstances, there is "no need for formal [rule-making] procedures because such advisory statements have no legal or regulatory effect." *Id.* at 619. Thus, where an agency's policies do not directly affect the legal interests of an individual and have no regulatory effect, there is no justiciable controversy. *Id.* at 623.

The same is true here. The Commission's policy directive contains no legally enforceable constraints on Gillnetters' ability to procure a fishing license and no legally enforceable constraints on the manner in which they may use a fishing license in the future. The challenged policy does not open any fishery, places no enforceable limits on any fisher, and subjects no one to legal sanctions for failing to conform to the policy. Constraints on Gillnetters' ability to fish become manifest only when implementing regulations are adopted.

Furthermore, because implementing regulations may deviate from the presumptive path set forth in the policy, any future regulatory effect remains speculative until such regulations are actually promulgated. There is no justiciable controversy that may be alleged by speculating how the policy may be implemented. *Accord Teamsters Local Union No. 117 v. Human Rights Comm'n.*, 157 Wn. App. 44, 48-49, 235 P.3d 858 (2010) (concluding that, under the APA, agencies are encouraged to advise the public of its current opinions, approaches, and likely courses of action by

means of interpretive or policy statements, but policy statements do not give rise to a justiciable controversy where they have no legally binding or regulatory effect).

C. Implementing Regulations Are Not Insulated From Review

In order to avoid the undeniable conclusion that Policy C-3620 itself produces no regulatory effect and is thus not a rule, Gillnetters argue that the Department's use of emergency rules are unreviewable except in a narrow procedural sense. On that basis, they urge this Court to consider the policy a "rule," notwithstanding the absence of any independent regulatory effect. That argument is legally incorrect.

RCW 34.05.350(3) provides one means to challenge emergency regulations – a petition to the Governor asserting that the rule is not really the product of emergent circumstances. However, that is not the exclusive means for challenging the substance of an emergency rule. Nothing in RCW 34.05.350(3) specifies that it limits the scope of judicial review of emergency rules and nothing in RCW 34.05.570(2)(c) limits judicial review to permanent as opposed to emergency rules.

Emergency rules do have a limited lifespan, both as a matter of law and as applied by the Department in practice when formulating fishing seasons. However, that does not mean they are necessarily insulated from judicial review on the basis that the justiciable controversy is mooted by expiration of the rule. Courts apply the principle of mootness with some flexibility so justiciable controversies with significant public interest that

are capable of repetition do not avoid review. *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 64, 256 P.3d 1179 (2011).

Furthermore, even so-called “permanent” rules are often transitory in the world of fishery management as they are replaced or amended from season to season. Despite this impermanent nature, courts are capable of reviewing their validity pursuant to RCW 34.05.570(2). *See, e.g., Puget Sound Harvesters Ass'n*, 157 Wn. App. 935, in which the superior court invalidated a July 2008 fishery rule that had already been replaced by the time the court undertook its review nearly a year later. The superior court invalidated the Department’s rule even though it was “technically moot.” *Id.* at 944. This Court then conducted appellate review and affirmed the superior court’s ruling in 2010. *Id.* at 938.

Requiring Gillnetters to focus on an actual rule implementing Policy C-3620 is consistent with the terms of the APA. Furthermore, remaining faithful to the review provisions of the APA is consistent with prior case law holding that disputes over policy statements alone do not present a justiciable controversy. Because Policy C-3620 is a “vision,” and because that vision itself recognizes potentially divergent implementation pathways, requiring Gillnetters to seek judicial review under RCW 34.05.570(2) based upon an actual rule ensures that the reviewing court will have a rule-making record in which to evaluate actual regulatory effects. In contrast, Gillnetters’ argument that Policy C-3620 should be treated as a rule to facilitate their challenge to the vision itself requires a reviewing court to second guess policy determinations

untethered to any specific factual scenario or any specific regulatory consequence.

VII. CONCLUSION

Because Policy C-3620 is not a “rule” as defined in the APA, the trial court properly dismissed Gillnetters’ rule-making challenge under RCW 34.05.570(2). In addition, there is no justiciable controversy because the policy is not legally enforceable. Accordingly, the Commission respectfully asks this Court to affirm the superior court’s dismissal of Gillnetters’ petition for declaratory relief seeking to invalidate Policy C-3620.

RESPECTFULLY SUBMITTED this 14th day of February, 2014.

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Appendix A

WSR 13-17-010
POLICY STATEMENT
DEPARTMENT OF
FISH AND WILDLIFE

[Filed August 8, 2013, 9:30 a.m.]

NOTICE OF ADOPTION OF A POLICY STATEMENT

Title of Policy Statement: Columbia River Basin Salmon Management (C3620).

Issuing Entity: Washington fish and wildlife commission.

Subject Matter: The objectives of this policy are to promote orderly fisheries (particularly in waters in which the states of Washington and Oregon have concurrent jurisdiction), advance the conservation and recovery of wild salmon and steelhead, and maintain or enhance the economic well-being and stability of the fishing industry in the state. (Columbia River policy purpose statement.)

Located at <http://wdfw.wa.gov/commission/policies/c3620.html>.

Effective Date: January 12, 2013.

Contact Person: Tami Lininger, Executive Assistant, Washington Fish and Wildlife Commission, 600 Capitol Way North, Olympia, WA 98501-1091, (360) 902-2267, commission@dfw.wa.gov.

FISH AND WILDLIFE COMMISSION

POLICY DECISION

POLICY TITLE: Columbia River Basin
Salmon Management

POLICY NUMBER: C-3620

Cancels or
Supercedes: C-3617, 2009
C-3618, 2011

Effective Date: January 12, 2013
Termination Date: December 31, 2023

Approved by: *Miranda Wecker*
Chair, Washington Fish and Wildlife Commission

Purpose

The objectives of this policy are to promote orderly fisheries (particularly in waters in which the states of Washington and Oregon have concurrent jurisdiction), advance the conservation and recovery of wild salmon and steelhead, and maintain or enhance the economic well-being and stability of the fishing industry in the state.

Definition and Intent

This policy is applicable to the management by the Washington Department of Fish and Wildlife (Department) of Pacific salmon (spring Chinook, summer Chinook, fall Chinook, sockeye, chum, and coho) fisheries in the mainstem of the Columbia River and the Snake River.

General Policy Statement

This policy provides the Department a cohesive set of guiding principles and a progressive series of actions to improve the management of salmon in the Columbia River basin. The actions will be evaluated and, as appropriate, progressively implemented in a transitional period occurring from 2013 through 2016. There is uncertainty in this presumptive path forward, including the development and implementation of alternative selective fishing gear, securing funding for enhanced hatchery production, and the expansion or development of off-channel fishing areas. Consequently, the Commission recognizes that management decisions in the transitional period, and subsequent years, must be informed by fishery monitoring (biological and economic) and may be modified as necessary to meet the stated purpose of this policy.

The Department will promote the conservation and recovery of wild salmon and steelhead and provide fishery-related benefits by maintaining orderly fisheries and by increasingly focusing on the harvest of abundant hatchery fish. The Department will seek to implement mark-selective salmon and steelhead fisheries, or other management approaches that are at least as effective, in achieving spawner and broodstock management objectives.

Fishery and hatchery management measures should be implemented as part of an “all-H” strategy that integrates hatchery, harvest, hydro-system and habitat actions. Although it focuses on hatchery and harvest reform, this policy in no way diminishes the significance of habitat and hydro-system protection and restoration.

