

No. 45378-9-II

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,

Respondent,

and

COASTAL CONSERVATION ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT CCA

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A. INTRODUCTION

The appellants Robert Sudar, Chris Doumit, John Hanson, Michael Wullger, and Jim Long ("gillnetters") argue that the policy of the Washington Fish and Wildlife Commission ("Commission") is a rule under the Administrative Procedures Act, RCW 34.05 ("APA"). Their effort to mount a rule challenge under RCW 34.05.570(2) to the Commission's Policy No. C-3620 ("Policy C-3620"), adopted on January 12, 2013, is premature as such a policy is not a rule subject to such a challenge under the APA. In specific, that policy does not fit within the definition of a rule as established by the Legislature in RCW 34.05.010(16).

More pointedly, the gillnetters fail to properly analyze the role of agency policies specifically authorized by the APA. The APA encourages agencies to adopt policies expressing the agency's vision. They are not rules. RCW 34.05.010(2); RCW 34.05.230(1). Policy C-3620 is precisely such a policy.

B. ASSIGNMENTS OF ERROR

Coastal Conservation Association ("CCA") acknowledges the gillnetters' assignment of error, br. of appellants at 1, but notes that the gillnetters failed to set forth any issues pertaining to that assignment as required by RAP 10.3(a)(4). The issues here are:

1. Where Policy C-3620 is a vision for fishery management on the Lower Columbia River that the gillnetters admit must be implemented by later, formal regulations, is it an action of general applicability that addresses the criteria set forth in RCW 34.05.010(16) so as to be an APA "rule"?

2. Where Policy C-3620 is a vision for fishery management, is it a policy statement under RCW 34.05.230(1) and therefore not subject to APA rulemaking requirements?

C. STATEMENT OF THE CASE

The gillnetters' statement of the case, br. of appellants at 1-5, does not comport with RAP 10.3(a)(5) in that it contains argument and statements that often are not supported by record citations. This Court should reject it.¹ That statement of the case also neglects to note that CCA

¹ The gillnetters argued below that Policy C-3620 fails because it was patterned after Oregon Administrative Rules OAR 635-500-6765 (the "Oregon Rules"), and those rules' implementation was previously stayed by order of the Oregon Court of Appeals. CP 8. However, that is not factually accurate. Although the Oregon Court of Appeals initially stayed implementation of the Oregon Rules, the Oregon Rules were again subjected to the rule making process and readopted on June 6, 2013. Thereafter, the Oregon Department of Fish and Wildlife ("ODFW") filed a notice of probable mootness with the Oregon Court of Appeals, advising that new rules had been adopted, rendering the prior petition for judicial review and the correspondent stay order moot. Although the Oregon petitioners challenged the notice, arguing that the Oregon Rules were substantially the same and the case should proceed as initially filed, the court agreed with the ODFW and on June 27, 2013 issued an order determining that judicial review was moot and lifting the stay order. The Oregon petitioners refiled their petition for review against the readopted Oregon Rules and moved for an emergency stay and a regular stay pending review. The court denied the emergency stay request by an order dated July 22, 2013. CP 74. By an order dated October 22, 2013, the Oregon Court of Appeals denied the stay request as well. The Oregon petitioners sought reconsideration of that denial, and reconsideration, too, was denied by an order dated December 2, 2013. The Oregon Rules remain in effect.

moved to intervene, and that motion was granted. CCA submitted briefing on the merits to the trial court. CP 77-87.

The trial court's rationale for its decision here was compelling:

... I think defendants have clearly shown that this is a policy-- it's not a rule -- and that the Administrative Procedures Act does not apply to it.

And listening to the legislative history is quite interesting. It makes perfect sense to me. It's difficult for courts to get involved in APA cases to begin with, but for courts to go beyond that and to have some kind of oversight rule in the development of policy I think really skews the relationship between the executive branch and the judicial branch, and it frankly would take me into a place that I'm not comfortable with. Development of policy takes time, it takes experience, subject matter experience, and it often requires the participation of stakeholders with different perspectives. And I think the APA was designed in a way to keep courts out of that business because I don't think courts belong there, and the legislature apparently didn't either. The Supreme Court agrees with that, and I'm not going to go there unless someone tells me I have to.

