



## PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with [RCW 34.05.330](#), the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at <http://apps.leg.wa.gov/wac/default.aspx?cite=82-05>.

### CONTACT INFORMATION *(please type or print)*

Petitioner's Name Nello Picinich  
Name of Organization Coastal Conservation Association Washington  
Mailing Address ████████████████████  
City ████████ State ██ Zip Code ████  
Telephone ████████ Email ████████████████████

### COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: <http://www.leg.wa.gov/CodeReviser/Documents/RClist.htm>.

### INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Dept. of Fish and Wildlife, Fish and Wildlife Commission

1. NEW RULE - I am requesting the agency to adopt a new rule.

The subject (or purpose) of this rule is: \_\_\_\_\_

The rule is needed because: \_\_\_\_\_

The new rule would affect the following people or groups: \_\_\_\_\_

**2. AMEND RULE - I am requesting the agency to change an existing rule.**

List rule number (WAC), if known: WAC 220-358-010

- I am requesting the following change: Amend the WAC to establish minimum standards for observation of non-tribal commercial fisheries in the mainstem lower Columbia River
- This change is needed because: No such requirement currently exists and the department rarely requires observation of non-tribal commercial fisheries that impact imperilled fish populations
- The effect of this rule change will be: Increase transparency and data related to the conservation impacts of non-tribal commercial fisheries and ensure compliance with the endangered species act
- The rule is not clearly or simply stated: \_\_\_\_\_

**3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.**

List rule number (WAC), if known: \_\_\_\_\_

*(Check one or more boxes)*

- It does not do what it was intended to do.
- It is no longer needed because: \_\_\_\_\_
- It imposes unreasonable costs: \_\_\_\_\_
- The agency has no authority to make this rule: \_\_\_\_\_
- It is applied differently to public and private parties: \_\_\_\_\_
- It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: \_\_\_\_\_
- It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: \_\_\_\_\_
- Other (please explain): \_\_\_\_\_

**Rulemaking Petition: Establishing minimum standards for observation of non-tribal commercial fisheries in the mainstem lower Columbia River**

Proposed rule language:

*The department shall require that all non-tribal commercial fisheries conducted in the mainstem lower Columbia River be subject to observation, either through on-board observers or electronic video monitoring. The department shall ensure that not less than forty percent of all Washington-licensed commercial vessels participating in any fishery opening shall be subject to observation. All non-confidential data, documentation, or recordings collected during observations, written or electronic, shall be made available to the public on the department’s website within three business days.*

Background:

WDFW and ODFW rarely require observation of non-tribal commercial fisheries in the mainstem lower Columbia River. These fisheries are mixed stock fisheries that largely target hatchery Chinook populations, but frequently snare non-target species as bycatch, including wild and endangered salmon, steelhead, and sturgeon. Observation data is critical to calculate mortalities to non-target species and for confirming current assumptions related to release mortality rates.

Based on [information provided by WDFW](#), traditional nontribal mainstem gillnet fisheries have only been observed six times over the past 40 years. For many of these years there were multiple fisheries each year, which means just a small percentage of these fisheries have been observed.

Table E. Columbia River mainstem commercial fishery monitoring results.

Year	Season	Gear	Type	Observed/ Expanded	Salmon/Sturgeon Kept	Steelhead Released	Sturgeon Released	Sockeye Released	Total Kept	Total Released	% Released
1986	Winter	Gill Net	Fishery	Expanded	9,000	2,956	NA	NA	9,000	2,956	25%
2009	Fall	Gill Net	Fishery	Observed	2,417	83	388	0	2,417	471	16%
2010	Summer	Gill Net	Fishery	Observed	203	11	170	20	203	201	50%
2011	Fall	Gill Net	Fishery	Observed	398	19	28	NA	398	47	11%
2012	Fall	Gill Net	Fishery	Expanded	40,800	2,095	5,336	NA	40,800	7,431	15%
2017	Fall	Gill Net	Fishery	Expanded	21,053	650	2,735	NA	21,053	3,385	14%

Consider the mainstem Zones 4-5 fall gillnet fishery. In 2018, WDFW and ODFW used the 2017 observer data to request a reduction in the release mortality rate assigned to large-mesh gillnets for steelhead, including ESA-listed “B-run” steelhead. The *US v. Oregon* Technical Advisory Committee (TAC) and the National Oceanic and Atmospheric Administration (NOAA) reviewed proposal and approved a modified reduced mortality rate for 9-inch gillnets of 38.3% - a significant reduction from the 59% rate that was in place prior to the change. The reduction was approved despite the lack of any research data on long-term release mortality rates.

