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

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

Appellants,

v.

WASHINGTON FISH AND WILDLIFE COMMISSION,

Respondent.

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**APPELLANTS' BRIEF**

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John G. Young, WSBA #12890  
Patrick E. Byrnes, WSBA #45467  
YOUNG deNORMANDIE, P.C.  
1191 Second Avenue, Suite 1901  
Seattle, Washington 98101  
Tel. (206) 224-9818  
Attorneys for Appellants

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## **I. ASSIGNMENT OF ERROR**

Appellants Robert Sudar, Chris Doumit, John Hanson, Michael Wullger, and Jim Long (collectively, “Sudar”) assign error to the trial court’s determination that the Washington Fish and Wildlife Commission’s “Columbia River Basin Salmon Management” policy is not a rule within the meaning of RCW 34.05.570(2)(c).

## **II. STATEMENT OF THE CASE**

### **A. Adoption of the Commission Action.**

This appeal stems from the Washington Fish and Wildlife Commission’s (“Commission”) implementation of a new regulatory scheme for the harvest of salmon on the Columbia River. The cornerstone of this new framework is the Commission’s “Columbia River Basin Salmon Management” policy, POL C-3620, adopted on January 12, 2013 (hereinafter, the “Commission Action”).<sup>1</sup>

The Commission Action outlines the future of the Columbia River salmon fishery – which includes an increased allocation of salmon for recreational fishers at the expense of commercial fishers, changes in permissible types of gear that may be used on the main stem of the Columbia River, and the creation of new fisheries.

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<sup>1</sup> The Commission Action and its Appendices can be found at Clerk’s Papers (“CP”) 27-42.

## **B. Implementation of the Commission Action.**

The vision outlined in the Commission Action has been given legally binding effect through a series of emergency regulations promulgated by the Washington Department of Fish and Wildlife (“Department”).<sup>2</sup> Comparing the regulations from 2013 with those from previous years reveals that the 2013 regulations diverge from those promulgated in years past to conform to the provisions set forth in the Commission Action. As a result, the Commission Action and attendant emergency rules have already unmistakably reshaped the Columbia River salmon fishery by altering allocation ratios between commercial and recreational fishers, changing allowable gear types, and creating new fisheries.

### **1. The Commission Action has Changed the Allocation Ratios Between Commercial and Recreational Fishers.**

One of the Commission Action’s primary objectives is to increase the Endangered Species Act (“ESA”)-impact allocation for recreational fishers while reducing the ESA-impact for commercial fishers.<sup>3</sup> The

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<sup>2</sup> At the time this case was heard by the trial court, the Department had already adopted 14 emergency rules implementing the Commission Action. *See* Declaration of Jim Scott (“Scott Declaration”), at CP 372-375 (listing emergency rules adopted by the Department pursuant to the Commission Action).

<sup>3</sup> Commission Action, Appendices A-E, at CP 38-42, which delineate a progressive increase in ESA-impacts for recreational fishers and a concomitant decrease in ESA-impacts for commercial fishers.

Department has given effect to this objective through the adoption of a series of emergency rules.

For example, for summer Chinook salmon in the years 2013 and 2014 on the mainstem Columbia River below Priest Rapids Dam, the Commission Action sets a target of a 60% share for recreational fishers and a 40% share for commercial fishers.<sup>4</sup> The Department followed this directive and adopted an emergency regulation setting the Summer Chinook Harvest Allocation at 55% for recreational fishers and 45% for commercial fishers.<sup>5</sup> This represents a change from previous seasons, in which the allocation had consistently been set at a 50/50 split.<sup>6</sup>

A similar allocation change was implemented for the Lower Columbia River Fall Chinook Season. For that fishery, the Commission Action sets a target allocation of a 70% share of the ESA-impact for Tule Chinook for recreational fishers and a 30% share of the ESA-impact for commercial

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<sup>4</sup> Commission Action, Appendix B, at CP 39.

<sup>5</sup> Department's June 12, 2013 Emergency Rule, at CP 423, which allocates 2,585 Chinook salmon to commercial fishers. *See also* Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: 2013 Summer Fact Sheet No. 1, at CP 118, indicating that 2,585 Chinook salmon represented 45% of the available harvest. Note that the allocation ratio was set by the Department at 55/45, and not the full 60/40 split called for by the Commission Action, solely to accommodate Oregon's policies, which called for a 50/50 split. *See* Scott Declaration, at CP 374.