RP 20-21.

D. SUMMARY OF ARGUMENT

Policy C-3620 is not a rule under the APA because it is not an agency action of general applicability affecting the criteria in RCW 34.05.010(16).

Instead, Policy C-3620 is precisely what it says – a policy. It articulates a vision for Lower Columbia River fishery management that must be implemented by later, more formal, agency actions. It is precisely

the type of policy statement encouraged by the Legislature in RCW 34.05.230(1). As such, it is not subject to APA rulemaking requirements.

E. ARGUMENT²

(1) Policy C-3620 Is Not a Rule under the APA

The trial court correctly determined that the Commission's Policy C-3620 was not a rule for purposes of RCW 34.05.010(16), thereby foreclosing a challenge to the policy under RCW 34.05.570(2). CP 438.

The Commission is the *policymaking body* for Washington fish and wildlife decisions. CP 13-15. *See generally*, RCW 77.04.013; RCW 77.04.055(1). In that context, the Commission properly undertook its role as the agency that articulates a vision for fishery management in adopting Policy C-3620, as it has adopted similar policy statements about this fishery in the past. The Commission often leaves implementing regulations to the Department's director, as it is authorized to do by RCW 77.04.020. CP 14.

Policy C-3620 itself makes clear that it is a *policy*, not a regulation:

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.

² This Court reviews de novo an order granting a motion to dismiss under CR 12(b)(6). *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

CP 27 (emphasis added). The policy is in the Appendix to this brief. The policy did not contemplate that it was self-executing, but rather that it was to be implemented elsewhere, often at a later time:

The Commission delegates the authority to the Director, through the Columbia River Compact and North 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.

CP 37.

RCW 34.05.010(16) defines a "rule" for purposes of the APA as

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.

Under a reading of the statute's plain language,³ a rule is only present if the action is of general applicability and the 5 enumerated

³ This Court should apply the statute as it was written by the Legislature. *Dep't of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

outcomes are present.⁴ See *State v. Straka*, 116 Wn.2d 859, 868, 810 P.2d 888 (1991) ("one of the five categories in the definition must be involved, regardless of whether a 'directive' is at issue."); *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000).⁵

Our Supreme Court has made clear that the definition of a rule in the APA must be carefully applied; not every agency action is necessarily a "rule":

In deciding this case, we are not unmindful of the consequences were we to adopt a very broad interpretation of "rule" (in line with Budget's argument), and the fact that it would all but eliminate the ability of agencies to act in any manner during the course of an adjudication. The simplest and most rudimentary interpretation of a statute or regulation would require an agency to go through formal rule making procedures. While it is true that the APA is designed to provide "greater public and legislative access to administrative decision making," RCW 34.05.001, we believe it is equally true that the APA's provisions were not designed to serve as the straitjacket of administrative action.

Budget Rent a Car Corp. v. State, 144 Wn.2d 889, 898, 31 P.3d 1174 (2001).

⁴ The core feature of the APA's definition of a rule is whether the agency action was a one of general applicability. William R. Andersen, *The 1988 Washington Administrative Procedure Act -- An Introduction*, 64 Wash. L. Rev. 781, 790-91 (1989).

⁵ The label affixed to an agency action is not determinative for purposes of RCW 34.05.010(16)'s definition of a rule. *McGee*, 142 Wn.2d at 322.

Washington courts have determined that a variety of agency actions are not rules subject to judicial review under the APA. *See, e.g., Orsi v. Aetna Ins. Co.*, 41 Wn. App. 233, 244 n.4, 703 P.2d 1053 (1985) (Insurance Commissioner's approval of language in an insurer's policy was not a rule); *Straka, supra* (state toxicologist's approval of appropriate breath analysis procedures was not a rule); *Budget, supra* (agency interpretation of a phrase in the international compact on rental car vehicle registration was not a rule).

