

1  EXPEDITE  
2  No Hearing is set  
3  Hearing is set:  
4     Date: April 2, 2021  
5     Time: 1:30 p.m.  
6     Judge/Calendar: Hon. Mary Sue Wilson

7                   SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 MARTHA HALL AND SHARON STROBLE, )  
9    ) Petitioners, ) No. 20-2-02511-34  
10    ) v. ) PETITIONERS' OPENING BRIEF  
11 WASHINGTON DEPARTMENT OF FISH )  
12 AND WILDLIFE, )  
13    ) Respondent. )  
14 \_\_\_\_\_ )

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**I. INTRODUCTION ..... 1**

**II. FACTS ..... 2**

**A. Status of Washington Black Bear Population is Uncertain ..... 2**

**B. Washington Is One of Few States to Allow Spring Bear Hunting ..... 3**

**C. Department Approves Rule to Authorize 2021 Spring Bear Hunt ..... 5**

**D. Procedural History ..... 6**

**III. ARGUMENT ..... 7**

**A. APA Sets Legal Standard for Invalidating Rule ..... 7**

**B. Petitioners Have Standing to Challenge Rule ..... 8**

**C. The Rule is Invalid: WDFW Did Not Comply with APA Notice Requirements ..... 10**

    1. CR-101 Inquiry Notice Does Not Disclose Need or Reason for Potential Rule ..... 10

    2. CR-102 Rule Notice Does Not Accurately Describe Proposed Rule ..... 11

    3. Department Doubles Down on a Likely Innocent Error ..... 12

    4. CR-102 Rule Notice Does Not Articulate Purpose for 2021 Spring Bear Hunt ..... 14

    5. Comments Reveal Confusion About Rule and its Purpose ..... 16

**D. Docket Did Not Provide Public with Access to Written Comments on Rule ..... 17**

**E. The Rule Is Invalid Because Decision to Approve Was Arbitrary and Capricious. 18**

    1. Department Did Not Understand Rule It Approved ..... 19

    2. WDFW Did Not Consider Possibility of Not Allowing Spring Hunt ..... 20

    3. Commission Did Not Consider Purpose of Rule or Reasons Supporting It ..... 22

    4. WDFW Did Not Consider Facts and Circumstances Raised by Public Comment ..... 24

**IV. CONCLUSION ..... 25**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

## I. INTRODUCTION

Like many Washingtonians, Petitioners have ethical objections to the spring black bear hunt, which stresses the bear population when it is at its most vulnerable, and orphans an unknown number of cubs unable to survive on their own. But Petitioners do not question the authority of the Washington Department of Fish and Wildlife (“WDFW” or “Department”) to authorize spring bear hunting—as long as it gives members of the public a meaningful opportunity to voice their opinions, and makes a reasoned choice after fairly weighing the merits and consequences of its decision.

This action challenges WDFW’s December 28, 2020 adoption of amendments to WAC 220-415-080 to create a 2021 spring bear hunt (the “Rule”), because WDFW disregarded these fundamental tenets of the Administrative Procedure Act (“APA”). The Department failed to notify the public that it was considering a rule that would authorize a 2021 spring bear hunt, and did not disclose the fact that, unlike past years, the purpose of the 2021 spring hunt was primarily recreational. Although WDFW’s attorney publicly acknowledged the inadequacy of its public notice, the Department repeatedly refused to take steps to correct this deficiency. Instead, the Fish and Wildlife Commission (“Commission”) gave a rubber stamp to a rule that its members did not understand, because many of them believed they had no other choice.

The result is a Rule that is a textbook case of an arbitrary and capricious decision, made after the Department consciously disregarded the APA’s “[p]aramount” requirement that it provide the public with meaningful notice and the opportunity to provide comment—an obligation that is “fundamental to the constitutional validity of legislative delegations to administrative agencies.” *Ocosta Sch. Dist. v. Brouillet*, 38 Wn. App. 785, 791, 689 P.2d 1382 (1984) (citing *Barry & Barry, Inc. v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 156, 500 P.2d 540 (1972)). This case thus extends beyond a difference of opinion about one particular wildlife policy, to reach foundational questions about whether WDFW follows the laws that form the basis for its legitimacy.

1 II. FACTS <sup>1</sup>

2 A. Status of Washington Black Bear Population is Uncertain

3 The Department’s current Game Management Plan (“Management Plan”)
4 acknowledges that it does not have reliable estimates for the Washington black bear population.
5 AR 52. For many years, the Department estimated the state population based on a formula
6 “predicated on density estimates derived from research in the 1970s and are hypothesized to be
7 a function of precipitation and vegetation[.]” AR 66 (2019 research article on black bear density
8 co-authored by two WDFW biologists). According to that formula, WDFW long estimated the
9 state’s bear population between 25,000 and 30,000, but it stopped including those estimates in
10 its annual status reports beginning in 2017.<sup>2</sup> In 2013, WDFW biologists began research to
11 update its bear population estimates for the first time in more than three decades. AR 58. Since
12 the 1970s, WDFW’s estimate of the bear population had been using average densities of 39
13 bears/100 km<sup>2</sup> in western Washington and 18 bears/100 km<sup>2</sup> in eastern Washington, but the
14 initial results of this research indicated bear densities in western Washington were 50% lower
15 than these estimates, averaging only 20 bears per 100 square kilometers. AR 66.

16 \_\_\_\_\_
17 <sup>1</sup> Citations are to the Agency Record (“AR”), and to Exhibits (“Exs.”) attached to the previously-filed Declaration
18 of Claire Loeb Davis in Support of Petitioners’ Motion for a Preliminary Injunction (filed Jan. 1 and containing
19 Exs. 5, 6, 9, 10, 17-19, 22-23); the Second Declaration of Claire Loeb Davis in Support of Petitioners’ Motion to
20 Expedite (filed Feb. 10 with Ex. 34); and the concurrently filed Declaration of Claire Loeb Davis in Support of
21 Petitioners’ Opening Brief (with Exs. 36-38).

19 Most of these Exhibits are provided for the Court’s convenience, including documents referenced in the agency
20 record, but not included in the AR, and which are available online (Exs. 9, 10), and rulemaking notices and orders
21 filed with the Washington State Register (Exs. 17, 18, 19). Also included is a copy of the transcript of the ruling
22 of Judge Skinder of the Motion for a Preliminary Injunction, which is part of the record of this case (Ex. 34).