In implementing the policy guidelines, the Department will work with the tribes in a manner that is consistent with *U.S. v. Washington* and *U.S. v. Oregon* and other applicable state and federal laws and agreements.

Guiding Principles

The Department will apply the following principles in the management of salmon fisheries in the Columbia River:

1. Promote the recovery of Endangered Species Act (ESA)-listed species and the conservation of wild stocks of salmon and steelhead in the Columbia River and ensure that fisheries and hatcheries are operated in a manner consistent with the provisions of the ESA.
2. Continue leadership on fish recovery actions, including improved fish survival through the Columbia River hydropower system, improved habitat conditions in the tributaries and estuary, hatchery reform, reduced predation by fish, birds, and marine mammals, and harvest management that meets conservation responsibilities.
3. Continue to meet the terms of *U.S. v. Oregon* management agreements with Columbia River Treaty Tribes.
4. Meet Colville tribal subsistence and ceremonial needs consistent with agreements with the Confederated Tribes of the Colville Reservation.
5. Provide Wanapum Band fishing opportunity consistent with RCW 77.12.453 (“Salmon fishing by Wanapum (Sokulk) Indians”).
6. In a manner that is consistent with conservation and does not impair the resource, seek to enhance the overall economic well-being and stability of Columbia River fisheries.
7. Subject to the adaptive management provisions of this Policy, for steelhead and salmon, prioritize recreational fisheries in the mainstem and commercial fisheries in off-channel areas of the lower Columbia River.
8. Subject to the adaptive management provisions of this Policy, and after thorough evaluation, seek to phase out the use of non-selective gill nets in non-tribal commercial fisheries in the mainstem Columbia River, and transition gill net use to off-channel areas.
9. In a manner consistent with the Department’s licensing authorities, develop and implement alternative selective-fishing gear and techniques for commercial mainstem

fisheries to optimize conservation and economic benefits. Provide incentives to commercial fishers to develop and implement these gear and techniques.

10. Enhance the economic benefits of off-channel commercial fisheries in a manner consistent with conservation and wild stock recovery objectives.
11. Seek to maintain consistent and concurrent policies between Oregon and Washington related to management of non-tribal Columbia River fisheries.
12. Develop a program that seeks to implement Marine Stewardship Council or other certification of salmon fisheries in the Columbia River as sustainably managed fisheries.

General Provisions

The Department will implement the following actions to promote the achievement of the purpose of this policy.

1. Gill Net License Buyback Program. Initiate in 2013 the development (with Oregon) of a program to buyback non-tribal gill net permits for the Columbia River and implement that program as soon as the appropriate authority and financing is secured. Efforts should be made to also develop, evaluate, and implement other tools (e.g., minimum landing requirements) to reduce the number of gillnet permits.
2. Development and Implementation of Alternative Selective Gear in Transition Period. The Department will investigate and promote the development and implementation of alternative selective gear during the transition period (2013-2016).. If alternative selective gear is not available and practical, based on administrative, biological or economic factors, the use of gill nets in these fisheries will be allowed during the transition period. The development and implementation of alternative selective gear such as purse seines and beach seines should provide area-specific opportunity to target fishery harvests on abundant hatchery stocks, reduce the number of hatchery-origin fish in natural spawning areas, limit mortalities of non-target species and stocks, and provide commercial fishing opportunities. To facilitate the timely development of and transition to alternative selective gear and techniques, Washington should work with Oregon to develop incentives for those commercial fishers who agree to use these gear and techniques.
3. Development and Implementation of Alternative Selective Gear in Long Term. Subject to available legal authorities and the adaptive management provisions of this Policy, and after thorough evaluation, non-tribal mainstem commercial fisheries should be restricted to the use of alternative selective gear and fishing techniques beginning in 2017. With respect to Upriver Bright fall Chinook, the presumptive path forward regarding targeted commercial harvest upstream of the Lewis River is to access these Chinook with alternative selective gear and techniques. Because access to Upriver Bright fall Chinook is critically important

to ensuring the long-term economic health of commercial fishers, adaptive management will be used to ensure available gear types and techniques are effective and that commercial fishers continue to have profitable mainstem access to these important salmon stocks.

4. Additional Opportunities for Mainstem Commercial Fisheries in the Transition Period. During the transition period, opportunities for additional mainstem commercial fishing directed at Upriver Bright fall Chinook and hatchery coho salmon using alternative selective gear, or gill nets if alternative selective gear is not available and practical, may be provided under the following conditions:
 - a. If mainstem recreational fisheries are predicted to be unable to fully use their shares of ESA-impacts or harvestable surplus, or
 - b. If reasonable goals¹ for mainstem recreational fisheries are predicted to be met, or
 - c. If alternative selective gear programs, off channel fishing opportunities, or other commercial fishing program elements of this Policy are unable to provide the anticipated catch and economic expectations to the commercial salmon fishing industry.

5. Additional Opportunities for Mainstem Commercial Fisheries in the Long Term. After the transition period, opportunities for additional mainstem commercial fishing directed at Upriver Bright fall Chinook, lower river hatchery fall Chinook, and hatchery coho salmon may be provided under the following conditions:
 - a. If mainstem recreational fisheries are predicted to be unable to fully use their shares of ESA-impacts or harvestable surplus, or
 - b. If reasonable goals for mainstem recreational fisheries are predicted to be met, or
 - c. As needed to remove lower river hatchery tule Chinook and coho consistent with conservation objectives, or
 - d. If alternative selective gear programs, off channel fishing opportunities, or other commercial fishing program elements of this Policy are unable to provide the anticipated catch and economic expectations to the commercial salmon fishing industry.

6. Off-Channel Commercial Fishing Sites. Seek funding (with Oregon) to evaluate the feasibility of establishing new off-channel sites. Seek funding to invest in the

¹ See Appendix B of Mainstem Strategies for Columbia River recreational and Commercial Fisheries: 2013 and Beyond. Recommendation of the Columbia River Fishery Management Workgroup to the Fish and Wildlife Commissions of Oregon and Washington. November 21, 2012.

infra-structure and fish rearing and acclimation operations necessary to establish new off-channel sites in Washington, as identified by evaluations completed during the transition period.

7. Barbless Hooks. Implement in 2013 the use of barbless hooks in all mainstem Columbia River and tributary fisheries for salmon and steelhead.
8. Logbooks. Evaluate the benefits of requiring licensed recreational fishing guides and charters to maintain and use logbooks. Logbook reporting could provide fishery managers with additional catch and harvest data on guided salmon, steelhead, sturgeon fishing trips on the Columbia River. In addition, evaluate the use of volunteer trip reports in private boat fisheries.
9. Enhance Fishery Management. Because implementation of this policy will change the current management of fisheries and because run-size forecasts play a vital role in shaping fisheries, two enhancements will be put in place during the transition period.
 - a. Increase Management Certainty. Increase management certainty, and ensure conservation effectiveness by: implementing outreach programs to increase compliance with recreational fishing rules; seeking means to increase the effectiveness of enforcement programs; and conducting enhanced fishery monitoring that more accurately accounts for harvest and fishing-related mortality.
 - b. Improve Management Tools. Explore and develop alternative approaches to improve: pre-season forecasts of run size and timing; in-season updates of run-size estimates; and in-season estimates of the harvest impacts by fishery.