<sup>6</sup> *See* Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: Summer Fact Sheet No. 1 for the years 2005-2012, at CP 120-163, all of which provide for a 50/50 split between commercial and recreational fishers.

fishers.<sup>7</sup> Consistent with that directive, the Department set the allocation at 69% for recreational fishers and 31% for commercial fishers – a sharp divergence from previous years, in which the split was much closer to 50/50.<sup>8</sup>

## **2. The Commission Action has Changed the Gear Types Available to Commercial Fishers.**

The Commission Action also aims to reduce or eliminate the use of gill nets by commercial fishers. Emergency regulations have already been adopted to implement this change. For example, in past years, both gill nets and tangle nets have been allowed in the Spring Chinook Salmon Fishery.<sup>9</sup> In 2013, however, consistent with the Commission Action,<sup>10</sup> emergency rules for the Spring Chinook season prohibited the use of gill nets.<sup>11</sup>

The Commission Action had a similar impact on the May portion of the spring Chinook fishery. Typically, both tangle nets and gill nets have

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<sup>7</sup> Commission Action, Appendix C, at CP 40.

<sup>8</sup> Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: 2012 Fall Fact Sheet No. 1a, at CP 220 (56/44 split in favor of recreational fishers); 2011 Fall Fact Sheet No. 1a, at CP 203 (62/38 split); 2010 Fall Fact Sheet No. 1, at CP 186 (51/49 split); 2009 Fall Fact Sheet No. 1, at CP 167 (58/42 split).

<sup>9</sup> Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: 2012 Winter Fact Sheet No. 1, at CP 244.

<sup>10</sup> Commission Action, Appendix A, at CP 38.

been allowed in this fishery.<sup>12</sup> However, consistent with the directives of the Commission Action, only tangle nets were permitted in the early portion of this fishery for the 2013 season.<sup>13</sup>

**C. The Commission Action is Being Used to Create New Fisheries.**

Finally, pursuant to the Commission Action, the Department has begun the process of creating a pilot fall Coho tangle net fishery.<sup>14</sup> Consistent with the Commission's directive to phase out the use of gill nets, this fishery will only allow the use of 3¾ inch tangle nets.<sup>15</sup>

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<sup>11</sup> April 8, 2013 Emergency Rule, at CP 389 (providing for a "4 ¼ inch maximum mesh size (tangle net)" on the Mainstem Columbia River).

<sup>12</sup> See, e.g., Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: 2011 Spring Fact Sheet No. 6, at CP 278-79 (allowing the use of 8" gill nets to reduce steelhead bycatch typically caused by the use of smaller nets).

<sup>13</sup> May 14, 2013 Emergency Rule, at CP 395 (providing for a "4 ¼ inch maximum mesh size (tangle net)" on the Mainstem Columbia River).

<sup>14</sup> Commission Action, Appendix E, at CP 42; see also Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: 2013 Fall Fact Sheet No. 1, at CP 291-308.

<sup>15</sup> Oregon and Washington Departments of Fish and Wildlife Joint Staff Report: 2013 Fall Fact Sheet No. 1, at CP 295.

### III. ARGUMENT

#### A. Standard of Review.

Questions of law are reviewed *de novo* on appeal.<sup>16</sup> Sudar is appealing the trial court's legal conclusion that the Commission Action is not a "rule" within the meaning of the Washington Administrative Procedures Act ("APA"). Thus, the standard of review is *de novo*.

**B. The Commission Action is a "Rule" Under the APA.** 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 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, for the Commission Action to be challengeable as a rule, two statutory criteria must be met: (1) the Commission Action must be an

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<sup>16</sup> *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (Wash. 2003) ("[q]uestions of law and conclusions of law are reviewed *de novo*"); *see also PacifiCorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App. 627, 662, 259 P.3d 1115 (Wash. Ct. App. 2011) ("[w]hether a statute applies to a factual situation is a question of law.")

“agency order, directive, or regulation of general applicability,” and (2) the Commission Action must fall into one of the five categories enumerated by the statute. Here, both criteria are satisfied: the Commission Action constitutes a directive or regulation of general applicability, and it establishes, alters, or revokes qualifications or requirements relating to the enjoyment of benefits or privileges conferred by law, as provided by RCW 34.05.010(16)(c).

**1. The Commission Action is a Directive or Regulation of General Applicability.**

As an initial matter, the Commission Action constitutes an “agency order, directive, or regulation of general applicability.” “Directive” is not defined by the APA but is generally defined as “an authoritative instruction or direction; [a] specific order.”<sup>17</sup> An agency action is of general applicability if it applies uniformly to all members of a class.<sup>18</sup> Here, the Commission Action is a directive or regulation because it provides authoritative instructions and specific orders as to how fish are allocated among commercial and recreational fishers, gear types that may be used, zones that may be fished, and fishery openings. Furthermore, it is a regulation of general applicability because it has been applied uniformly

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<sup>17</sup> <http://dictionary.reference.com/browse/directive?s=t>.

to all commercial fishers on the Columbia River. Therefore, the first criterion for challenging the Commission Action as a rule is met.