21 In addition, Petitioners ask the Court to take judicial notice of several exhibits that contain facts that are “not
22 subject to reasonable dispute,” and which are “capable of accurate and ready determination by resort to sources
23 whose accuracy cannot be questioned.” ER 201; *Ctr. for Biological Diversity*, 14 Wn. App. 2d at 963 (taking
24 judicial notice of documents in APA case decided on agency record). Petitioners seek judicial notice of the
25 following documents that fit these criteria: Exs. 5 and Exs. 36-38 (WDFW’s Game Status and Trend Reports for
26 2004, 2012, 2016, and 2017, all of which are available online at website designated within the brief); Ex. 6
27 (WDFW’s online statistics for the 2019 bear hunting season); and Exs. 22 and 23 (copies of online rulemaking
dockets from the state Departments of Ecology and Health).

25 <sup>2</sup> See WDFW’s 2016 Black Bear Status and Trend Report at 227, available at
26 <https://wdfw.wa.gov/sites/default/files/publications/01875/wdfw01875.pdf> (excerpts at Ex. 36) (last report
27 including 25,000 to 30,000 estimate); WDFW’s 2017 Black Bear Status and Trend Report at 238, available at
<https://wdfw.wa.gov/sites/default/files/publications/01961/wdfw01961.pdf> (excerpts at Ex. 37) (indicating “[n]o
formal population estimate for black bears in Washington exists at this time[.]”)

1 WDFW’s biologists emphasize that the “greatest management need is to acquire a better  
2 understanding of black bear density and abundance” so WDFW does not allow bears to be  
3 overhunted. AR 59. Toward this end, WDFW was expecting to receive results from additional  
4 research in late 2020, from which it could generate additional density estimates. AR 60. In the  
5 meantime, WDFW acknowledges in its Management Plan that it does not have accurate  
6 population measurements, warning that “bear populations are especially sensitive to over-  
7 exploitation,” and “by the time a decline is detected, bear numbers may have been reduced to a  
8 point where it could take as long as 15 years to recover the population.” AR 54. Nonetheless,  
9 in 2019, the Commission voted to increase the bag limit of bears in eastern Washington and to  
10 expand the fall bear season hunting dates, resulting in a 50% increase in the number of bears  
11 legally killed by hunters in 2019. AR 63. Other scientific data indicates that in some areas, only  
12 50% of the bear mortality was from legal hunting, with another 17% from “conflict” kills, 10%  
13 from poaching, 8% killed by vehicles, and 8% that died after wounds sustained during hunts—  
14 with just 7% of the bears dying from natural causes. AR 62.

15 **B. Washington Is One of Few States to Allow Spring Bear Hunting**

16 Washington’s main hunting season for black bear is in the late summer and fall, but for  
17 years the state has also held a “special permit” spring black bear hunt, allowing hunters to enter  
18 a lottery for the right to kill bears each spring. *See* AR 103 (describing 2019 lottery).

19 When WDFW first began the spring black bear hunt roughly 20 years ago, it only  
20 allowed spring black bear hunting in the Blue Mountains, where hunters killed a handful of  
21 bears each spring. *See, e.g.*, 2004 Washington Game and Status Report (reporting an average  
22 of 15 bears killed each spring between 1999 and 2003).<sup>3</sup> By 2011, WDFW had expanded the  
23 hunt to more areas, and hunters killed 52 bears that spring. *See* 2012 Washington Game and  
24 Status Report at 197, 199, 205, 207, & 210 (listing bears killed for each management unit).<sup>4</sup>  
25 Recently, Washington’s spring bear hunt has expanded to more than 20 Game Management

26 \_\_\_\_\_  
<sup>3</sup> *Online at* <https://wdfw.wa.gov/sites/default/files/publications/00440/wdfw00440.pdf> (Ex. 5 at 140, 151).

27 <sup>4</sup> *Online at* <https://wdfw.wa.gov/publications/01451> (Ex. 38 at 197-212).

1 Units statewide, with hunters killing an average of 114 black bears in each of the past five  
2 springs for which WDFW has reported its statistics.<sup>5</sup>

3 Washington is one of only eight states that allows hunters to kill black bears during the  
4 spring.<sup>6</sup> Game professionals have long recognized ethical issues with spring bear hunting: it  
5 targets bears at their most weak and vulnerable, after they emerge from hibernation; it imposes  
6 stress on the bear population during a sensitive time of year; and it inevitably results in the  
7 killing of nursing mothers, dooming orphaned cubs to die of starvation. AR 614-15, 617.<sup>7</sup>  
8 WDFW does not allow spring hunting for any other game species except turkey.<sup>8</sup> However,  
9 WDFW has historically justified spring bear hunting as necessary to “address emerging  
10 management needs, such as bear damage to trees in commercial timberlands, bear-human  
11 conflict, or to more evenly distribute harvest compared to fall seasons.” AR 52.

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12  
13 <sup>5</sup> See the following publicly available WDFW reports: 2019 Statewide black bear harvest statistics, at  
14 <https://wdfw.wa.gov/hunting/management/game-harvest/2019/black-bear-statewide> (114 bears killed) (Ex. 6);  
15 2018 Statewide black bear harvest statistics, at: <https://wdfw.wa.gov/hunting/management/game-harvest/2018/black-bear-statewide> (97 bears killed); 2017 Statewide black bear harvest statistics, at  
16 <https://wdfw.wa.gov/hunting/management/game-harvest/2017/black-bear-statewide> (139 bears killed); 2016  
17 Statewide black bear harvest statistics, at <https://wdfw.wa.gov/hunting/management/game-harvest/2016/black-bear-statewide> (124 bears killed); and 2015 Statewide black bear harvest statistics, at  
18 <https://wdfw.wa.gov/hunting/management/game-harvest/2015/black-bear-statewide> (94 bears killed).