Spring Chinook Salmon

The presumptive path for the management of spring Chinook salmon fisheries is summarized in Appendix Table A. Subject to the adaptive management provisions of this policy, the Department will manage spring Chinook salmon fisheries consistent with the Guiding Principles and the following objectives:

1. The Department will exercise in-season management flexibility to utilize the non-Indian upriver spring Chinook impact allocation to meet the objectives of both fisheries, i.e., upriver impact sharing adjustments in response to in-season information pertaining to catch and run size.
2. Fishery Management Buffer. To account for uncertainties in the information used to plan and implement fisheries, a management buffer in fishery structure will be established and applied to fisheries occurring prior to the run size update (primarily in March and April). The buffer is intended to be sufficient to cover potential run-size forecasting error and ensure compliance with ESA requirements and *U.S. v. Oregon* allocation provisions. Prior to the run size update, the

Department will manage non-treaty fisheries for a run size that is 70% of the pre-season forecast (30% buffer) or other fishery management buffer as agreed through *U.S. v. Oregon*. During the transition period, the overall buffer will be achieved by applying: a fishery management buffer of 20% of the sport fishery impact to the sport fishery; and a fishery management buffer of 40% of the commercial fishery impact to the commercial fishery.

3. Recreational-Commercial Allocation During Transition Period (2013-2016). In 2013, the Department will assign 65% of the ESA-impact for upriver spring Chinook stocks to mainstem recreational fisheries and the balance (35%) to off-channel and mainstem commercial fisheries.

During 2014-16, the Department will assign 70% of the ESA-impact for upriver spring Chinook stocks to mainstem recreational fisheries and the balance (30%) to off-channel and mainstem commercial fisheries

4. Recreational-Commercial Allocation in Long Term (2017 and Beyond). The Department will assign 80% of the ESA-impact to mainstem recreational fisheries to meet management objectives and the balance (20%) to commercial fisheries for use in off-channel areas. The commercial fishery ESA-impact share will not be subject to the pre-run-size update buffer in the off-channel areas.
5. The Department will ensure broad geographic distribution of recreational fishing opportunity in the main-stem Columbia River including the Snake River. Seventy-five percent (75%) of the impacts allocated to the sport fisheries will be assigned to the sport fishery downstream from Bonneville Dam. Twenty-five percent (25%) will be assigned and reserved for the sport fishery upstream from Bonneville Dam. After the run-size update, the Department will place the highest sport fishery priority on providing for a sport fishery upstream from Bonneville Dam.
6. The Department will provide to the Commission each year a briefing on the effectiveness of fishery management actions in meeting spring Chinook recreational fishery allocation objectives throughout the Columbia River basin. The Commission may consider changes to the recreational allocation in this policy in the future to balance recreational fishery objectives in the areas below Bonneville Dam, above Bonneville Dam, and in the Snake River.
7. Without compromising the objectives for recreational fisheries upstream of Bonneville Dam, the Department will seek in the long-term to extend recreational fishing opportunity downstream of Bonneville Dam as long into April as possible, with a high probability of an uninterrupted 45-season beginning March 1.

Summer Chinook Salmon

The presumptive path for the management of summer Chinook salmon fisheries is summarized in Appendix Table B. Subject to the adaptive management provisions of this policy, the Department will manage summer Chinook salmon fisheries consistent with the Guiding Principles and the following objectives:

1. The Department will manage the upper Columbia summer Chinook populations for sustainable natural production and for the artificial production programs that are necessary to meet mitigation requirements and provide conservation safeguards.
2. The Department will manage for population specific performance goals for Wenatchee, Methow and Okanogan natural populations, and for hatchery escapement goals.
3. Non-treaty Sharing Above and Below Priest Rapids Dam. The highest priority for state managed summer Chinook fisheries is recreational fishing opportunity above Priest Rapids Dam. In light of the changing abundance of summer Chinook, the Department will adjust the allocation of the non-treaty (including the Confederated Tribes of the Colville Reservation) harvest assigned to fisheries above Priest Rapids Dam to be consistent with the following guidelines:

River-mouth run size	Percent of non-treaty allocation assigned to fisheries above Priest Rapids Dam
0 – 29,000	>90%
29,001 – 50,000	90%
50,001 – 60,000	70% - 90%
60,001 – 75,000	65% - 70%
75,001 – 100,000	60% - 65%
>100,000	60%

4. Nontreaty Sharing Below Priest Rapids Dam. The harvestable surplus available for nontreaty fisheries below Priest Rapids Dam will be allocated as follows:
 - a. Through 2014, assign 60% of the nontreaty harvestable surplus to mainstem recreational fisheries and the balance (40%) to mainstem commercial fisheries.
 - b. Beginning in 2015 and for the remainder of the transition period (through 2016), assign 70% of the harvestable surplus to the recreational fisheries and the balance (30%) to commercial fisheries.
 - c. The Recreational-Commercial allocation beginning in 2017 will be determined following additional discussions with the Oregon Department of Fish and Wildlife.
5. Provide for in-season management flexibility to utilize the non-treaty summer Chinook harvest to meet the objectives of all fisheries.

Sockeye Salmon

Subject to the adaptive management provisions of this policy, the Department will manage sockeye salmon fisheries consistent with the Guiding Principles and the following objectives:

1. During 2013-2016, assign 70% of the ESA-impact for Snake River sockeye to mainstem recreational fisheries and the balance (30%) to mainstem commercial fisheries for incidental harvest of sockeye in Chinook-directed fisheries.
2. Beginning in 2017, assign approximately 80% of the ESA-impact for Snake River sockeye to mainstem recreational fisheries to meet management objectives and the balance (approximately 20%) to mainstem commercial fisheries for incidental harvest of sockeye in Chinook-directed fisheries.
3. If NOAA Fisheries increases the allowable ESA-impact for Snake River sockeye, the Department will provide opportunities for increased commercial harvest using alternative selective gear if developed and practical, within the constraints of achieving escapement objectives for other sockeye populations in the Columbia River Basin.

Tule Fall Chinook Salmon

The presumptive path for the management of tule fall Chinook salmon fisheries is summarized in Appendix Table C. Subject to the adaptive management provisions of this policy, the Department will manage tule fall Chinook fisheries consistent with the Guiding Principles and the following objectives:

1. During 2013-2016, the Department will assign no more than 70% of the ESA-impact for lower Columbia River tule fall Chinook to mainstem recreational fisheries to meet management objectives and the balance (not less than 30%) to: off-channel commercial fisheries; mainstem commercial fisheries that target Upriver Bright fall Chinook; and, if selective gear is developed during the transition period, mainstem commercial fisheries that harvest Washington Lower River Hatchery Chinook to help reduce strays.
2. Beginning in 2017, the Department will assign no more than 80% of the ESA-impact for lower Columbia River tule fall Chinook to mainstem recreational fisheries to meet management objectives and the balance (not less than 20%) to: off-channel commercial fisheries; mainstem commercial fisheries that target Upriver Bright fall Chinook; and mainstem commercial fisheries that harvest Washington Lower River Hatchery Chinook with selective gear to help reduce strays.
3. The Department will seek to achieve the following recreational fisheries objectives:
 - a. Buoy 10 season – August 1 to Labor Day
 - b. Tongue Point to Warrior Rock season – August 1 to September 7 as non-mark-selective and September 8-14 as mark-selective

- c. Warrior Rock to Bonneville Dam season – August 1-October 31.