However, in a July 30, 2018 concurrence memo (enclosed) for the recommended release mortality rates, NOAA’s Jeremy Jording cautioned about the need to “...review the information and revise methods as appropriate for estimating the anticipated mortality resulting from fisheries is paramount.” Jording also made clear that NOAA expects continued observation of this fishery:

*Monitoring plans and descriptions included in the 2017 Biological Assessment on the Agreement (TAC 2017) include placing on-board observers on all participating vessels to collect biological data, including mark rates and species composition of released fish. The recommended release mortality rates were developed with this methodology. While these methods are scientifically based and represent the best available science, the parties' commitment to continue to review the information and revise methods as appropriate for estimating the anticipated mortality resulting from fisheries is paramount. NMFS expects, per the terms and conditions of the 2018-2027 U.S. v. Oregon harvest biological opinion (i.e., terms and conditions 1a and 1b (NMFS 2018)) that the State of Oregon and Washington will implement observers again to verify the continued results at various times during the course of the Agreement to verify the consistency of these release mortality revisions.*

Despite this, we are unaware of any observation of this fishery since the 2017 observation data was collected, despite the direction from NOAA to implement observers again “at various times” during the 2018-2027 *US v. Oregon* management agreement, which ends in just a few years. Instead, the Zones 4-5 fishery has been conducted each year from 2018-2023 utilizing this reduced mortality rate, which effectively allows the fishery to kill more steelhead, including ESA-listed steelhead populations.

There are similar concerns with the mainstem small-mesh tangle gillnet fishery for Coho during the fall management season, which impacts ESA-listed steelhead, ESA-listed fall “Tule” Chinook, and other species.

The Commission should act now to establish minimum standards for observation of non-tribal commercial fisheries in the mainstem lower Columbia River to better understand the impact of these fisheries on non-target species, including ESA-listed stocks.



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
510 Desmond Drive SE, Suite 103  
Lacey, Washington 98503-1263

July 30, 2018

MEMORANDUM FOR: Stuart Ellis, current *U.S. v. Oregon* Technical Advisory Committee Chair

FROM: Jeromy Jording  
NOAA's National Marine Fisheries Service  
West Coast Region,  
Sustainable Fisheries Division

SUBJECT: Release Mortality rates for fall season non-treaty commercial gillnet and tangle net gear.

Thank you for your May 17, 2018 memo seeking concurrence from NOAA's National Marine Fisheries Service (NMFS) that revising specific harvest management measures will not alter the determinations made in our 2018 biological opinion on the 2018-2017 *U.S. v. Oregon* Management Agreement (Agreement). This response to your request was prepared by the NMFS pursuant to section 7(a)(2) of the Endangered Species Act (ESA), implementing regulations at 50 CFR 402.

Your memo summarizes the recommendations of the *U.S. v. Oregon* Technical Advisory Committee (TAC) to revise release mortality rates used in the 2018-2027 *U.S. v. Oregon* Biological Assessment of Incidental Impacts on Species Listed Under the ESA Affected by the Agreement (TAC 2017). The TAC recommends the following revisions for fall season commercial gillnet and tangle net gear, by gear type, for the species encountered:

<b>Gear</b>	<b>Species</b>	<b>Recommended release mortality rate</b>
≤ 3.75-inch tangle net	coho, steelhead	23.6%
8-inch minimum gillnet	steelhead	44.8%
9-inch minimum gillnet	steelhead	38.3%