19 <sup>6</sup> See AR 914 (Commissioner Barbara Baker questioning why only 8 states allow spring bear hunting); *see also*  
20 Humane Society of the United States, “States that Allow Spring Bear Hunting,”  
21 <https://www.humanesociety.org/sites/default/files/docs/bear-spring-hunts-map-detail.pdf> (map indicating those  
22 states are Alaska, Oregon, Idaho, Montana, Wyoming, Utah, Arizona, and Washington);  
23 <http://www.akleg.gov/basis/aac.asp#5.85.015> (Alaska bear season runs from September through June);  
24 [http://www.eregulations.com/wp-content/uploads/2020/11/21ORHD\\_VLR.pdf](http://www.eregulations.com/wp-content/uploads/2020/11/21ORHD_VLR.pdf), p. 63 (discussing Oregon spring  
25 bear season); <https://idfg.idaho.gov/sites/default/files/seasons-rules-big-game-2019-2020-black-bear.pdf>, pp. 70-  
26 73 (discussing Idaho spring bear season); <https://fwp.mt.gov/binaries/content/assets/fwp/hunt/regulations/2021/2021-black-bear-final-for-web.pdf>, pp. 6-7  
27 (discussing Montana spring bear season); [https://wgfd.wyo.gov/WGFD/media/content/Final%20Regs/CH-  
3\\_Final\\_1-28-2021.pdf](https://wgfd.wyo.gov/WGFD/media/content/Final%20Regs/CH-3_Final_1-28-2021.pdf), pp. 6-7 (discussing Wyoming spring bear season); [https://wildlife.utah.gov/guidebooks/2021\\_bear.pdf](https://wildlife.utah.gov/guidebooks/2021_bear.pdf), pp. 33-41 (discussing Utah spring bear season); [https://azgfd-portal-wordpress-pantheon.s3.us-west-2.amazonaws.com/wp-content/uploads/archive/2021-Spring-  
Regulations\\_201211.pdf](https://azgfd-portal-wordpress-pantheon.s3.us-west-2.amazonaws.com/wp-content/uploads/archive/2021-Spring-Regulations_201211.pdf), pp. 22-23 (discussing Arizona spring hunt).

28 <sup>7</sup> See also Thomas D. Beck et al., “Sociological and ethical considerations of black bear hunting,” Proceedings of  
29 the Western Black Bear Workshop 5 (1995) (cited at AR 615-17, 625, 633), available at  
30 [https://www.bearbiology.org/fileadmin/tpl/Downloads/WBBW/5th\\_WBBW/5th\\_Western\\_Black\\_Bear\\_Worksh](https://www.bearbiology.org/fileadmin/tpl/Downloads/WBBW/5th_WBBW/5th_Western_Black_Bear_Worksh)  
31 [op.pdf](https://www.bearbiology.org/fileadmin/tpl/Downloads/WBBW/5th_Western_Black_Bear_Worksh) (starting at p. 119) (copied as Ex. 9).

32 <sup>8</sup> WDFW also allows cougar hunting from November through April. See  
33 <https://wdfw.wa.gov/hunting/regulations/summary-of-seasons/cougar>. The state also allows year-round hunting  
34 for coyote, which are not classified as a game species. See <https://wdfw.wa.gov/hunting/regulations/summary-of-seasons/small-game>.

1 A 2019 poll shows that 60% of Americans oppose spring bear hunting, with 64% of the  
2 population of Western states opposed to these hunts—and only 15% of Westerners supporting  
3 them. AR 614.<sup>9</sup> WDFW has long known spring bear hunting is unpopular, and has not offered  
4 it “solely for the purpose of providing recreational opportunity,” because it has recognized “the  
5 public’s sensitivity to hunting bears while adult females are accompanied by the young of the  
6 year.” *See* Wash. St. Reg. 15-04-085 (CR-102 issued in 2015 for spring bear hunt rule)  
7 (included at Ex. 18). Even so, it has dramatically increased the number of spring bear permits  
8 issued in recent years. *Compare* 2004 Washington Game and Status Report (Ex. 5) at 151  
9 (average of 15 bears killed each spring from 1999 to 2003) *with* 2012 Washington Game and  
10 Status Report (Ex. 6) (114 bears killed in spring 2019).

### 11 **C. Department Approves Rule to Authorize 2021 Spring Bear Hunt**

12 On August 17, 2020, WDFW issued a CR-101 Preproposal Statement of Inquiry  
13 (“Inquiry Notice”), announcing it was “considering rule changes for spring black bear hunting  
14 seasons and regulations.” AR 94. The notice did not describe why a 2021 spring bear season  
15 was needed, nor what the Department expected it to accomplish. *Id.*

16 On October 5, 2020, WDFW released a CR-102 Proposed Rule Making (“Rule  
17 Notice”). AR 95. The notice attached the proposed Rule, amending WAC 220-415-080, the  
18 authorization for the 2020 spring bear hunt. AR 98. The Rule changed the title of WAC 220-  
19 415-080 from “2020 Spring black bear special permits” to “2021 Spring black bear special  
20 permits,” thus authorizing black bear hunting during spring 2021. *Id.* It also adjusted specific  
21 dates within the season, so the hunt would start earlier in some areas; removed one hunt area;  
22 and made small amendments to the requirements for “harvest checks” and the collection of  
23 biological samples. AR 98-99.

24 The Rule Notice did not disclose that the Rule would establish a new spring bear hunting

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25  
26 <sup>9</sup> *Citing* Responsive Management and National Shooting Sports Foundation, “Americans’ Attitudes Toward  
27 Hunting, Fishing, Sport Shooting, and Trapping” (Harrisonburg, VA 2019), available at:  
[https://www.fishwildlife.org/application/files/7715/5733/7920/NSSF\\_2019\\_Attitudes\\_Survey\\_Report.pdf](https://www.fishwildlife.org/application/files/7715/5733/7920/NSSF_2019_Attitudes_Survey_Report.pdf) (*see*  
pp. 35, 42) (copied as Ex. 10).

1 season for 2021. It discussed only minor changes made from the 2020 season, and suggested  
2 that the Rule’s change in title, from “2020” to “2021,” was merely “editorial.” AR 96.

3 WDFW received written comments opposing the spring bear hunt from individuals and  
4 environmental groups, many of which raised substantive concerns. *See* AR 614-28 (letter from  
5 Humane Society of the United States); AR 632-34 (letter from the Center for Biological  
6 Diversity); AR 643-52; 654-65; 680-88; 697-724 (letters from Petitioner Hall). The written  
7 comments were not posted on WDFW’s online rulemaking docket (“Docket”), nor did the  
8 Docket indicate where they could be inspected. AR 93.

9 The Commission considered the Rule at its December 3, 2020 Wildlife Committee  
10 meeting, and at its full meeting the next day. WDFW Game Division Manager Anis Aoude  
11 spoke about the Rule at both sessions, followed by Commission discussion. AR 845-859; AR  
12 872-880. The Commission heard public testimony on the Rule at its December 4 meeting, and  
13 additional testimony the next day at an open comment session. AR 882-910; AR 923-949. On  
14 December 4, 2020, the Commission also heard public comment on the Rule from 13 people, 12  
15 of whom opposed the Rule. AR 882-910. Further public comment on the spring bear hunt was  
16 offered during the general comment session on the morning of the December 5 Commission  
17 meeting. Of ten people who spoke about the spring bear hunt during this comment period, all  
18 ten opposed the Rule. AR 923-949.