Upriver Bright Fall Chinook Salmon

The presumptive path for the management of Upriver Bright fall Chinook salmon fisheries is summarized in Appendix Table D. Subject to the adaptive management provisions of this policy, the Department will manage Upriver Bright fall Chinook fisheries consistent with the Guiding Principles and the following objectives:

1. During 2013-2016, the Department will assign no more than 70% of the ESA-impact for Snake River Wild fall Chinook to mainstem recreational fisheries to meet management objectives and the balance (not less than 30%) to off-channel and mainstem commercial fisheries.
2. Beginning in 2017, the Department will assign no more than 80% of the ESA-impact for Snake River Wild fall Chinook to mainstem recreational fisheries to meet management objectives and the balance (not less than 20%) to off-channel and mainstem commercial fisheries.
3. a) The Department will focus mainstem commercial fisheries to target Upriver Bright fall Chinook in the area upstream of the Lewis River where the incidental take of lower river tule Chinook is reduced;
b) Harvest of Upriver Bright fall Chinook in the area downstream from the Lewis River will occur in selective fisheries that target Washington Lower River Hatchery Chinook and coho.
4. The presumptive path forward regarding targeted commercial harvest of Upriver Bright fall Chinook upstream of the Lewis River will be to access available Chinook with alternative selective gear and techniques. Because access to Upriver Bright fall Chinook will be important to ensuring the long-term economic viability of commercial fishers, adaptive management will be used to ensure alternative selective gear and techniques are effective and that commercial fishers continue to have profitable mainstem access to these economically important salmon stocks.

Coho Salmon

The presumptive path for the management of coho salmon fisheries is summarized in Appendix Table E. Subject to the adaptive management provisions of this policy, the Department will manage coho fisheries consistent with the Guiding Principles and the following objectives:

1. During 2013-2016, the Department will assign: commercial fisheries a sufficient share of the ESA-impact for Lower Columbia Natural coho to implement off-channel coho and fall Chinook fisheries and mainstem fall Chinook fisheries; and the balance to in-river mainstem recreational fisheries (currently in-river mainstem recreational fisheries are assigned a sufficient share of the allowable incidental-take of ESA-listed coho to meet fishery objectives). If these fisheries are

expected to be unable to use all of the ESA-impact for Lower Columbia Natural coho, the Department will assign the remainder to mainstem commercial coho fisheries. As selective techniques and alternative gear are developed, the Department will provide additional commercial mainstem coho fisheries with an emphasis on harvesting hatchery coho in October when wild coho are less abundant.

2. Beginning in 2017, the Department will assign: commercial fisheries a sufficient share of the ESA-impact for Lower Columbia Natural coho to implement off-channel coho and fall Chinook fisheries and mainstem fall Chinook fisheries; and the balance to in-river mainstem recreational fisheries. If these fisheries are unable to use all of the ESA-impact for Lower Columbia Natural coho, the Department will assign the remainder to mainstem commercial coho fisheries. It is expected that substantial new opportunities for selective mainstem commercial fisheries will be available for hatchery coho, particularly in October.

Chum Salmon

The Department will maintain the current practice of opening no fisheries that target chum salmon and assign commercial fisheries a sufficient share of the ESA-impact for chum to implement off-channel and mainstem fisheries targeting other salmon species (retention in recreational fisheries is currently prohibited).

Adaptive Management

The Commission recognizes that appendix tables A-E describe a presumptive path forward for salmon fishery management in the Columbia Basin. Uncertainty exists in some aspects of the presumptive path, including the development and implementation of alternative selective fishing gear, the securing of funding for enhanced hatchery production, and the expansion or development of off-channel fishing areas. Under these conditions, adaptive management procedures will be essential to achieve the purpose of this policy. As indicated in the General Policy statement, management actions will be evaluated and, as appropriate, implemented in a progressive manner.

The Commission will track implementation and results of the fishery management actions and artificial production programs in the lower Columbia River during the transition period, with annual reviews beginning at the end of 2013 and a comprehensive review at the end of the transition period (e.g., 2016). State-managed fisheries pursuant to this Policy will be adaptive and adjustments may be made to mainstem fisheries if policy objectives, including catch or economic expectations for commercial or recreational fisheries, are not achieved consistent with the principles of this plan. If these expectations are not achieved, efforts will be made to determine why and to identify actions necessary to correct course. Department staff may implement actions necessary to manage adaptively to achieve the objectives of this policy and will coordinate with the Commission, as needed, in order to implement corrective actions. Reconsideration of state-managed mainstem fisheries may take place under the following circumstances:

1. Lower than anticipated catch and economic expectations to the commercial salmon fishing industry, or

2. Insufficient space within off-channel sites to accommodate the commercial fleet,
or
3. Biological, fiscal and/or legal circumstances that delay or preclude implementation of alternative selective gear, buyback of commercial fishing permits, and/or additional off-channel hatchery investments, or
4. Management objectives are not achieved for commercial or recreational fisheries,
or
5. Conflicts with terms of *U.S. v Oregon* management agreements with Columbia River Tribes, or
6. Failure to meet conservation objectives.

Planned enhancements of salmon and steelhead production upstream from Bonneville Dam may have implications to harvest management contemplated in this plan. For production enhancements that come on-line and produce adult salmon on or after 2017, Oregon and Washington staff should evaluate the implications of the increased mainstem production on these harvest strategies, including *U.S. v. Oregon* harvest agreements, and make additional recommendations to the Commission as needed, consistent with the guiding principles.

Delegation of Authority

The Commission delegates the authority to the Director, through the Columbia River Compact and North of Falcon stakeholder consultation process, to set seasons for recreational and commercial fisheries in the Columbia River, to adopt permanent and emergency regulations to implement these fisheries, and to make harvest agreements with treaty tribes and other government agencies. The Director will work with the Oregon Department of Fish and Wildlife to achieve implementation of this Commission action in a manner that results in concurrent regulations between the two states. The Director will consult with the Commission Chair if it becomes necessary to deviate from the Commission's policy to achieve concurrent regulations with Oregon.

Appendix A. Tabular Summary of the Presumptive Management Framework for Non-Tribal Mainstem Columbia River Recreational and Commercial Fisheries - **Spring Chinook Salmon.**

Sharing Metric: Incidental-take of ESA-listed upriver spring Chinook

Fishing Year	Recreational Fishery		Commercial Fishery		
	Impact Share	Location	Share	Location	Gear
2013	65%	Mainstem Columbia River and Snake River	35%	Mainstem Columbia below Bonneville Dam Off-Channel Areas	Tangle Net Tangle-Net/ Gill Net
2014-2016	70%	Mainstem Columbia River and Snake River	30%	Mainstem Columbia below Bonneville Dam	Tangle Net
				Off-Channel Areas	Tangle Net/ Gill Net
2017+	80%	Mainstem Columbia River and Snake River	20% ¹	Off-channel and mainstem areas of the Columbia River	Tangle Net/ Gill Net ² / Beach Seine/ Purse Seine/Other Alternative Selective Gear

¹ Not subject to pre-update buffer.

² Gill nets confined to off-channel areas

Appendix B. Tabular Summary of the Presumptive Management Framework for Non-Tribal Mainstem Columbia River Recreational and Commercial Fisheries – **Summer Chinook Salmon.**

Sharing Metric: Harvestable share of summer Chinook available downstream from Priest Rapids Dam

Fishery-Specific Objective: Meet terms of agreements with the United Tribes of the Colville Reservation.