**2. The Commission Action Establishes, Alters, or Revokes Qualifications or Requirements Relating to the Enjoyment of Benefits or Privileges Conferred by Law.**

There is no dispute that the ability to fish commercially for salmon on the Columbia River is a benefit or privilege conferred by law. RCW 77 *et seq.* lays out the licensing and other requirements one must follow in order to receive this benefit or privilege.<sup>19</sup> Washington case law additionally makes clear that no right to harvest fish exists absent a grant of authority from the State.<sup>20</sup> Additionally, the Commission agrees that RCW “Title 77 and its licensing provisions grant a privilege to harvest. That privilege is constrained by restrictions on who can obtain or hold a license, and by regulatory limits on the time, manner, and method of

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<sup>18</sup> *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 648, 835 P.2d 1030 (Wash. 1992) (finding that a numeric standard that was applied uniformly to all entities that discharged dioxin into the water was a regulation of general applicability).

<sup>19</sup> RCW 77.65.160 (setting out the requirements for obtaining a commercial salmon fishing license, which confers to the holder the privilege of fishing commercially for salmon); *see also* RCW 77.32.050(1) (“All recreational and commercial licenses . . . shall be issued under the authority of the commission.”)

<sup>20</sup> *Vail v. Seaborg*, 120 Wash. 126, 133-134, 207 P. 15 (Wash. 1922) (“The food fish in the waters of the state belong to the people of the whole state, and the state through its legislature has the same right of regulation and control of this property that it has of any other state property . . . . The right exists in the state in the first place to say whether any fish whatever shall be taken . . . . Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority . . . .”)

harvesting.”<sup>21</sup> Thus, the Commission Action concerns benefits or privileges conferred by law.

The Commission Action also provides new qualifications or requirements relating to Appellants’ enjoyment of the privilege of fishing commercially.<sup>22</sup> It does so by changing the allocation ratios between commercial and recreational fishers (which requires commercial fishers to catch fewer fish) and by requiring the use of certain gear types. The adjustment in allocation ratios has also had the incidental effect of changing the zones in which commercial fishers may fish. As a result, the Commission Action has changed the requirements regarding the areas in which commercial fishers may exercise their privilege to harvest salmon. Thus, through the “restrictions [it has] placed on actual harvesting activity,”<sup>23</sup> the Commission Action has established or altered the qualifications or requirements relating to Appellants’ enjoyment of the privilege of commercial fishing.

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<sup>21</sup> Commission’s Memorandum in Support of its Motion to Dismiss (“Motion to Dismiss”), at CP 20.

<sup>22</sup> See, e.g., *Faylor’s Pharmacy v. Department of Social & Health Servs.*, 125 Wn.2d 488, 497, 886 P.2d 147 (Wash. 1994) (changes to the reimbursement schedules for Medicaid patients related to the enjoyment of benefits conferred by law).

<sup>23</sup> Motion to Dismiss, at CP 20.

**C. The Commission's Argument that the Commission Action is not a Rule Elevates Form over Substance.**

The Commission will argue that because the Commission Action itself does not contain the legally enforceable regulations it envisions, it should not be challengeable as a rule. If accepted, this argument would insulate the Commission Action from any meaningful judicial review.

The Commission is in a position to argue that the Commission Action is shielded from judicial review because of the manner in which it has chosen to implement its new regulatory scheme. Instead of adopting a permanent rule to effect the changes called for in the Commission Action, the Commission and Department have enforced the Commission Action through a series of emergency rules.<sup>24</sup> These emergency rules are typically in effect for a week or less after being filed.

For example, an emergency rule filed by the Department on January 31, 2013 set a season lasting until February 7.<sup>25</sup> As another example, the Department filed an emergency rule on June 12, 2013 that set a fishing season that lasted from June 16 until June 17.<sup>26</sup> As a final example, the

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<sup>24</sup> Scott Declaration, at CP 366-75. By comparison, Oregon, which shares jurisdiction over the Columbia River fishery with Washington, adopted similar changes to the fishery through the use of permanent rules, which were subject to judicial review. *See* Motion to Dismiss, at CP 15.

<sup>25</sup> Department's January 31, 2013 Emergency Rule, at CP 376-78.

<sup>26</sup> Department's June 12, 2013 Emergency Rule, at CP 421-23.

Department's July 11, 2013 emergency rule set a season that lasted from July 15 until July 16.<sup>27</sup>

The same pattern holds true for many of the emergency rules filed by the Department: the season is over shortly after the rule setting the season is filed. Thus, even if Sudar were to bring a legal challenge to an emergency rule, the brief fishery season set by that rule would almost certainly be over before any meaningful judicial review could take place.