19 On December 18, the Commission voted to adopt the Rule. On December 28,  
20 Commission Chair Larry Carpenter signed the CR-103 Rule-Making Order (“Order”),  
21 subsequently filed and published at Washington State Register 21-02-015. AR 100-101. On the  
22 same date, WDFW posted a Concise Explanatory Statement (“CES”) on its website, in which  
23 WDFW revealed for the first time that the Rule’s purpose was to “[p]rovide a spring black bear  
24 recreational hunting opportunity in 2021[.]” AR 104.

#### 25 **D. Procedural History**

26 On December 23, Petitioners filed their first Petition for Judicial Review and  
27 Declaratory and Injunctive Relief. On January 7, 2020, Petitioners filed the Amended Petition,

1 challenging the Order and adding allegations related to the Inquiry Notice, the Docket, and the  
2 CES. On January 19, Petitioners filed their Motion for Preliminary Injunction to Stay Agency  
3 Rule (“PI Motion”), seeking to stay implementation of the Rule until a hearing on the merits.  
4 On January 29, Judge John Skinder denied the motion for a preliminary injunction, holding that  
5 the plaintiffs had not carried the “high burden” necessary for such an “extraordinary remedy,”  
6 but not making any findings as to the merits of the case. Ex. 34 (hearing transcript) at 3. On  
7 February 4, 2021, Petitioners filed a motion to expedite the hearing on the merits, which this  
8 Court granted in an order dated February 16, setting the final hearing for April 2, 2021.

### 9 III. ARGUMENT

#### 10 A. APA Sets Legal Standard for Invalidating Rule

11 “The burden of demonstrating the invalidity of agency action is on the party asserting  
12 invalidity.” *Hillis v. State Dep’t of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997);  
13 RCW 34.05.570(1)(a). An agency rule is invalid if it is arbitrary and capricious or was adopted  
14 without compliance with statutory rulemaking procedures. RCW 34.05.570(2)(c).

15 An agency rule is arbitrary and capricious if it was adopted through agency action that  
16 was “willful and unreasoning and taken without regard to the attending facts or  
17 circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. and Transp. Comm’n*, 148 Wn.2d 887,  
18 905, 64 P.3d 606 (2003). In weighing whether a decision was arbitrary and capricious, a  
19 reviewing court should “scrutinize the record” in weighing whether a decision was arbitrary  
20 and capricious, to “determine if the result was reached through a process of reason.” *Rios v.*  
21 *Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (internal citation omitted).

22 Among other requirements, the APA directs an agency to (1) issue a “prenotice inquiry”  
23 regarding the subject of possible rule making (RCW 34.05.310(1)(a)); (2) issue a notice of a  
24 proposed rule, which includes an explanation of the rule, its purpose, its anticipated effects, and  
25 the reasons behind any changes to existing rules (RCW 34.05.320(1)); (3) maintain a public  
26 rule-making docket that indicates specific information about each rule-making proceeding,  
27 including the place where written submissions about proposed rules may be inspected (RCW

1 34.05.315(1) & (3)(d)); and (4) issue a concise explanatory statement of every adopted rule,  
2 which summarizes all comments received, and indicates how the final rule reflects  
3 consideration of these comments or why it fails to do so (RCW 34.05.325(6)(a)).

4 **B. Petitioners Have Standing to Challenge Rule**

5 Petitioners have standing under the APA if they are “aggrieved or adversely affected”  
6 by agency action, meaning: (1) the action has prejudiced or is likely to prejudice them; (2) their  
7 interests were among those that the agency was required to consider when it engaged in the  
8 agency action challenged; and (3) a judgment in their favor would substantially eliminate or  
9 redress the injury caused by the agency action. RCW 34.05.530; *see Seattle Bldg. & Constr.*  
10 *Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 793-94, 920 P.2d 581  
11 (1996) (“*Trades Council*”) (discussing RCW 34.05.530). Standing is “relaxed” for procedural  
12 injuries: a party must (1) identify a statutory procedural right the government has violated;  
13 (2) show a “reasonable probability” that the deprivation of that right will threaten a “concrete  
14 interest;” and (3) show the party’s interest is one protected by the statute. *Five Corners Family*  
15 *Farmers v. State*, 173 Wn.2d 296, 303, 268 P.3d 892 (2011).

16 Petitioners easily meet this test, having demonstrated precisely the sort of aesthetic,  
17 recreational, and civic injuries that the Court of Appeals found sufficient to confer standing in  
18 a similar challenge last year. *See Ctr. for Biological Diversity, v. Dep’t of Fish & Wildlife*, 14  
19 Wn. App. 2d 945, 979-83, 474 P.3d 1107 (2020) (finding standing to challenge WDFW’s  
20 failure to follow APA procedures in developing rules for a special bear timber hunt).

21 First, “[a]ny member of the public . . . has a statutory procedural right to participate in  
22 notice and comment rulemaking when the agency adopts a rule.” *Id.* at 981 (citing *Simpson*  
23 *Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 648-49, 835 P.2d 1030 (1992));  
24 *see* RCW 34.05.375. Similarly, the public has a procedural right to require agencies to engage  
25 in a reasoned process when adopting rules. *See* RCW 34.05.570(2)(c).

26 Second, Petitioners have a “concrete interest” in the Rule authorizing the 2021 spring  
27 bear hunt. Petitioners have shown that the Rule will injure their “aesthetic” interests in

1 observing animals, which are “undeniably a cognizable interest for purpose[s] of  
2 standing.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63, 112 S. Ct. 2130, 119 L. Ed. 2d 351  
3 (1992). Petitioners are avid hikers and wildlife watchers who enjoy seeing bears and signs of  
4 bears in Washington’s forests, including mother bears with their cubs in the spring. *See*  
5 Declaration of Martha Hall (“Hall Decl.”) ¶¶ 4-6; Declaration of Sharon Stroble (“Stroble  
6 Decl.”) ¶¶ 3-5.<sup>10</sup> Petitioners’ opportunity to see bears or signs of bears is decreased by the  
7 continuation of the spring hunt—not only because of the number of bears that are killed and  
8 terrorized by the hunt itself, but because the presence of spring bear hunters limits the areas that  
9 they feel safe exploring. Hall Decl. ¶¶ 9-13, 18; Stroble Decl. ¶¶ 7-10, 13. Both Petitioners also  
10 care deeply about the humane treatment of Washington’s bears, and actively participate in  
11 WDFW meetings and rulemaking activities. Hall Decl. ¶¶ 9, 14-17; Stroble Decl. ¶¶ 6, 11-12.