Fishing Year	Recreational Fishery		Commercial Fishery ¹		
	Share	Location	Share	Location	Gear
2013-2014	60%	Mainstem Columbia River below Priest Rapids Dam	40%	Mainstem Columbia River below Bonneville Dam	Gill Net
2015-2016	70%	Mainstem Columbia River below Priest Rapids Dam	30%	Mainstem Columbia River below Bonneville Dam	Gill Net
2017+	TBD ²	Mainstem Columbia River below Priest Rapids Dam	TBD	Mainstem Columbia River below Bonneville Dam	Beach Seine/ Purse Seine/ Other Alternative Selective Gear

¹ To offset reductions in mainstem commercial harvest of summer Chinook, Oregon will enhance the fisheries for Select Area Bright Fall Chinook.

² Recreational- Commercial allocations will be determined following additional discussions with the Oregon department of Fish and Wildlife.

Appendix C. Tabular Summary of the Presumptive Management Framework for Non-Tribal Mainstem Columbia River Recreational and Commercial Fisheries – Tule Fall Chinook Salmon.

Sharing Metric: Incidental-take of ESA-listed Lower Columbia River natural (tule) fall Chinook

Fishing Year	Recreational Fishery		Commercial Fishery		
	Share	Location	Share	Location	Gear
2013-2015	≤70%	Mainstem Columbia below Bonneville Dam	≥30%	Mainstem Columbia River below Bonneville Dam and off-channel areas	Gill Net/ Pilot Beach Seine/ Pilot Purse Seine
2016	≤70%	Mainstem Columbia below Bonneville Dam	≥30%	Mainstem Columbia River below Bonneville Dam	Beach Seine/ Purse Seine
				Off-channel areas	Gill Net
2017+	≤80%	Mainstem Columbia below Bonneville Dam	≥20%	Mainstem Columbia River below Bonneville Dam	Beach Seine/ Purse Seine/ Other Alternative Selective Gear
				Off-channel areas	Gill Net

Appendix D. Tabular Summary of the Presumptive Management Framework for Non-Tribal Mainstem Columbia River Recreational and Commercial Fisheries – Upriver Bright Chinook Salmon.

Sharing Metric: Incidental-take of ESA-listed Snake River wild fall Chinook

Fishery-Specific Objective: Implement mainstem commercial fisheries in Zones 4 and 5 upstream of the Lewis River to remove excess hatchery-origin bright Chinook and harvest surplus wild bright Chinook

Fishing Year	Recreational Fishery		Commercial Fishery		
	Share	Location	Share	Location	Gear
2013-2016	Necessary to meet recreational objectives, but not more than 70% ¹	Mainstem Columbia below Bonneville Dam	Dependant on recreational fisheries need, but not less than 30%	Mainstem Columbia River below Bonneville Dam	Gill Net ² / Beach Seine ³ / Purse Seine ³
2017+	Necessary to meet recreational objectives, but not more than 80%	Mainstem Columbia below Bonneville Dam	Dependant on recreational fisheries need, but not less than 20%	Mainstem Columbia River below Bonneville Dam	Beach Seine/ Purse Seine/ Other Alternative Selective Gear
				Above Lewis River	Alternative Selective Gear ⁴

¹ It is expected that recreational fishery objectives (Buoy 10 season August 1-Labor Day; Tongue Point to Warrior Rock season August 1-September 7 as non-mark selective and September 8-14 as mark selective and Warrior Rock to Bonneville Dam season August 1-October 31 when the season is assumed to be essentially complete) will be met in most years at less than a 50% share of Snake River Wild fall Chinook impacts (see Appendix B, Table B.3). However, the recreational fishery share will likely need to be increased to meet objectives in years when Upriver Bright fall Chinook returns are significantly less than recent years.

² The mainstem gill net fishery will be restricted to the area above the Lewis River in 2016.

³ Beach seine and purse seine fisheries will be pilots in 2013, 2014 and 2015.

⁴ The presumptive (expected) path forward regarding targeted commercial harvest of Upriver Bright fall Chinook upstream of the Lewis River will be to access available Chinook with alternative selective gear and techniques. Because access to Upriver Bright fall Chinook is critically important to ensuring the long-term economic viability of commercial fishers, adaptive management will be used to ensure alternative selective gear and techniques are effective and that commercial fishers continue to have profitable mainstem access to these economically important salmon stocks.

Appendix E. Tabular Summary of the Presumptive Management Framework for Non-Tribal Mainstem Columbia River Recreational and Commercial Fisheries – Coho Salmon.

Sharing Metric: Incidental-take of ESA-listed coho

Fishing Year	Recreational Fishery		Commercial Fishery		
	Share	Location	Share	Location	Gear
2013-2016	1	Mainstem Columbia below Bonneville Dam	1	Mainstem Columbia River below Bonneville Dam and off-channel areas	Gill Net/ Tangle Net ² / Beach Seine ² / Purse Seine ²
2017+	3	Mainstem Columbia below Bonneville Dam	3	Mainstem Columbia River below Bonneville Dam and off-channel areas	Tangle Net/ Beach Seine/ Purse Seine/ Other Alternative Selective Gear

¹ Maintain current sharing except provide sufficient additional impacts to the commercial fishery to implement the pilot alternative selective gear fisheries.

² Tangle net, beach seine and purse seine fisheries will be pilots in 2013, 2014 and 2015.

³ Assign commercial fisheries a sufficient share of the ESA-impact for Lower Columbia Natural coho to implement off-channel coho fisheries, fall Chinook fisheries as described above, and alternative selective gear fisheries to reduce the number of hatchery-origin coho in natural spawning areas. Assign the balance to mainstem recreational fisheries. If these recreational fisheries are unable to use all of the ESA-impact for Lower Columbia Natural coho, assign the remainder to mainstem commercial coho fisheries.

Appendix B

FISH AND WILDLIFE COMMISSION POLICY DECISION

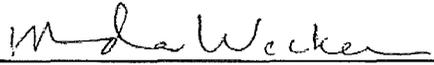
POLICY TITLE: 2013-2014 North of Falcon

POLICY NUMBER: C-3608

Supersedes: C-3608, 2011-2012

Effective Date: February 8, 2013
Termination Date: December 31, 2014

See Also: Policy C-3001
Policy C-3620

Approved by:  Chair
Washington Fish and Wildlife Commission, 02/08/2013

North of Falcon Policy

This Policy will guide Department staff in considering conservation, allocation, in-season management, and monitoring issues associated with the annual salmon fishery planning process known as "North of Falcon." When considering management issues, Department staff will ensure that decisions are made consistent with: the Department's statutory authority; *U.S. v. Washington*; *U.S. v. Oregon*; the Endangered Species Act; the Puget Sound Chinook Harvest Management Plan; the Pacific Salmon Treaty; the Pacific Fishery Management Council's Framework Salmon Management Plan; pertinent state/tribal agreements; and the applicable Fish and Wildlife Commission policies.

The Department will implement this Policy consistent with the purposes and intended outcomes described in the 21st Century Salmon and Steelhead Planning Project including:

- Salmon and steelhead will be managed to recover and assure sustainability in a way that is science-based, well-documented, transparent, well-communicated, and accountable.
- Fisheries will be managed to meet or exceed ESA, recovery, and conservation goals; and harvest management measures will protect and promote the long-term well-being of the commercial and recreational fisheries.

