

Legal Briefing for:

Rule-Making Petition to the Commission

(Requesting Conversion of NoF policy C-3608 Into a Rule)

PETITIONERS:

WASHINGTON CITIZEN SPORTSMEN – Perry Menchaca

TWIN HARBORS FISH AND WILDLIFE ADVOCACY – Tim Hamilton

Legal Framework for a Decision

- ▶ RCW 34.05.230 of the Administrative Procedures Act (APA) – Policies and Rules
 - ▶ Agencies do not have to adopt policies as rules. But they are encouraged to do so in certain cases, and may be petitioned to consider that option.
 - ▶ You have been petitioned to convert the North of Falcon (NoF) policy into a rule. Two aspects to consider here:
 - ▶ Underlying **principles guiding a decision to convert policies into rules**; and
 - ▶ The APA **process for decision-making** on the petition
- ▶ **APA Guiding Principles on Conversion of a Policy into a Rule:**
 - ▶ **Daylight Internal Agency Policies** - 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.
 - ▶ **To Better Inform and Involve the Public** – Agencies are encouraged [but not required] to convert longstanding policies into rules using the APA's public rule-making process.
 - ▶ **Enforceability Issues** - Current interpretive and **policy statements are advisory only**.

Legal Framework for a Decision

- ▶ **APA Process for Decisions on a Rule-Making Petition under RCW 34.05.230:**
 - ▶ A person may **petition an agency** requesting the conversion of interpretive and policy statements into rules. Upon submission, the agency shall notify the joint administrative rules review committee of the petition. **Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for the denial, or initiate rule-making proceedings in accordance with this chapter.**
 - ▶ Thus, there are **two course of action**:
 - ▶ Decide to **move forward with rule-making** using APA processes to generate a rule; **OR**
 - ▶ **Deny the petition and identify the reasons** for that decision.
 - ▶ **Case law regarding the decision-making process:** *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 740, 312 P.3d 766 (2013) – An agency has “**wide discretion**” when deciding on a rule-making petition, **but must confront the issues** presented by the petitioner(s) **and explain its reasoning** when rendering a decision.

Additional Legal Principles to Consider:

- ▶ What's a rule? (Definition at RCW 34.05.010(16))
 - ▶ An order or directive;
 - ▶ Of “general applicability” (meaning some general public application);
 - ▶ With binding legal effect or consequences affecting identified public rights and responsibilities

- ▶ What's not a rule? (Definition at RCW 34.05.010(16) and case law)
 - ▶ “Statements concerning only the **internal management of an agency** and not affecting private rights or procedures available to the public.”
 - ▶ *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wn. App. 22, 347 P.3d 1090 (2015);
 - ▶ Commission policy on Columbia River salmon management is not like a rule because it “is a **directive to agency staff, not the public. Its purpose is to guide agency staff.**”
 - ▶ Commission policies that provide internal guidance to agency staff are thus not a matter for judicial review.

Specific Legal Considerations Here:

- ▶ Engaging the APA Principles at Issue – **Informing and Involving the Public**
 - ▶ The formal APA rule-making process provides an open forum to identify an agency policy objective and solicit public comment
 - ▶ For agencies that have long-standing policies ultimately relating to how the agency regulates members of the public, but which aren't widely known or were developed without public input, the rule-making process offers an opportunity to “inform and involve the public.”
- ▶ Contrast here:
 - ▶ The Commission already discusses and develops its policies in multiple open public sessions, with opportunity for public involvement;
 - ▶ The Commission publishes its policies on both the agency website and with the Code Reviser.
 - ▶ Ask yourself: Is more needed in order to inform and involve the public?

Specific Legal Considerations Here:

- ▶ Engaging the APA Principles at Issue – **Internal Management, or an Order/Directive with Enforceable Legal Effect?**
 - ▶ The Commission has successfully charted a preferred path on the distinction between rules and advisory policies - allowing the Commission's policies to be publicly developed and vetted, without opening that staff guidance itself to legal challenge. Examples:
 - ▶ Columbia River Salmon Management Policy (Sudar lawsuit); and
 - ▶ Willapa Bay Salmon Management Policy (Gillnetters lawsuit)
 - ▶ Petitioners assert that “the Commission needs to give its subordinates (Dept.) clearer instructions” relating to transparency and implementation of the NoF policy.
 - ▶ Is the adoption of a rule your preferred way to engage with staff on this subject?
 - ▶ Who enforces policy that guides staff? One of the Petitioners has stated that adopting the NoF policy as a rule “would allow us to sue if needed.”
 - ▶ This is a questionable assertion given the case law we have developed regarding the ability to challenge staff guidance in court proceeding, but do you want to open that line of thinking?
 - ▶ Even assuming a lawsuit is possible over a policy adopted as a rule, who should ultimately control the formulation and implementation of staff guidance – the Commission or Courts?