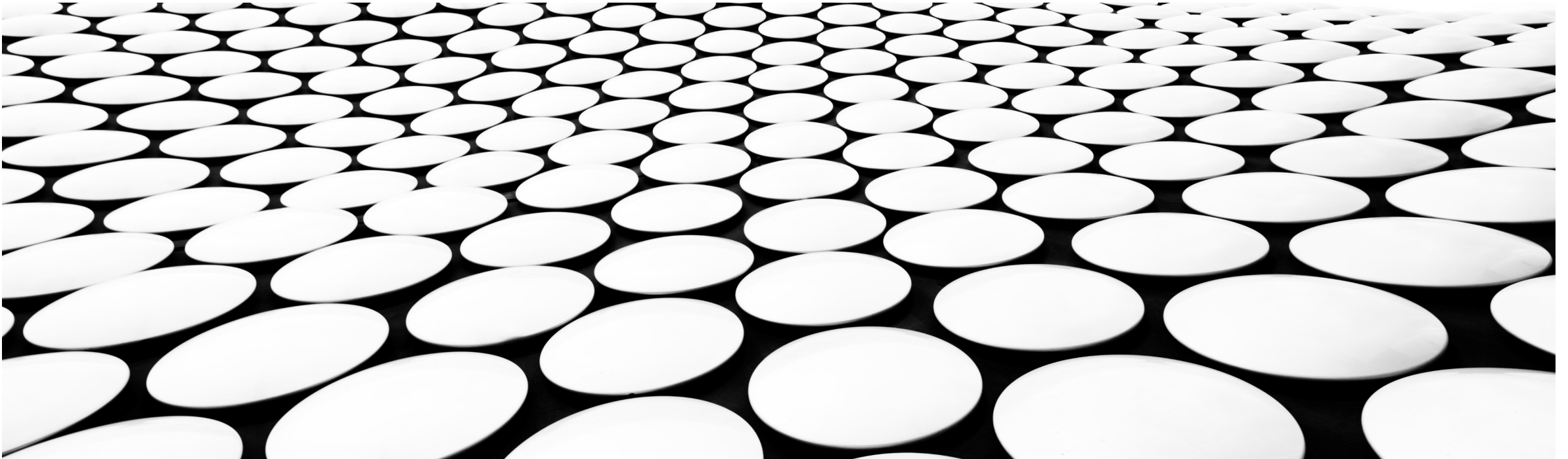

POLICIES VERSUS RULES

FISH AND WILDLIFE COMMISSION PRESENTATION, 9/17/2021



SOME HIGHLIGHTS OF LEGISLATIVE STRUCTURAL CHANGES TO FISH AND WILDLIFE MANAGEMENT

Department of Fisheries – Director
Department of Game – 6 member Commission + Director
1947 amendment: Commission hires Director

1993 law directs merge in 1994.
9 commissioners, but only Wildlife authority
Gov. hires Director
1995 Referendum 45: Fully empowers Commission on almost all matters
Commission hires Director



Game changed to Department of Wildlife
Gov. appoints Director; Commission remains.

STATUTORY RULE OF COMMISSION

RCW 77.04.012 -- MANDATE

- Too dense to unpack here. Highlights: Conserve, and don't impair, yet maintain fishing industry and maximize public recreational game fishing and hunting opportunities.
- The mandate statute doesn't directly get into policymaking role.

1995 REFERENDUM 45

RCW 77.04.013 FINDINGS AND INTENT

- Commission shall “assume regulatory authority for food fish and shellfish in addition to its existing authority for game fish and wildlife.”
- Gives commission “authority to review and approve department agreements, to review and approve the department's budget proposals, to adopt rules for the department, and to select commission staff and the director of the department.”
- Decision-making authority should rest with the commission, which should act in open and deliberative process.

RCW 77.04.055 – DUTIES OF COMMISSION

- “(1) In establishing policies to preserve, protect, and perpetuate wildlife, fish, and wildlife and fish habitat, the commission shall meet annually with the governor to:
- (a) Review and prescribe basic goals and objectives related to those policies; and
- (b) Review the performance of the department in implementing fish and wildlife policies.”
- Pre-1993 wildlife language: “In addition to any other duties and responsibilities, the commission shall establish, and periodically review with the governor and the legislature, the department’s basic goals and objectives to preserve, protect, and perpetuate wildlife and wildlife habitat.”