Fishery Management

General

- On a statewide basis, fishing opportunities will be provided when they can be directed at healthy wild and hatchery stocks.
- Selective fishing methods and gears that maximize fishing opportunity and minimize impacts on depressed stocks will be utilized to the fullest extent possible taking into consideration legal constraints on implementation and budgetary limits associated with required sampling, monitoring and enforcement programs.
- When assessed from a statewide perspective, fishing directed at chinook, coho, pink, sockeye, or chum salmon will not be exclusively reserved for either sport or commercial users.
- When managing sport fisheries, meaningful recreational fishing opportunities will be distributed equitably across fishing areas and reflect the diverse interests of fishers, including retention and catch and release fisheries.
- The Department will seek non-treaty fishing access to unutilized portions of treaty harvest allocations through the implementation of pre-season agreements, taking into consideration changes in abundance, fishery conflicts, and factors that may influence attainment of spawning escapement objectives.

fisheries directed at other species, shall be resolved by involving the appropriate sport and commercial representatives in a dispute resolution process managed by Department staff.

Incidental Mortalities

- The Department will manage fisheries to minimize mortalities on non-target species (e.g. rockfish, sea birds, etc.). Management regimes will include strategies to limit seabird mortalities consistent with the federal Migratory Bird Treaty Act.

Communications

- The Department shall strive to make ongoing improvements for effective public involvement during the North of Falcon planning process and annual salmon fishery implementation, incorporating the following intents:
 - North of Falcon participants will be included as observers during appropriate state/tribal discussions of fishery issues.
 - all decisions made during the North of Falcon process will be recorded in writing.
 - variety of tools will be used to effectively communicate with the public, to receive input on pre-season planning or in-season fishery issues, and to make available the record of decisions. Such tools will include: recreational and commercial advisory groups; public workshops to address key issues; the WDFW North of Falcon Web site; and in-season tele-conferences.

Other Species

- The Fish and Wildlife Commission's policy on Lower Columbia Sturgeon Management (POL-C3001) shall guide pre-season and in-season planning of Columbia River and coastal sturgeon fisheries and related incidental impacts. Management of Willapa Bay sturgeon fisheries will be further guided by Willapa Bay Framework management objectives.

Delegation of Authority

The Fish and Wildlife Commission delegates the authority to the Director to make harvest agreements with Northwest treaty tribes and other governmental agencies, and adopt permanent and emergency regulations resulting from the agreements made during the annual North of Falcon process.

FISH AND WILDLIFE COMMISSION
POLICY DECISION

POLICY TITLE: Mainstem Columbia River Spring Chinook Management and Allocation for Non-Indian Fisheries, 2009-2013 **POLICY NUMBER: C-3617**

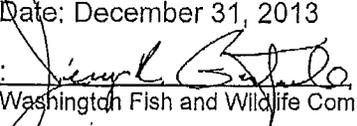
Supersedes: C-3617, 2008

Effective Date: January 1, 2009

Termination Date: December 31, 2013

See Also: Attachment 1, and C-3618

Approved by:


Washington Fish and Wildlife Commission

Discussion: This policy is similar to Policy C-3617 for 2008, with changes associated with discussion of the Columbia River Fish Working Group (CRFWG). Attachment #1 from Policy C-3617 for 2008 is replaced with recommendations from the CRFWG as amended by the Washington Fish and Wildlife Commission decision of January 16, 2009.

Policy:

Guiding Principles

- The Department serves as the trustee of this public resource and as such is responsible and accountable for sustainable fisheries.
- Conservation and recovery are the highest priorities and will take precedence in managing the resource.
- The Department will comply with the provisions of the *U.S. v Oregon* Management Agreement for upriver spring Chinook.
- Tradeoffs between current harvest benefits and long-term stock well-being will be resolved in favor of the long-term stock well-being.
- The Department must be consistent with prescribed recovery measures in National Marine Fisheries Service Biological Opinions, and safeguard the health and viability of all salmon stocks as a precondition for harvest.
- Manage harvest to meet hatchery goals.
- The Department must meet conservation requirements for wild spring Chinook and wild winter steelhead, including populations listed under the federal Endangered Species Act.
- The Department will manage harvest consistent with the applicable recovery management objectives.

Selective Fishery and Enforcement Guidelines

- All fishers will comply with selective fisheries rules and standards.
- The Department will continue to make improvements in the selectivity of recreational and commercial fishery gear through research and feasibility studies.
- The Department will develop and implement a strategy for public communications and outreach on compliance issues.
- The Department will continue to pursue strategies to enhance enforcement efforts and successful prosecution through the use of observer programs, increased enforcement presence, and cooperative work with local prosecutors.
- The Commission expects recreational and commercial fishing sectors to demonstrate responsibility for continuous learning and skills development for selective harvest practices.

Columbia River Fish Working Group (CRFWG)

- The Commission supports the CRFWG Phase I process to develop short-term recommendations regarding sport/commercial allocation of spring and summer Chinook.
- The Commission supports the CRFWG Phase II process to develop long-term fishery management plans and strategies to assist in recovery of Columbia River salmon and steelhead resources.

Fisheries Management Objectives

- The Department will manage the mainstem Columbia River spring Chinook fisheries to limit the wild winter steelhead impact to less than 2%.
- The Department will exercise in-season management flexibility to utilize the non-Indian upriver spring Chinook impact allocation to meet the objectives of both fisheries, i.e., upriver impact sharing adjustments in response to in-season information pertaining to catch and run size.
- The Department will recognize the economic benefits of recreational and commercial fisheries in the Columbia River and associated value of the early portions of the fisheries.
- The Department will provide for sport fisheries throughout the Columbia River downstream of McNary Dam, sport/tribal fisheries in the Snake River and upper Columbia River, and commercial and sport fisheries in select areas, as well as in the mainstem below Bonneville Dam.
- The Department will ensure broad geographic distribution of the sport fishing opportunity in the main-stem Columbia River.
- Harvestable Lower Columbia River spring Chinook should provide opportunity to areas below the Willamette River.
- Extend sport fishing opportunity as far into April as possible downstream of Bonneville Dam, with a high probability of an uninterrupted 45-day season March-April.

Delegation of Authority

The Washington Fish and Wildlife Commission delegates the authority to the Director, through the Columbia River Compact process, to set seasons for sport and commercial fisheries in the Columbia River consistent with Policy C-3617, and to adopt permanent and emergency regulations to implement these fisheries. The Director shall work with the Oregon Department of Fish and Wildlife to achieve implementation of this Commission action in a manner that results in concurrent regulations between the two states. The Director shall consult with the Commission if it becomes necessary to deviate from the Commission's Policy to achieve concurrent regulations with Oregon.

Allocation of Upriver Spring Chinook Impacts and Fishery Management Plan

The Commission adopts the recommendations of the CRFWG, and except the commercial buffer is reduced by 10% (e.g., 50% to 40%), and except there would be up to 10% flexibility in the recreational buffer in order to meet management objectives.

**C-3617
ATTACHMENT #1**

**2008 Management Measure
Recommendation to the Columbia River Compact Process**

Fishery Management Objectives

- The pre-season structure will be designed based on a 61% allocation of the ESA impacts to the sport fishery and 39% allocated to the commercial fishery.
- For the Lower Main-stem below the Willamette River, provide a 12 consecutive day recreational fishery in late March and early April, and a one fish bag limit as a buffer against management uncertainty.
- For the Upper Main-Stem above Willamette River, provide a March 16 – April 30 recreational fishery, six days per week (Wednesday through Monday), and a one fish bag limit as a buffer against management uncertainty.
- For the main-stem commercial fishery, restrict the fishery to the upper-river and establish a total catch objective of 6,800 fish. Prior to April 30, manage the commercial fishery to total catch of 5,200 fish as a buffer against management uncertainty.
- After April 30, additional fishing opportunity for the recreational and/or the commercial fishery will be based on a 61%-39% allocation of the available ESA impacts.