12 Third, there is more than a reasonable probability that the Commission would not have  
13 approved the Rule if it had been issued with proper notice and a full opportunity for public  
14 comment, and if the Commission had engaged in a reasoned process when considering the Rule.  
15 *See Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 293, 2 P.3d 1022 (2000)  
16 (“[t]echnically sound, lawful, and politically responsive rules are more likely” with notice and  
17 comment) (internal citation omitted). Such a showing that the failure to comply with procedure  
18 “might have affected the ultimate decision” is enough to establish injury. *Trades Council*,  
19 129 Wn. 2d at 794 (courts “routinely” grant standing for procedural harms even if injury is  
20 “both indirect and speculative”) (internal citations omitted).

21 Finally, Petitioners’ interest in rules regulating the state’s bear population are among  
22 those WDFW was required to consider when adopting the Rule. WDFW holds wildlife in trust  
23 for the benefit of all Washingtonians—including those, like Petitioners, who wish to observe  
24 wildlife rather than hunt it. *See State v. Longshore*, 97 Wn. App. 144, 150, 982 P.2d 1191  
25 (1999). And the APA’s rulemaking procedures are designed to “ensure that members of the

26 \_\_\_\_\_  
27 <sup>10</sup> Both the Hall and Stroble Declarations were filed on January 19, 2021, in conjunction with Petitioners’ Motion  
for Preliminary Injunction to Stay Agency Rule.

1 public can participate meaningfully in the development of agency policies which affect them,”  
2 and “provide greater public access to administrative decisionmaking.” *See Ctr. for Biological*  
3 *Diversity*, 14 Wn. App. 2d at 983 (quoting *Simpson Tacoma Kraft Co.*, 119 Wn.2d at 648-49).

4 **C. The Rule is Invalid: WDFW Did Not Comply with APA Notice Requirements**

5 A rule is invalid if an agency fails to comply with statutory rulemaking procedures.  
6 RCW 34.05.570(2)(c); *see also* RCW 34.05.375 (no rule is valid unless adopted in “substantial  
7 compliance” with APA procedures). Providing the public with adequate notice and opportunity  
8 to comment is “[p]aramount” among the APA’s requirements, and the adherence to that  
9 mandate is “fundamental to the constitutional validity of legislative delegations to  
10 administrative agencies.” *Ocosta*, 38 Wn. App. at 791; *see also Mahoney v. Shinpoch*, 107  
11 Wn.2d 679, 691, 732 P.2d 510 (1987) (“The opportunity for public comment is essential to  
12 agency rulemaking, not because public comment is invariably helpful in discerning legislative  
13 intent but because the agency’s authority to act is premised on the functioning of such  
14 procedural safeguards.”) (internal citation omitted)).

15 In considering the Rule, the Department failed to comply with APA procedures, thus  
16 depriving the public of its right to “participate meaningfully in the development of agency  
17 policies which affect them.” *Ctr. for Biological Diversity*, 14 Wn. App. 2d at 981 (quoting  
18 *Simpson Tacoma Kraft Co.*, 119 Wn.2d at 648-49). The Rule is thus invalid.

19 1. CR-101 Inquiry Notice Does Not Disclose Need or Reason for Potential Rule

20 The Inquiry Notice was WDFW’s first communication about the Rule. Agencies must  
21 issue this notice to solicit comments on the subject of potential rulemaking before proposing  
22 draft language. RCW 34.05.310(1)(a). Among other requirements, it must discuss “why rules  
23 on this subject may be needed and what they might accomplish.” RCW 34.05.310(1)(a)(ii).

24 The Department’s Inquiry Notice consists of just three sentences. AR 94. It indicates  
25 WDFW is considering rule changes to “set the 2021 spring bear hunting seasons and  
26 regulations,” but does not explain that new rules are necessary to *authorize* spring bear hunting  
27 for 2021. *Id.* WDFW’s Game Management Plan differentiates between the recreational bear

1 hunting season in the fall and the “limited permit-only spring hunt,” which is “designed to  
2 address emerging management needs[.]” AR 52. However, the Inquiry Notice does not list any  
3 “management needs” that might justify a 2021 spring bear hunt. Instead, it offers only a generic  
4 statement that the contemplated rules would “provide recreational hunting opportunity in a  
5 manner that does not jeopardize bear populations.” AR 94.

6 2. CR-102 Rule Notice Does Not Accurately Describe Proposed Rule

7 Unfortunately, WDFW’s Rule Notice exponentially compounded these errors. The APA  
8 requires an agency to provide notice of each proposed rule at least 20 days before the hearing  
9 at which it will allow public testimony. RCW 34.05.320(1). This notice must include “a short  
10 explanation of the rule,” and “a description of the rule’s purpose, and any other information  
11 which may be of assistance in identifying the rule or its purpose.” RCW 34.05.320(1)(a) & (c).  
12 An agency must thus make a “good faith effort” to ensure its notice “accurately reflects the rule  
13 to be presented and considered.” RCW 34.05.325(1). Ultimately, the question is whether the  
14 agency’s notice was “fair and reasonable.” *State v. Squally*, 78 Wn.2d 475, 479, 474 P.2d 897  
15 (1970); *see also Empire Health Found. v. Price*, 334 F. Supp. 3d 1134, 1159 (E.D. Wash. 2018)  
16 (an agency “must provide notice sufficient to fairly apprise interested persons of the subjects  
17 and issues before the Agency”) (quoting *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002)).

18 The Rule modifies WAC 220-415-080 to authorize a 2021 spring bear hunt. It makes  
19 the following amendment to the previous rule’s title: “**((2020)) 2021 Spring black bear special**  
20 **permits.**” AR 98 (emphases in original). The prior version of WAC 220-415-080 only allowed  
21 spring bear hunting in 2020, and there is no other rule that provides for the continuation of  
22 spring bear hunting. *Without this rule change, there is no 2021 season.*

23 Any coherent explanation of the Rule and its purpose must thus start with the fact that  
24 the Rule authorizes spring bear hunting in 2021. Rather than disclose that the Rule would  
25 establish a *new* spring bear hunt for 2021, the Rule Notice clearly implies the opposite:  
26 indicating the Rule’s purpose is merely to “align the rules with the appropriate season dates;  
27 adjust permit numbers in areas where needed; adjust hunting areas where needed; and update

1 harvest check[.]” AR 95. Even worse, under “Reasons supporting proposal,” the Rule Notice  
2 asserts that the change in the rule’s title is “*editorial and clarifies* the 2021 special permit hunts.”  
3 AR 96 (emphasis added). This characterization is not merely misleading—it is patently false.  
4 The title change is not an “editorial” adjustment; it is a significant policy enactment. And it  
5 does not “clarify” the 2021 special permit hunts; it *creates* them.