NMFS has reviewed the information explaining the rationale for the revision (TAC 2018) and concurs with the recommendation of the TAC to use the release mortalities listed in the table above. These are total mortality rates encompassing immediate and post-release mortality. The immediate release mortality is based on direct observations over multiple years, varying by gear type (TAC 2018). A long-term survival study for the proposed gear types, suite of regulations,

and fishery timing has not been conducted. Therefore, ODFW and WDFW evaluated whether the relationship between immediate and total release mortality rates for salmon and steelhead in other release mortality studies would be statistically robust enough to estimate total release mortality for the gear types and species specified above. The states set criteria to identify which studies to use, such as only using studies specifically performed in the Columbia River, to estimate a post-release mortality (for the complete criteria list see TAC 2018). The linear regression fitted to this relationship ( $R^2 = 0.83$ ) based on these studies is used to estimate the total release mortality rate associated with an observed immediate release mortality rate. NMFS agrees that this incorporates the best available science into current harvest management. As a precaution, the highest point estimate of immediate release mortality observed in the dataset was used as the input value, instead of the average. This yields the highest calculated post release mortality possible from the dataset in the revised release mortality rates, whereas using the average would have resulted in a lower mortality rate. The current data on direct observations from the fishery also encompass both historical and contemporary environmental conditions, providing a range of observed survival. Therefore, NMFS believes this is an appropriately conservative approach until the dataset is expanded through future collections.

The recommendations of the TAC are consistent with the available information. However, NMFS nonetheless encourages the states to continue efforts to assess release mortality rates for these evolving selective fisheries. The commitment to utilize additional information from future fisheries to ensure these rates continue to be appropriate (Ellis 2018) is encouraging. If additional information contradicts these findings, or if a catch monitoring review (i.e., term and condition 1b (NMFS 2018)) requires modifications of harvest management measures, we expect written documentation from TAC reconciling inconsistencies. Aside from retained catch, release mortality rates are an important component of the total mortality to ESA-listed stocks in these fisheries together with the number of fish released and the stock composition of these releases. In addition, underlying temperature conditions can significantly influence mortality rates. Therefore, it is also appropriate to monitor the temperature conditions while implementing fall fisheries to assess whether assumptions related to the mortality rate estimates continue to apply. NMFS expects this information to be included when reporting on monitoring activities over the course of the Agreement.

NMFS has reviewed the information provided during the season setting process (Lothrop 2018) regarding the expected incidental take of ESA-listed steelhead and coho salmon resulting from the gear types and expected regulations for 2018 commercial fisheries. Based on the 2018 preseason calculations using the expected fishing effort and forecasted abundances, the anticipated mortality for fall fisheries using the revised release mortality rates is:

- 13,583 total coho salmon mortalities (13,161 coho salmon retained plus 422 coho salmon release mortalities),
  - 418 Lower Columbia Natural total coho mortalities (299 release mortalities from mark selective fisheries and 119 mortalities in non-mark selective fisheries; representing a 1.9% exploitation rate) from 1,387 Lower Columbia Natural coho encounters,
- 112 total natural origin steelhead mortalities (0 steelhead kept plus 112 steelhead killed as result of release),

- 208 natural origin A-Index and 29 natural origin B-Index steelhead encounters (95 natural origin A-Index release mortalities representing a 0.21% harvest rate; and, 17 natural origin B-Index release mortalities representing 0.49% harvest rate).

According to the Incidental Take Statement (ITS) of the 2018-2027 *U.S. v. Oregon* harvest biological opinion, fishery mortalities will be kept to a minimum, but are subject collectively to annual incidental take limits (NMFS 2018). Based on the 2018 preseason forecasts, the allowable mortality limits are an 18.0% exploitation rate for the Lower Columbia River coho salmon ESU (synonymous with the Lower Columbia Natural coho stock) (collectively including ocean fisheries), and 2.0% harvest rate for the A-Index and B-Index components of the aggregate upriver steelhead run. When combining the anticipated mortality described above with all other fisheries a 15.3% total exploitation rate for Lower Columbia River coho salmon is expected from the in-river harvest management model (Lothrop 2018). Under the same scenario for steelhead, when the anticipated mortality described above is combined with all other fisheries in-river, a 1.8% total harvest rate for B-Index steelhead and a 1.1% harvest rate for A-Index steelhead are expected (Lothrop 2018). Therefore fisheries are planned for 2018 consistent with the level of take specified in the ITS annual incidental take limits of the 2018-2027 *U.S. v. Oregon* harvest biological opinion (NMF 2018).