RCW 77.04.055 – DUTIES OF COMMISSION

- (2) establish hunting, trapping & fishing seasons, set time, place, manner & method
- (3) establish provisions regulating food fish and shellfish
- (4) final approval authority for tribal, interstate, international, and any other department agreements
- (5) shall adopt rules to implement fish and wildlife laws
- (6) final approval authority for budget proposals
- (7) hire its own staff and appoint the director

AUTHORITY TO DELEGATE

- RCW 77.04.020 “The commission may delegate to the director any of the powers and duties vested in the commission.”
- RCW 77.04.080 “The director shall supervise the administration and operation of the department and perform the duties prescribed by law and delegated by the commission.”

POLICY ROLE? – LOOK AGAIN AT 77.04.055 & 77.04.013

- “(1) In establishing **policies** to preserve, protect, and perpetuate wildlife, fish, and wildlife and fish habitat, the commission shall meet annually with the governor to:
- (a) Review and prescribe basic goals and objectives related to those policies; and
- (b) Review the performance of the department in implementing fish and wildlife policies.
- Findings and Intent section – RCW 77.04.013, references role of commission in setting “a single comprehensive set of goals, **policies**, and objectives.”

MERRIAM-WEBSTER DEFINITION OF POLICY INCLUDES:

- **5 a** : a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usually determine present and future decisions
- **b(1)** : a specific decision or set of decisions designed to carry out such a chosen course of action
- **(2)** : such a specific decision or set of decisions together with the related actions designed to implement them
- **c**: a projected program consisting of desired objectives and the means to achieve them

USE OF COMMISSION POLICIES

- General sense: “inward” expectations to the Director and Department staff about how they shall carry out statutory and regulatory directives.

IS A POLICY NECESSARY?

- RCW Title 77 has 27 chapters. Hundreds of sections.
- DFW has 56 chapters of rules in Title 220 WAC. Hundreds of individual rules.
- When is a written policy from the commission necessary to “fill in the gaps” of this statutory and regulatory direction?
- Commission also acts through other actions, e.g., approving various wildlife management plans and other department guidance documents.



INWARD FACING VS. DIRECTLY IMPACTING THE PUBLIC

- Administrative Procedures Act, Chapter 34.05 RCW. Definition of “rule” under RCW 34.05.010(16).
- Rule does not include “statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public.”
- But when the Commission adopts a position that directly impacts the public, that position likely needs to be adopted through rulemaking. See next slide for the test...

DEFINITION OF “RULE”

- any agency order, directive, or regulation of **general applicability**
- (a) the violation of which subjects a person to a penalty or administrative sanction;
- (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;

“POLICY STATEMENT”

- RCW 34.05.010(15): “written description of the current approach of an agency . . . to implementation of a statute or other provision of law, of a court decision, or of an agency order, including . . . the agency’s current practice, procedure, or method of action based upon that approach.”
- Interpretive or policy statements must be “advisory only” when directed towards conduct of public to avoid rulemaking trigger.

SUDAR V. DFW COMMISSION

- 187 Wn. App. 22 (2015)
- Challenged Columbia River Basin Salmon Management Policy C-3620
- Claimed policy resulted in direct impacts on licensed commercial fishers, and that the policy fixed the outcome of future rulemaking/regulations, thus should have gone through rulemaking itself.

SUDAR V. DFW COMMISSION

- Described Policy C-3620 as providing guiding objectives or principles, and also as a “vision statement written to guide agency staff and not the public” *Id.* at 31. Thus “not a rule of general applicability.”
- Later described the policy as providing “only a presumptive management framework the Department will consider along with other factors.” *Id.* at 32.
- “Its purpose is to guide agency staff who are tasked with promulgating rules to regulate; however, it has no legally enforceable regulatory effect on fishers.”

SUDAR V. DFW COMMISSION

- Sudar argued the policy itself mandated the outcome of the rules and thus was a rule itself. Court disagreed.
- “It provides guidance in implementing a future vision for fishery management through adaptive management. Because Policy C–3620 does not require strict adherence to its objectives and reaches only agency staff, it is not of general applicability to commercial fishermen.” at 32 (emphasis added).
- Subsequent department staff “evaluation of facts and data relevant to fishery management” informed the eventual outcome of eventual rulemaking.
- Key takeaway: the more a policy attempts to dictate the outcome of a future rule, the policy itself may need to be adopted as a rule.



QUESTIONS AND DISCUSSION