Buffer

- Reserve 10% of the allowable ESA impacts
 - 75% of the buffer will be reserved from the commercial fishery through managing the total catch to a level that is 76% of the total catch objective.
 - 25% of the buffer will be reserved from the sport fishery through the use a one fish bag limit.
- Half of the buffer may be used inseason for the sport fishery to meet the upper river's season management objective of April 30.
- Half of the buffer will be held as a precautionary measure until the inseason run size update is completed to ensure that our conservation objective is met.

Catch Projections

Upper River recreational Main-Stem

15,800 fish kept

Lower River

2,950 total kept catch. 2,250 upriver fish, 450 Willamette fish 250 Cowlitz, Kalama, Lewis fish

Commercial Fishery – Mainstem

Before Buffer: 6,800 upriver fish kept (@ 18.5% mortality)

With Buffer: 5,200 upriver fish kept (@ 18.5% mortality)

FISH AND WILDLIFE COMMISSION

POLICY DECISION

**POLICY TITLE: Mainstem Columbia River
Summer Chinook Allocation
for Non-Indian Fisheries
Below Priest Rapids Dam, 2011-2013**

POLICY NUMBER: C-3618

Supersedes: Policy C-3618, 2009-10

Effective Date: February 4, 2011
Termination Date: December 31, 2013

See Also: C-3619

Approved by: *Miranda Wecker*, CHAIR
Washington Fish and Wildlife Commission, 02/04/2011

Purpose

The purpose of this policy is to provide guidelines for management of upper Columbia River summer Chinook.

Definition and Intent

Upper Columbia River summer Chinook migrate through the lower Columbia River during June and July and are destined for areas above Priest Rapids Dam. The intent of the policy is to manage upper Columbia summer Chinook in a way that promotes a healthy population and is consistent with management agreements developed under *U.S. v Oregon* or with other co-managers.

General Policy Statement

Manage the Upper Columbia summer Chinook population with conservation and fishery management objectives that are consistent with a healthy population.

Policy Guidelines

Conservation Principles

- Manage the upper Columbia summer Chinook populations for sustainable natural production as well as the artificial production programs which are necessary to meet mitigation requirements and to provide conservation safeguards; consistent with the provisions of Commission Policy C-3619 (Hatchery and Fishery Reform).
- Manage for population specific performance goals for Wenatchee, Methow and Okanogan natural populations, and for Eastbank, Turtle Rock, Wells, and Chief Joseph hatchery programs.
- Manage for the natural and hatchery aggregate escapement goal as required by *U.S. v Oregon* Management Agreement.

Fishery Management Principles

- Meet treaty Indian/non-treaty harvest sharing objectives described in *U.S. v Oregon* Management Agreement.
- Meet Colville tribal subsistence and ceremonial harvest needs, consistent with the 2007 "Agreement between the Confederated Tribes of the Colville Reservation and the

POLICY DECISION

Washington Department of Fish and Wildlife on jointly managed salmon and steelhead populations.”

- Provide Wanapum Band fishing opportunity consistent with RCW 77.12.453 “Salmon fishing by Wanapum (Sokulk) Indians.”
- Impacts in the Washington ocean fishery will be managed by the Pacific Fishery Management Council (PFMC) based on the Pacific Coast Salmon Plan.
- The highest priority for state managed fisheries is recreational fishing opportunity above Priest Rapids Dam.
- Consistent with conservation objectives, provide recreational fishing opportunity throughout the Columbia River and commercial fisheries below Bonneville Dam.

Fishery Management Objectives

- Season objectives for recreational fisheries:
 - Fishery above Priest Rapids Dam. The full season is July 1 through October 15, and the base season objective is July through the Labor Day weekend.
 - Fishery below Priest Rapids Dam. The full season is from June 16 through July 31, and base season objective is late June through July 4. If July 4 is on Friday or Saturday, the fishery would continue through Sunday.
- Season objectives for commercial fisheries:
 - Maximize ex-vessel value and harvest opportunity.
 - Determine date of first opening during discussions with constituents and Oregon Department of Fish and Wildlife during annual North of Falcon meetings.

Harvest Allocation For Fisheries Below Priest Rapids Dam – Recreational and Commercial

- No directed fisheries and no allocation when abundance is below *U.S. v Oregon* escapement goal.
- Limited or base level recreational fisheries when 90% of non-treaty harvest is allocated to fisheries above Priest Rapids Dam.
- Balanced opportunity to both sectors; measured using amount of non-treaty harvest available below Priest Rapids Dam, defined as 50/50 sport/commercial sharing.
- When developing recreational and commercial options for fisheries below Priest Rapids Dam, the Department shall consider catch opportunity, stability and duration of fisheries.
- Implement mark-selective fisheries as necessary to:
 - Contribute to natural conservation objectives, and
 - Meet fishery season objectives.
- Specific structure of recreational and commercial fisheries will be set by the Columbia River Compact following stakeholder consultation in the North of Falcon process on an annual basis to meet adopted allocation policies and fisheries objectives after run size forecasts are available.

FISH AND WILDLIFE COMMISSION POLICY DECISION

- Provide for in-season management flexibility to utilize the non-treaty summer Chinook harvest to meet the objectives of both fisheries. When allowable harvest is either very large or very small, adjustments may need to be made to the allocation based on the capabilities of each fleet.
- In shaping fisheries, consult with stakeholders to recognize economic benefits of recreational and commercial fisheries in the Columbia River.

Delegation of Authority

The Commission delegates the authority to the Director, through the Columbia River Compact and North of Falcon stakeholder consultation processes, to set seasons for recreational and commercial fisheries in the Columbia River, and to adopt permanent and emergency regulations to implement these fisheries. The Director shall work with the Oregon Department of Fish and Wildlife to achieve implementation of this Commission action in a manner that results in concurrent regulations between the two states. The Director shall consult with the Commission Chair if it becomes necessary to deviate from the Commission's policy to achieve concurrent regulations with Oregon. The Director will provide an annual report to the Commission including a summary of the stock status and fisheries.

Appendix C

RCW 34.05.010
Definitions.

***** CHANGE IN 2013 *** (SEE 1400.SL) *** - *this change does not affect the portions of the statute referenced in the briefing.***

The definitions set forth in this section shall apply throughout this chapter, unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW [34.05.260](#). "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW 34.05.240, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, or (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes.

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW 34.05.610 for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule,

authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.

[2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

[Code Reviser's Notes have been omitted.]

RCW 34.05.230

Interpretive and policy statements.

(1) An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.

(2) A person may petition an agency requesting the conversion of interpretive and policy statements into rules. Upon submission, the agency shall notify the joint administrative rules review committee of the petition. Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for the denial, or initiate rule-making proceedings in accordance with this chapter.

(3) Each agency shall maintain a roster of interested persons, consisting of persons who have requested in writing to be notified of all interpretive and policy statements issued by that agency. Each agency shall update the roster periodically and eliminate persons who do not indicate a desire to continue on the roster. Whenever an agency issues an interpretive or policy statement, it shall send a copy of the statement to each person listed on the roster. The agency may charge a nominal fee to the interested person for this service.

(4) Whenever an agency issues an interpretive or policy statement, it shall submit to the code reviser for publication in the Washington State Register a statement describing the subject matter of the interpretive or policy statement, and listing the person at the agency from whom a copy of the interpretive or policy statement may be obtained.