None of the criteria in RCW 34.05.010(16) apply here. Policy C-3620 is not an agency action of general applicability; it is a vision for fishery management. More pointedly, with regard to the five statutory criteria, nothing in Policy C-3620 subjects a person to penalties or administrative sanctions, RCW 34.05.010(16)(a), and that is the only criterion of the rule that comes even close to being met by the Policy.⁶ In sum, Policy C-3620 is not a rule under RCW 34.05.010(16).

(2) Policy C-3620 Is Not a Rule under RCW 34.05.230(1)

⁶ The gillnetters claim RCW 34.05.010(16)(c) applies here. Br. of Appellants at 7-10. They are wrong. They assert that Policy C-3620 establishes, alters, or revokes qualifications or requirements relating to benefits or privileges conferred by law. Again, Policy C-3620 only articulates the Commission's vision for fishery management, as contemplated by RCW 34.05.230(1). Under the definition of a policy in that statute, it is *advisory only*. The Policy itself contemplates *implementing regulations*. By itself Policy C-3620 does not establish, alter, or revoke anything, even assuming that the gillnetters are correct that the right to harvest fish is a "benefit or privilege conferred by law."

Left unaddressed in the gillnetters' brief⁷ is the fact that RCW 34.05.230(1) provides in pertinent part that agency policy statements and interpretive rules or guidelines are not rules under the APA as they are advisory only:

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.

(emphasis added).

A policy statement is defined in RCW 34.05.010(15) as:

A written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to the implementation of a statute or other provision of law, or 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.

Similarly, an interpretive statement is defined as “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 provisions of law, of a court decision, or of an agency order.” RCW 34.05.010(8). Such statements sometimes are adopted as rules.⁸

⁷ The gillnetters' counsel also failed to address this statute in argument to the trial court. RP 19-20.

⁸ Such interpretive rules are described in RCW 34.05.328(5)(c)(ii). *Ass'n of Wash. Business v. State Dep't of Revenue*, 155 Wn.2d 430, 449, 120 P.3d 46 (2005)

A categorical exemption from the definition of a rule for policy statements like Policy C-3620 is consistent with the intent of the APA's drafters. Professor Andersen, one of the key participants in the multi-year process leading to the enactment of the APA in 1988, stated that policy and interpretive statements were not rules under the APA:

Interpretive statements are agency statements about the meaning of an agency statute, regulation, judicial decision, or other provision of law. Policy statements are agency descriptions of its current approach to implementing provisions of law. As discussed below, these tools are part of the Act's general effort to encourage and empower agencies to give the public reliable advice about the likely course of agency action.

64 Wash. L. Rev. at 788-89. He further stated:

Certain actions which would ordinarily come within these definitions are expressly excluded from the definition of a rule and thus from the requirement that rulemaking procedures be followed. These actions included matters of internal agency management which do not affect the public, *interpretive and policy statements* as provided for in section 34.05.230, certain traffic regulations, and a cluster of rules made by institutions of higher education concerning academic matters.

Id. at 791 (emphasis added).

(DOR had authority to adopt interpretive regulations on tax code and such interpretive rules did not fit within the definition of a rule in RCW 34.05.010(16)); *Serres v. Wash. Dep't of Retirement Sys.*, 163 Wn. App. 569, 261 P.3d 173 (2011), *review denied*, 173 Wn.2d 1014 (2012) (regulations regarding retroactive salary increases for pension purposes were interpretive). Interpretive rules or statements describe how an agency will enforce a statute.