6 The Supreme Court has emphasized that the sufficiency of a pre-adoption notice should  
7 be determined by comparing the “substance of the rule with that of the notice.” *Squally*, 78  
8 Wn.2d at 478 (evaluating precursor to the current APA). Here, the notice “contains no  
9 indication whatsoever that the proposed regulations” would establish a 2021 bear season. *See*  
10 *id.* at 477. After reviewing the notice, an “ordinary reader” would conclude that the proposed  
11 Rule would only make minor changes to a *previously authorized* 2021 spring bear hunt—a  
12 reading that would be “buttressed” by the notice’s instructions to disregard the change in the  
13 rule’s title. *See id.* at 477. As a result, someone with strong feelings about the *continuation* of  
14 spring bear hunting “would not be concerned” with the proposal—and would thus be unlikely  
15 to participate in the process. *See id.*; *see also* Declaration of Martha Hall (“Hall Decl.”) ¶¶16-  
16 17 (Hall contacted “friends, fellow wildlife enthusiasts and several environmental  
17 organizations,” many of whom believed the rule only “made small editorial changes to an  
18 existing spring bear hunt,” and as a result “did not realize what was at stake, and declined to  
19 participate in the process”). When there is such a “discrepancy between the notice given and  
20 the rule adopted,” the resulting rule is invalid. *Squally*, 78 Wn.2d at 479.

### 21 3. Department Doubles Down on a Likely Innocent Error

22 The history of the Rule suggests that the glaring omissions in the Rule Notice began as  
23 an innocent error. In prior years, WDFW adopted rules authorizing the spring bear hunt in  
24 conjunction with its other three-year hunting packages. *See* Wash. St. Reg. 15-10-066 (CR-  
25 103P issued on May 1, 2015, amending rule that had set the spring black bear hunt for 2013-  
26 2015, to establish a new hunt for 2016-2018) (Ex. 17 at PE-5). Rulemaking notices for these  
27 amendments are explicit regarding their nature, purpose, and the reasons supporting them. For

1 example, the CR-102 notice for the 2015 amendment (“2015 Notice”) clearly states that “[t]he  
2 proposed rule **establishes** the 2016, 2017, and 2018 spring black bear seasons.” Wash. St. Reg.  
3 15-04-085 (Ex. 18 at PE-3) (emphasis added).

4 Following these multi-year authorizations, WDFW routinely adopted rules to make  
5 minor changes to already established seasons. For example, in 2019 WDFW proposed minor  
6 changes to the 2020 spring bear hunt season already authorized by rule the previous year. *See*  
7 Wash. St. Reg. 19-18-050 (CR-102 notice at Ex. 19) (“2019 Rule Notice”).

8 Rather than using language from notices that proposed *new* hunting seasons, in drafting  
9 its 2020 Rule Notice the Department appears to have inadvertently copied the 2019 Rule Notice,  
10 which made changes to an existing season. Both the 2019 and 2020 notices claim the “purpose  
11 of the proposed amendments” is to “align the rules with the appropriate season dates” and  
12 “[adjust] permit numbers in areas where needed[.]” *Compare* AR 95 to Ex. 19 at 1. The 2020  
13 Rule Notice also copies nearly verbatim the claim in the 2019 Notice that “[t]he change in title  
14 is editorial and clarifies the 2020 special permit hunts[.]” *Compare* AR 95 to Ex. 19 at 1. The  
15 key difference is that for the 2019 Notice, that characterization was *accurate*: The 2019  
16 proposal merely *subtracted* a season from the existing rule. Ex. 19(a) at 1 (amending WAC 220-  
17 415-080: “((~~2019-2020~~)) **2020 Spring black bear special permits**”) (emphases in original).

18 Although its mistake may have begun inadvertently, upon discovery of the error WDFW  
19 unfortunately doubled down. During the December 5, 2020 Commission meeting, Assistant  
20 Attorney General Joe Panesko conceded WDFW had not issued sufficient notice to alert people  
21 that it was considering whether to authorize future spring bear hunting:

22 It was not properly noticed with a CR-101, the introductory form to start rule-  
23 making process, or the CR-102, the notice for this public hearing. The repeal of  
24 all spring bear hunting was not something that was teed up with public notice.  
25 For example, those who engage in the hunt, if they knew that that option was on  
the table, my hunch is you’d be hearing a little bit more variety of opinions  
before you. But since that wasn’t on the table, you know, that part of your  
constituency probably didn’t feel the need to come in and speak up.

26 AR 928.

27 However, the Commissioners drew exactly the wrong conclusion from the shortcomings

1 of the Department’s notice—perhaps because WDFW’s management and advisors were  
2 confused by their own error (*see supra* at III(E)(1)). Since a refusal to approve the Rule  
3 authorizing a 2021 spring hunt would effectively “repeal” future bear hunting, Mr. Panesko’s  
4 advice suggested the only action the Commission could legally take was to vote in favor of the  
5 rule and authorize the 2021 hunt. AR 928. That, of course, is not the law—the APA requires  
6 the Department to give appropriate public notice before it *adopts* new rules, even if those rules  
7 are similar or even identical to now-expired rules adopted in the past. If an agency has failed to  
8 give proper notice of the matters under consideration, the proper course of action is to either  
9 reject the proposal or delay its consideration until the notice problem has been remedied. *See*  
10 *Squally*, 78 Wn.2d at 478-79 (if rule is adopted without proper notice, it may be invalidated).

11 Following Mr. Panesko’s comments, several members of the public asked WDFW to  
12 delay the vote to allow for proper notice. AR 934-47. This plea was echoed in a December 11  
13 letter from attorneys for conservation organizations (AR 755-57), and a December 17 letter  
14 from Petitioners (AR 752-54). The Commission refused, approving the Rule on December 18.

15 4. CR-102 Rule Notice Does Not Articulate Purpose for 2021 Spring Bear Hunt

16 To comply with the APA, a notice for a proposed rule must also describe the rule’s  
17 “purpose,” its “anticipated effects,” and for proposals that amend an existing rule, “a statement  
18 of the reasons supporting the proposed action.” *See* RCW 34.05.320(1)(a) & (c).