NMFS understands the release mortality rates were estimated using specific methods for gear configurations and operator fishing procedures anticipated to be implemented under the Agreement. The proposed regulations take this into account by mirroring the gear and operation, and limit the tangle-net gear to multi-filament mesh 3.75-inch (stretched measure) with a maximum length of 900 feet, including a set of live-capture fishery rules. Deployed nets would be limited to a soak time of 30 minutes with each participating vessel required to use an operating onboard recovery box. Regulations also require participants to complete a training course provided by ODFW or WDFW regarding the best methods for conducting live capture fisheries. These regulations were developed using information gathered during gear evaluation studies performed for the gear described here, during the fall salmon and steelhead migration period and would not be applicable to other management periods. Results from these investigations showed that immediate mortality for released coho salmon rose concurrently with water temperature and, as previously mentioned, temperature effects factored heavily into developing the timing for using tangle-net gear during the fall. Gillnet gear would limit net gear to multi-filament mesh 8- or 9-inch (stretched measure) minimum mesh size restrictions with multiple net rules, essentially requiring net sizes not authorized for a fishery to be excluded from being onboard a participating vessel.

Monitoring plans and descriptions included in the 2017 Biological Assessment on the Agreement (TAC 2017) include placing on-board observers on all participating vessels to collect biological data, including mark rates and species composition of released fish. The recommended release mortality rates were developed with this methodology. While these methods are scientifically based and represent the best available science, the parties' commitment to continue to review the information and revise methods as appropriate for estimating the anticipated mortality resulting from fisheries is paramount. NMFS expects, per the terms and conditions of the 2018-2027 *U.S. v. Oregon* harvest biological opinion (i.e., terms and conditions 1a and 1b (NMFS 2018)) that the State of Oregon and Washington will implement observers again to verify the continued results

at various times during the course of the Agreement to verify the consistency of these release mortality revisions.

In summary, based on the information provided (Ellis 2018 and TAC 2018) and reviewed in this memo, updating release mortality rates used to set season structures for specific fishing gear types does not modify the effects of the action considered in the 2018-2027 *U.S. v. Oregon* harvest biological opinion (NMFS 2018). NMFS previously considered these effects on ESA-listed species or their critical habitat listed (see NMFS 2018, Table 1-1 for the complete species list and critical habitat designations) and our opinion remains unchanged, that the action is not likely to jeopardize the continued existence and/or destroy or adversely modify their designated critical habitat, therefore this additional information does not require reinitiation of consultation.

We look forward to reviewing the results of the planned fisheries post-season with you, and remain committed to coordinated future efforts, as needed. Please contact me at (360) 753-9576, or [jeromy.jording@noaa.gov](mailto:jeromy.jording@noaa.gov), with any questions regarding this memo.

cc: Susan Bishop, NOAA Fisheries  
Peter Dygert, NOAA Fisheries  
TAC membership roster

#### Literature Cited

- Ellis, S. 2018. Memo from S. Ellis, Columbia River Intertribal Fish Commission, *U.S. v. Oregon* Technical Advisory Committee Chair on May 17, 2018 to J. Jording, NOAA's National Marine Fisheries Service, West Coast Region, Sustainable Fisheries Division regarding release mortality rates for fall season commercial gillnet and tanglenet gear in 2018.
- Lothrop, R. 2018. Email from R. Lothrop to *U.S. v. Oregon* Technical Advisory Committee on April 11, 2018 containing final preseason Columbia River Fisheries Regulation Assessment Model calculations for estimating 2018 fall fisheries catches by stock groups.
- NMFS. 2018. Endangered Species Act – Section 7 Consultation Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation. Consultation on effects of the 2018-2027 *U.S. v. Oregon* Management Agreement. NMFS, WCR, Sustainable Fisheries Division. WCR-2017-7164. February 23, 2018. 582p.
- TAC. 2017. 2018-2027 *U.S. v. Oregon* Biological Assessment of Incidental Impacts on Species Listed Under the Endangered Species Act Affected by the 2018-2027 *U.S. v. Oregon* Management Agreement. June 21, 2017. 624p.



TAC. 2018. Memo from *U.S. v. Oregon* Technical Advisory Committee to *U.S. v. Oregon* Policy Committee. Recommended Revisions to Release Mortality Rates Used for Fall Non-Treaty Commercial Fisheries. March 23, 2018. 34p.