The legislative history of the APA supports the plain language of RCW 34.05.230(1) and Professor Andersen's assertion that agency policy statements are categorically not a rule under the APA. The APA was the product of a Washington State Bar Association task force that recommended a bill to the 1987 Legislature. The task force report was part of the Legislature's intent when the chair of the Senate Committee addressing the legislation, Sen. Phil Talmadge, incorporated the task force report into the Senate Journal upon the APA's enactment in 1988. *Senate Journal*, 50th Leg., Reg. Sess. at 606. Thus, the Legislature recognized that interpretive and policy statements play an important role in the development and articulation of agency policy when the task force report stated:

One way an agency announces its intentions is to adopt, after citizen involvement, formal rules. However, agency intentions are sometimes set forth in the form of interpretations or policy statements that do not have the status of rules and that may not be as readily accessible to the public as are rules. The act encourages agencies to publish such interpretations and policies to the public, while allowing agencies to freely change their interpretations and policies as circumstances require. When an agency announces its intentions, even if tentative, the citizens affected are better able to plan their lives. Certainty is not guaranteed, but uncertainty as to where a citizen stands with respect to his government is reduced. The citizen and business then have some idea what to expect from state government.

Id. at 607. Commenting on the definition section, the task force stated:

The definitions of "interpretive statement" and "policy statement" are new. One of the major complaints by persons dealing with agencies is that agencies avoid making open public "rules" by use of nonpublic "interpretive" and "policy" statements. An agency by internal memoranda, word-of-mouth, or a course of conduct lets its staff know how it expects staff members to decide in certain circumstances of general applicability. However, the person dealing with the agency is not privy to these "interpretive" or "policy" statements and does not know what to expect. The complaint is made that agencies operate by a "secret law," when it could and should be operating under written rules that have been subject to open, public rule making procedures. The whole idea behind our democratic concept of a "government of law, not men" presupposes that the governed know or have access to the laws or rules applied by the government...

On the other hand, agency personnel have legitimately indicated that it often takes some time and experimenting before the agency is in a position to determine what the final content of a rule should be. During this period, flexible policy statements allow the agency to make decision while adjusting to changing factual situations, new knowledge, or increased experience. Once the agency is more certain as to what is required, then and only then is it in a position to adopt a rule that is fully binding.

The act balances both positions by providing that agencies are encouraged to make written interpretive and policy statements, by providing that all such statements must be published and available to the public, but by providing that such statements are not rules that unconditionally bind the agency. The objective is to encourage agencies to announce their opinions, and approaches, and likely courses of action, without sacrifice of agency flexibility when a rule is not feasible.

Id. at 611-12.

Thus, RCW 34.05.230(1) is consistent with the decision in *Wash. Education Ass'n v. Wash. State Public Disclosure Comm'n*, 150 Wn.2d 612, 618-19, 80 P.3d 608 (2003) in which our Supreme Court held that guidelines issued by the Public Disclosure Commission regarding the use of school district facilities for campaign purposes were not a rule under the APA because they carried no legal or regulatory effect ("a person cannot violate an interpretive statement and conduct contrary to the agency's written opinion does not subject a person to penalty or administrative sanctions."). The Supreme Court there noted that the Legislature *encouraged* agencies to adopt policies or interpretive statements to emphasize education and assistance before imposing penalties. *See also, Budget*, 144 Wn.2d at 446-47; *Teamsters Local Union No. 117 v. State Human Rights Comm'n*, 157 Wn. App. 44, 235 P.3d 858 (2010) (opinion letter was advisory interpretive statement not subject to APA judicial review).

A policy statement under RCW 34.05.230(1) is similarly exempt from the requirement of APA rulemaking.⁹ It is a vision for fishery management that is to be implemented in later actual rulemaking.

⁹ The gillnetters *admit* in their brief at 2, 3, 10 that the policy is actually implemented by regulations adopted by the Commission. They then raise the fear that because those rules are emergency rules, no effective judicial review is possible. Br. of Appellants at 10, 13. They are wrong. The gillnetters could seek judicial review of such rules. RCW 34.05.542; RCW 34.05.546; RCW 34.05.570(2). Moreover, courts may

In this case, Policy C-3620 is precisely what it says -- a policy. It is the type of policy statement the Legislature in RCW 34.05.230(1) encouraged agencies to adopt. As such, it is not a rule subject to review under RCW 34.05.570(2).