[2004 c 31 § 3; 2001 c 25 § 1; 1997 c 409 § 202; 1996 c 206 § 12; 1995 c 403 § 702; 1988 c 288 § 203.]

[Code Reviser's Notes have been omitted.]

RCW 34.05.375

Substantial compliance with procedures.

No rule proposed after July 1, 1989, is valid unless it is adopted in substantial compliance with RCW 34.05.310 through 34.05.395. Inadvertent failure to mail notice of a proposed rule adoption to any person as required by RCW 34.05.320(3) does not invalidate a rule. No action based upon this section may be maintained to contest the validity of any rule unless it is commenced within two years after the effective date of the rule.

[1988 c 288 § 314.]

RCW 34.05.570
Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-

making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

[Code Reviser's Notes have been omitted.]

RCW 77.04.012

Mandate of department and commission.

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.

The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.

The commission may authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.

The commission shall attempt to maximize the public recreational game fishing and hunting opportunities of all citizens, including juvenile, disabled, and senior citizens.

Recognizing that the management of our state wildlife, food fish, game fish, and shellfish resources depends heavily on the assistance of volunteers, the department shall work cooperatively with volunteer groups and individuals to achieve the goals of this title to the greatest extent possible.

Nothing in this title shall be construed to infringe on the right of a private property owner to control the owner's private property.

[2000 c 107 § 2; 1983 1st ex.s. c 46 § 5; 1975 1st ex.s. c 183 § 1; 1949 c 112 § 3, part; Rem. Supp. 1949 § 5780-201, part. Formerly RCW 75.08.012, 43.25.020.]

[Code Reviser's Notes have been omitted.]

RCW 77.04.013**Findings and intent.**

The legislature supports the recommendations of the state fish and wildlife commission with regard to the commission's responsibilities in the merged department of fish and wildlife. It is the intent of the legislature that, beginning July 1, 1996, the commission assume regulatory authority for food fish and shellfish in addition to its existing authority for game fish and wildlife. It is also the intent of the legislature to provide to the commission the authority to review and approve department agreements, to review and approve the department's budget proposals, to adopt rules for the department, and to select commission staff and the director of the department.

The legislature finds that all fish, shellfish, and wildlife species should be managed under a single comprehensive set of goals, policies, and objectives, and that the decision-making authority should rest with the fish and wildlife commission. The commission acts in an open and deliberative process that encourages public involvement and increases public confidence in department decision making.

[1995 1st sp.s. c 2 § 1 (Referendum Bill No. 45, approved November 7, 1995). Formerly RCW 75.08.013.]

[Code Reviser's Notes have been omitted.]

RCW 77.04.020

Composition of department — Powers and duties.

The department consists of the state fish and wildlife commission and the director. The commission may delegate to the director any of the powers and duties vested in the commission.

[2000 c 107 § 202; 1996 c 267 § 32; 1993 sp.s. c 2 § 59; 1987 c 506 § 4; 1980 c 78 § 3; 1955 c 36 § 77.04.020. Prior: 1947 c 275 § 2; Rem. Supp. 1947 § 5992-12.]

[Code Reviser's Notes have been omitted.]

RCW 77.04.055

Commission — Duties.

(1) In establishing policies to preserve, protect, and perpetuate wildlife, fish, and wildlife and fish habitat, the commission shall meet annually with the governor to:

- (a) Review and prescribe basic goals and objectives related to those policies; and
- (b) Review the performance of the department in implementing fish and wildlife policies.

The commission shall maximize fishing, hunting, and outdoor recreational opportunities compatible with healthy and diverse fish and wildlife populations.

(2) The commission shall establish hunting, trapping, and fishing seasons and prescribe the time, place, manner, and methods that may be used to harvest or enjoy game fish and wildlife.

(3) The commission shall establish provisions regulating food fish and shellfish as provided in RCW 77.12.047.

(4) The commission shall have final approval authority for tribal, interstate, international, and any other department agreements relating to fish and wildlife.

(5) The commission shall adopt rules to implement the state's fish and wildlife laws.

(6) The commission shall have final approval authority for the department's budget proposals.

(7) The commission shall select its own staff and shall appoint the director of the department. The director and commission staff shall serve at the pleasure of the commission.

[2000 c 107 § 204; 1995 1st sp.s. c 2 § 4 (Referendum Bill No. 45, approved November 7, 1995); 1993 sp.s. c 2 § 62; 1990 c 84 § 2; 1987 c 506 § 7.]

[Code Reviser's Notes have been omitted.]

RCW 77.04.090

Rule-making authority — Certified copy as evidence.

The commission shall adopt permanent rules and amendments to or repeals of existing rules by approval of a majority of the members by resolution, entered and recorded in the minutes of the commission: PROVIDED, That the commission may not adopt rules after July 23, 1995, that are based solely on a section of law stating a statute's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt any rule. The commission shall adopt emergency rules by approval of a majority of the members. The commission, when adopting emergency rules under RCW 77.12.150, shall adopt rules in conformance with chapter 34.05 RCW. Judicial notice shall be taken of the rules filed and published as provided in RCW 34.05.380 and 34.05.210.

A copy of an emergency rule, certified as a true copy by a member of the commission, the director, or by a person authorized in writing by the director to make the certification, is admissible in court as prima facie evidence of the adoption and validity of the rule.

[1996 c 267 § 35; 1995 c 403 § 111; 1984 c 240 § 1; 1980 c 78 § 16; 1955 c 36 § 77.12.050. Prior: 1947 c 275 § 15; Rem. Supp. 1947 § 5992-25. Formerly RCW 77.12.050.]

[Code Reviser's Notes have been omitted.]

RCW 77.04.130

Adoption and certification of rules.

(1) Rules of the commission shall be adopted by the commission or a designee in accordance with chapter 34.05 RCW.

(2) Rules of the commission shall be admitted as evidence in the courts of the state when accompanied by an affidavit from the commission or a designee certifying that the rule has been lawfully adopted and the affidavit is prima facie evidence of the adoption of the rule.

(3) The commission may designate department employees to act on the commission's behalf in the adoption and certification of rules.

[1995 1st sp.s. c 2 § 12 (Referendum Bill No. 45, approved November 7, 1995); 1983 1st ex.s. c 46 § 16; 1973 c 93 § 1; 1955 c 12 § 75.08.090. Prior: 1949 c 112 § 6, part; Rem. Supp. 1949 § 5780-205, part. Formerly RCW 75.08.090.]

[Code Reviser's Notes have been omitted.]

NO. 45378-9

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

ROBERT SUDAR, a Washington
resident; CHRIS DOUMIT, a
Washington resident; JOHN HANSON,
a Washington resident; MICHAEL
WULLGER, a Washington resident; and
JIM LONG, a Washington resident,

Petitioners,

v.

WASHINGTON FISH AND
WILDLIFE COMMISSION,

Respondent.

CERTIFICATE OF
SERVICE

I certify that I caused a true and correct copy of the Brief of
Respondent Washington Fish and Wildlife Commission to be served on
all parties or their counsel of record on the date below as follows:

U.S. Mail Postage Prepaid via Consolidated Mail Service

Patrick Edward Byrnes
Young deNormandie, P.C.
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Philip Albert Talmadge
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Talmadge/Fitzpatrick
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Tukwila, Washington 98188-4630

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of February, 2014, at Olympia, Washington.

/s/ Dominique P. Starnes
Dominique P. Starnes
Legal Assistant

TALMADGE FITZPATRICK LAW

February 14, 2014 - 9:56 AM

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