Furthermore, emergency rules may only be challenged on narrow grounds. RCW 34.05.350 provides that a challenge to an emergency rule is limited to a determination of whether adoption of the rule on an emergency basis was necessary.<sup>28</sup> Therefore, a ruling that the

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<sup>27</sup> Department's July 11, 2013 Emergency Rule, at CP 427-29.

<sup>28</sup> RCW 34.05.350(3) states: "Within seven days after the rule is adopted, any person may petition the governor requesting the immediate repeal of a rule adopted on an emergency basis by any department listed in RCW 43.17.010. Within seven days after submission of the petition, the governor shall either deny the petition in writing, stating his or her reasons for the denial, or order the immediate repeal of the rule. In ruling on the petition, the governor shall consider only whether the conditions in subsection (1) of this section were met such that adoption of the rule on an emergency basis was necessary. If the governor orders the repeal of the emergency rule, any sanction imposed based on that rule is void. This subsection shall not be construed to prohibit adoption of any rule as a permanent rule."

Subsection (1)(a) of the statute provides that an emergency rule may be adopted where the agency finds "[t]hat immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest . . . ." The Department has justified the adoption of the emergency regulations at issue here on the grounds listed in RCW 34.05.350(1)(a). Thus, any challenge to those emergency rules would be limited to a determination of whether the requirements of (1)(a) had been met.

Commission Action is not challengeable as a rule under RCW 34.05.570(2)(c) would effectively insulate the Commission Action and its implementing emergency regulations from judicial review on the merits.

The Commission will argue that because the Commission Action is intended to be “adaptive,” the emergency rules that implement it will vary as future facts develop. Essentially, the Commission’s argument seems to be that Sudar’s challenge is not yet ripe because the Commission Action has not been fully implemented. The Commission’s Reply Memorandum in Support of its Motion to Dismiss states:

[T]he challenged policy is adaptive . . . . What this highlights is that Petitioners are really interested in attacking the vision of the new policy before it has ever had an opportunity to develop. But a justiciable controversy depends upon the ability to look at facts in relation to a legitimate legal interest. For rule challenges pursuant RCW 34.05.570(2), that means taking a look at the facts which support a rule with legally binding effect. The policy itself does not produce a legal effect and its implementation may vary as facts develop in the future.<sup>29</sup>

While Sudar is interested in challenging the Commission Action, the “vision” called for in the Commission Action has already been implemented through the use of the emergency regulations cited to in this brief, many of which conform closely to the provisions of the Commission Action. As a result, the Commission Action is not as adaptive as the

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<sup>29</sup> CP 364-65.

Commission suggests, and Sudar's legitimate legal interests have already been affected.

To agree with the Commission that the Commission Action is not subject to judicial review merely because it does not contain the regulations that implement it would give the Commission and Department a pass to implement the Commission Action essentially free from the possibility of judicial review. Because the regulations adopted after the Commission Action clearly conform to its guidance, the legal distinction the Commission tries to draw between the Commission Action and its regulations is largely meaningless. As a result, this Court should allow Sudar to challenge the Commission Action directly as a rule under RCW 34.05.570(2)(c).

#### **IV. CONCLUSION**

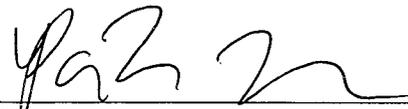
The trial court erred in ruling that the Commission Action is not a rule under the APA. The effects of the Commission Action have already been felt by Sudar through the Department's adoption of emergency regulations, which follow the provisions set forth in the Commission Action closely. To hold that the Commission Action is not challengeable as a rule would insulate the Commission and Department's regulation of the Columbia River salmon fishery from judicial review. The Court of Appeals should look past the legal distinction the Commission tries to

draw and allow Sudar to challenge the Commission Action on the merits  
as a rule.

DATED this 16 day of December, 2013 at Seattle, Washington.

YOUNG deNORMANDIE, P.C.

By



John G. Young, WSBA #12890  
Patrick E. Byrnes, WSBA #45467  
Attorneys for Petitioners/Appellants

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 16, 2013, a copy of the foregoing **Appellants' Brief** was delivered at the following address via U.S. Mail and email.

Michael S. Grossmann  
Attorney General's Office  
Fish & Wildlife Division  
PO Box 40100  
Olympia, WA 98504-0100  
Email: [mikeg1@atg.wa.gov](mailto:mikeg1@atg.wa.gov)

Philip Albert Talmadge  
Emmelyn Hart  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98118-4630  
Email: [phil@tal-fitzlaw.com](mailto:phil@tal-fitzlaw.com)  
Email: [emmelyn@tal-fitzlaw.com](mailto:emmelyn@tal-fitzlaw.com)

Court of Appeals, Division II  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427  
Email: [coa2filing@courts.wa.gov](mailto:coa2filing@courts.wa.gov)

DATED this 16 day of December, 2013 at Seattle, Washington.

  
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Jan Helde