F. CONCLUSION

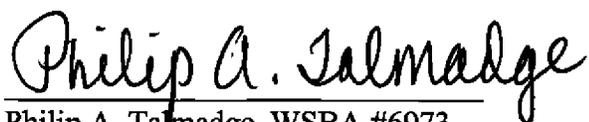
The gillnetters' effort to seek judicial review of Policy C-3620 is premature. The trial court properly granted the Commission's CR 12(b)(6) motion.¹⁰

consider issues that are technically moot if they involve matters of continuing and substantial public interest. For example, this Court held in *Price v. Price*, 174 Wn. App. 894, 301 P.3d 486 (2013) that judicial review of an expired civil anti-harassment order was not moot.

¹⁰ In footnote 13 in its memorandum in support of the motion to dismiss below, CP 18, the Commission asserted that if Policy C-3620 is determined, in fact, to be a rule by this Court, then it would be invalid on its face because it was not adopted in accordance with APA rulemaking procedures. CCA disagrees. The Commission substantially complied with the APA rulemaking procedures. RCW 34.05.375. The core of the rulemaking process is "notice to the public of the proposed rule and an opportunity to comment, thus ensuring that members of the public can meaningfully participate in the development of the rules pertaining to them." *Wash. Independent Telephone Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 902, 64 P.3d 606 (2003). The Policy was validly adopted by the Commission after *extensive* public participation. If this Court agrees that Policy C-3620 is a rule, then this Court should remand the case to the trial court to conduct review on the merits of the gillnetters' claims under RCW 34.05.570(2).

DATED this ~~14th~~ day of February, 2014.

Respectfully submitted,



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APPENDIX

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 Weckin*
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 tute 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		Gear
	Impact Share	Location	Share	Location	
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 Off-Channel Areas	Tangle Net
2017+	80%	Mainstem Columbia River and Snake River	20% ¹	Off-channel and mainstem areas of the Columbia River	Tangle Net/ Gill Net/ 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		Gear
	Share	Location	Share	Location	
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
2013-2015	≤70%	Mainstem Columbia below Bonneville Dam	≥30%	Mainstem Columbia River below Bonneville Dam and off-channel areas
2016	≤70%	Mainstem Columbia below Bonneville Dam	≥30%	Mainstem Columbia River below Bonneville Dam Off-channel areas
2017+	≤80%	Mainstem Columbia below Bonneville Dam	≥20%	Mainstem Columbia River below Bonneville Dam Off-channel areas
				Gear
				Gill Net/ Pilot Beach Seine/ Pilot Purse Seine
				Beach Seine/ Purse Seine
				Gill Net
				Beach Seine/ Purse Seine/ Other Alternative Selective Gear
				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		Gear
	Share	Location	Share	Location	
2013-2016	Necessary to meet recreational objectives, ¹ but not more than 70%	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 Above Lewis River	Beach Seine/ Purse Seine/ Other Alternative Selective Gear 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		Share	Commercial Fishery	
	Share	Location		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/ Beach Seine/ ¹ 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.

08/23/2013

BETTY J. GOULD, CLERK

BY _____
DEPUTY

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set:
4 Date: Friday, August 23, 2013
5 Time: 9:00 a.m.
6 The Honorable Chris Wickham

7
8 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **FOR THURSTON COUNTY**

10 ROBERT SUDAR, a Washington
11 resident; CHRIS DOUMIT, a
12 Washington resident; JOHN HANSON, a
13 Washington resident; MICHAEL
14 WULLGER, a Washington resident; and
15 JIM LONG, a Washington resident,

16 **Petitioners,**

17 v.