19 In its CR-102 rule notices for prior spring bear hunts, WDFW has disclosed the  
20 “purpose” of the spring hunt, and the reasons supporting its proposal. For example, after the  
21 2015 Notice described the proposed rule to establish spring black bear seasons for 2016 to 2018,  
22 it disclosed that the “purpose” of these hunts was to: “1) reduce tree damage by bears in western  
23 Washington; 2) disperse harvest geographically and reduce female harvest in southeastern  
24 Washington; and 3) reduce nuisance and damage activity in northeastern and southwestern  
25 Washington[.]” Ex. 18 at PE-3. The 2015 Notice goes on to describe the unpopularity of spring  
26 bear hunts as one of the “reasons” supporting its proposal: “Spring bear opportunity is provided  
27 to address management needs rather than solely for the purpose of providing recreational

1 opportunity. This is due to the public’s sensitivity to hunting bears while adult females are  
2 accompanied by the young of the year.” *Id.*

3 Since the 2020 Rule Notice does not reveal that the Rule establishes a new spring bear  
4 hunt for 2021, however, it unsurprisingly also does not explain the “purpose” of authorizing  
5 such a hunt, or the “reasons” supporting it. *See* RCW 34.05.320(1)(a) & (c). Moreover, the Rule  
6 Notice does not describe the Rule’s “anticipated effects” (RCW 34.05.320(1)(c))—such as how  
7 many bears might be killed, how that would impact the population, or how many cubs might be  
8 orphaned. AR 95-6. Rather, the Rule Notice indicates that the Rule’s “purpose” and “anticipated  
9 effects” are to adjust season dates, permit numbers, hunting areas, and harvest check  
10 requirements. AR 95. Similarly, its “[r]easons supporting the proposal” bypass any justification  
11 for the most significant aspect of the Rule—the creation of the 2021 spring bear hunting  
12 season—to focus on the rationale for those minor changes. AR 96.

13 These failures are particularly significant given WDFW’s admission that the 2021  
14 spring bear hunt was a “recreational” hunt. *See* PI Opp. at 8 (describing purpose of the rule  
15 amendment as a “2021 recreational spring bear season”; *id.* at 13 (discussing the hunt as an  
16 “recreational opportunity”); AR 665 (Mr. Aoude describing the hunt as “recreational hunting  
17 opportunity” in response to emailed questions from Petitioner Hall). This was a marked  
18 departure from the “purpose” of hunts approved in prior years (*see* Ex. 18 at PE-3), as well as  
19 the characterization of the rationale behind spring bear hunting in WDFW’s own Management  
20 Plan. *See* AR 52 (“Spring hunts are designed to address emerging management needs, such as  
21 bear damage to trees in commercial timberlands, bear-human conflict, or to more evenly  
22 distribute harvest compared to fall seasons.”).

23 WDFW’s decision not to disclose the new “purpose” of the spring hunt prior to the close  
24 of public comment was also telling, given its recognition as recently as 2015 that the public  
25 would not support a recreational spring bear hunt. Ex. 18 at PE-3. Indeed, Petitioners repeatedly  
26 challenged WDFW regarding its private admission of the recreational nature of the proposed  
27 hunt, which was made in response to emails from Petitioner Hall (AR 643-52; 654-65; 680-88;

1 697-724), but not included in any of the public documentation about the proposed Rule. *See,*  
2 *e.g.*, AR 629 (noting the public has believed the spring hunt was for “special conflict situations,”  
3 but “it turns out that this is not the main purpose at all”); AR 926 (“Does the Department policy  
4 and State law even allow the Commission to vote on a rule-making proposal when the public  
5 and Commission hasn’t been told the reason for the proposal?”); AR 934-35 (“The public and  
6 the Commission deserve to understand why exactly these hunts are necessary . . . So far, the  
7 Department has not articulated any rationale that is able to withstand scrutiny.”).

8 In its CES, WDFW retreats to the rationale for the spring hunts from the Management  
9 Plan, claiming it was to “address emerging management needs.” AR 103. No such management  
10 needs were identified during rulemaking. And at no point *before* its vote on the Rule did WDFW  
11 provide any consistent rationale for the Rule, or respond to the comments questioning its  
12 apparent switch to holding the spring hunts primarily for recreation.

13 5. Comments Reveal Confusion About Rule and its Purpose

14 The comments on the Rule reveal the widespread confusion caused by the Rule Notice.  
15 None of the comments prior to the close of the written comment period on November 26, 2020  
16 addressed the fact that by voting against the Rule, the Commission would be stopping a bear  
17 hunt from going forward during spring 2021. Even commentators who expressed their opposition  
18 to spring bear hunting did not draw a connection between approval of the Rule and a 2021  
19 spring hunt. *See, e.g.*, AR 614 (letter from Humane Society of the United States asking WDFW  
20 “not to approve the proposed rule and, *instead*, to prohibit the recreational hunting of black  
21 bears during the spring.” (emphasis added)); AR 632 (letter from Center for Biological  
22 Diversity, noting that the proposed changes “appear to be somewhat insignificant,” but urging  
23 WDFW to take “the opportunity to more fully consider...the spring bear hunt generally[.]”). Of  
24 the 328 comments received through the online survey, WDFW noted that 20 of them expressed  
25 confusion about the proposal. AR 818; *see, e.g.* AR 798 (“Your description of what and why  
26 this change is being discussed is that of a grade schooler. . . . Until you can come up with a decent  
27 description of why these changes are needed and why all of a sudden they are a big deal, I

1 cannot agree. Mainly because of lack of information that you are providing.”); AR 808 (“Not  
2 sure [of] the specifics because you don’t list them here clearly.”).

3 Commentors voiced even more significant confusion and distress over the Department’s  
4 failure to provide specifics following the start of public meetings on the Rule on December 3.  
5 Of 23 comments made about the spring bear hunt on December 4 and 5, 13 voiced concerns  
6 over the Department’s failure to provide clear notice of the purpose of the Rule, or to explain  
7 its rationale. *See, e.g.*, AR 886-88 (describing WDFW’s failure to disclose that hunts were  
8 primarily for recreation); AR 888 (“staff is refusing to tell the public why these special hunts  
9 are being held”); AR 896 (claiming that the hunt is full of “outright misrepresentation of its  
10 very purpose”); AR 898 (if the hunt is just a recreational opportunity, “the Department needs  
11 to be transparent about that”); AR 900 (“if the public was fully informed of this...you know as  
12 well as I do they would be overwhelmingly opposed to it”); AR 937 (“There seems to be some  
13 confusion about what changes were included in the proposal, exactly what the Commission  
14 would be voting on.”); AR 942 (urging Commission to provide “full disclosure of the details to  
15 the public so we may then make fully-informed comments before any new rule is voted on”).

16 Despite the public’s outcry over the confusion created by the Rule Notice, the  
17 Commission refused repeated requests to postpone its vote until WDFW could issue proper  
18 notice regarding the purpose and reasoning behind the proposed Rule.