18 WASHINGTON FISH AND WILDLIFE
19 COMMISSION,

20 **Respondent.**

NO. 13-2-00767-1

[PROPOSED] ORDER GRANTING
WASHINGTON FISH AND
WILDLIFE'S COMMISSION'S
MOTION TO DISMISS PURSUANT
TO CR 12(b)

21 *and COASTAL CONSERVATION ASSOCIATION, Intervenor*
22 This matter came before the Court for hearing on the motion of Respondent,

23 Washington Fish and Wildlife Commission ("Respondent" or "Commission"), to dismiss
24 Petitioners' Petition for Judicial Review brought pursuant to RCW 34.05.570(2). The Petition
25 for Declaratory Relief challenges the Commission's January 2013 adoption of a new policy to
26 guide management of salmon harvest in the Columbia River Basin.

The Respondent appeared by and through its attorneys, Michael S. Grossmann and
William C. Frymire, Senior Counsels; Petitioners appeared by and through their attorneys,

1 John G. Young and Patrick Byrnes; Intervenor Coastal Conservation Association appeared by
2 and through its attorneys, Philip A. Talmadge and Emmelyn Hart.
3

4 The Court considered Respondent's Motion to Dismiss Pursuant to CR 12(b),
5 Petitioners' Response to Motion to Dismiss Pursuant to CR 12(b); Respondent's Reply
6 Memorandum in Support of Motion to Dismiss, Intervenor Coastal Conservation Association's
7 Memorandum on Motion to Dismiss, and all declarations and exhibits in support of the above
8 pleadings, and the arguments of both parties. This Court concludes that the challenged policy
9 is not a "rule" as defined in the APA. Accordingly, there is no justiciable controversy under
10 RCW 34.05.570(2) and no claim for relief seeking to invalidate the policy may be asserted.
11

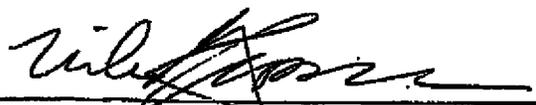
12 **IT IS HEREBY ORDERED** that Respondent Washington Fish and Wildlife
13 Commission's Motion to Dismiss Pursuant to CR 12(b) is **GRANTED** and Petitioners' Petition
14 for Judicial Review is hereby **DISMISSED**.

15 **DONE IN OPEN COURT** this 23 day of August, 2013.
16

17
18
19 THE HONORABLE CHRIS WICKHAM
Nurston County Superior Court Judge

20 Presented by:

21 **ROBERT W. FERGUSON**
22 Attorney General

23 
24 Michael S. Grossmann, WSBA #15293
25 Senior Counsel
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William C. Frymire, WSBA #16551
Senior Counsel
Attorneys for Respondent
Washington Fish and Wildlife Commission

Approved for entry,
Notice of Presentation Waived:

YOUNG deNORMANDIE, P.C.

[Handwritten signature] for John Young

John G. Young, WSBA #12890

[Handwritten signature]

Patrick Byrnes, WSBA #45467
Attorneys for Petitioners Robert Sudar,
Chris Doumit, John Hanson, Michael Wullger
and Jim Long

TALMADGE/FITZPATRICK

[Handwritten signature]

Philip A. Talmadge, WSBA #6973

[Handwritten signature] for EH

Emmelyn Hart, WSBA #28820
Attorneys for Intervenor
Coastal Conservation Association

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Respondent CCA in Court of Appeals Cause No. 45378-9-II to the following parties:

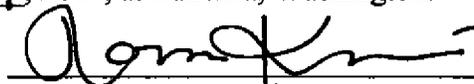
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Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Original efiled with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 14th, 2014, at Tukwila, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

WASHINGTON STATE ATTORNEY GENERAL

February 14, 2014 - 4:24 PM

Transmittal Letter

Document Uploaded: 453789-Respondent's Brief~3.pdf

Case Name: Sudar v. Washington Fish and Wildlife Commission

Court of Appeals Case Number: 45378-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Mike Grossman - Email: **Mikeg1@atg.wa.gov**