19 **D. Docket Did Not Provide Public with Access to Written Comments on Rule**

20 WDFW further hampered the public’s participation in the process by violating the  
21 APA’s mandate that it maintain a rulemaking docket that specifies the “place where written  
22 submissions about the proposed rule may be inspected.” *See* RCW 34.05.315(3)(d).

23 While the Rule was under consideration, the Docket did not post public comments to  
24 the Rule or say where they could be accessed. *See* AR 93.<sup>11</sup> Indeed, by its own admission,

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25 <sup>11</sup> The Agency Record does not provide a date for the excerpt that it includes from WDFW’s Rulemaking Docket,  
26 but it seems to post-date the conclusion of the rulemaking process, since it includes links to the CR-103 and the  
27 CES. AR 93. However, WDFW does not contend that the Docket contained information about how to inspect  
written comments for the Rule at any point in time. *See* PI Opp. at 7; *see also* Ex. 2 (archived copy of Docket as it  
appeared on November 28, submitted with PI Motion).

1 WDFW does not comply with these requirements. *See* WDFW Opposition to Motion for  
2 Preliminary Injunction to Stay Agency Rule (“PI Opp.”), at 7. Although WDFW has an online  
3 Docket, it does not follow the example of other state agencies, which use their dockets to post  
4 public comments on pending rules.<sup>12</sup> Instead, WDFW’s rules specify that its rulemaking files  
5 are available for inspection at its Olympia’s office by appointment, and that copies may be  
6 obtained by submitting a public disclosure request. *See* WAC 220-111-003, -004 (cited at PI  
7 Opp. at 7). WDFW does not claim that the information from this rule about how to obtain  
8 written comments was ever posted on its rulemaking Docket, as the APA requires; or how its  
9 rules are applicable now, when all its offices are closed due to the ongoing health emergency.  
10 To inspect comments on the Rule, WDFW concedes a member of the public would have needed  
11 to: (1) know WDFW has designated its rules coordinator to maintain all rulemaking files; (2)  
12 contact the rulemaking coordinator (whose contact information is the only relevant information  
13 on the Docket); (3) submit a public information request; and (4) wait for that request to be filled  
14 in due course by WDFW public disclosure office. PI Opp. at 7; see Mot. at 9.

15 WDFW’s refusal to allow timely access to public comments is no mere technical  
16 violation of the APA. Many comments include thoughtful discussions of aspects of the Rule  
17 that WDFW does not disclose. By hiding these comments from public view, WDFW limits the  
18 public’s exposure to perspectives outside the Department’s own controlled messaging, prevents  
19 members of the public from being exposed to additional information, and curbs thoughtful and  
20 informed discussions about its proposals. This factor is especially important where, as here, the  
21 Department’s public notice is deficient, leaving individual members of the public on their own  
22 to try to decipher the meaning of the proposed.

23 **E. The Rule Is Invalid Because Decision to Approve Was Arbitrary and Capricious**

24 An agency rule is invalid as arbitrary and capricious if the decision to adopt it was  
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26 <sup>12</sup> *See, e.g.*, Department of Ecology rulemaking docket, [https://ecology.wa.gov/Regulations-Permits/Laws-rules-](https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-445)  
27 [rulemaking/Rulemaking/WAC-173-445](https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-445) (Ex. 22); Department of Health rulemaking docket,  
<https://fortress.wa.gov/doh/policyreview/> (Ex. 23).

1 “willful and unreasoning and taken without regard to the attending facts or circumstances.”

2 *Hillis*, 131 Wn.2d at 383.

3 1. Department Did Not Understand Rule It Approved

4 It is axiomatic that an agency’s decision is “unreasoning” if the decisionmakers do not  
5 understand the decision that they are making. *Id.* Such is the case here, as the Commissioners  
6 were confused by WDFW’s inaccurate Rule Notice and erroneous guidance from their advisors.  
7 In short, the Commission wrongly believed there was an “existing rule” that authorized spring  
8 bear hunts, to which the proposed Rule made only minor adjustments.

9 Mr. Aoude fueled this confusion starting with his discussion of the Rule in the email  
10 WDFW sent out about the proposed Rule, in which he asked for feedback “to better understand  
11 how the public feels about adjusting season dates and permit numbers in some areas.” AR 711.  
12 Mr. Aoude’s comments made clear that WDFW considered the 2021 spring bear hunt a  
13 foregone conclusion, rather than an issue to be decided by the proposed Rule. *Id.* (indicating at  
14 WDFW would use information from the public to “guide *how* we offer spring black bear  
15 opportunities in 2021”). Mr. Aoude also described the Rule as a proposal to make minimal  
16 changes to an existing hunt in his presentations to the Commission. In his December 3 briefing  
17 to the wildlife committee, he said “the spring bear hunt is one that happens every year because  
18 it’s a permitted hunt, so we bring it in front of the Commission every year to adjust permits or  
19 change language. This year there’s not a whole lot really to change.” AR 845; *see also* AR 872-  
20 75, 878 (in briefing full Commission on December 4, indicating Rule would make minimal  
21 changes to an existing hunt); AR 832-33 (copy of presentation, listing only minimal changes).

22 This message was reinforced by the Summary Sheet prepared for the Commission (AR  
23 825), and by the Rule Notice, which the Commissioners scrutinized to try to understand the  
24 issue that was before them. See, e.g., AR 911-12 (Commissioner Don McIsaac reviewing notice  
25 to determine what the “Commission task is here,” and after only finding references to minor  
26 changes, opining that it may not be “legitimate” to consider not going forward with the hunt);  
27 AR 917 (Commissioner Bob Kehoe echoing McIsaac’s concerns, indicating the Commission

1 was not deciding “whether to allow a spring bear hunt altogether,” but doing “more of kind of  
2 a -- kind of fine-tuning certain regulations that we have”).

3 In light of several public comments calling for the end to spring bear hunting,  
4 Commissioner Barbara Baker asked for clarification from Mr. Panesko on December 5:

5 What I wanted to make clear to the spring bear hunt opposition is that the vote that  
6 we’re taking -- this is my opinion, and this is sort of the question for Joe. The vote that  
7 we’re taking on the 18th is whether we tweak the WAC a little bit, the current WAC.  
8 If we don’t vote, if we just left it alone and didn’t vote, we would still have the current  
9 WAC. So although this change has seemed to have opened a lot of opinion about  
10 whether we should have spring bear hunts, that isn’t teed up for us just now, I believe.

11 AR 927. In response, Mr. Panesko confirmed this mistaken interpretation, claiming erroneously  
12 that there was an “existing rule that allows the spring bear hunts,” and that the “complete repeal  
13 of the existing rule is not something on the table.” AR 928.

14 Fueled by the mistaken impression that the proposed Rule did not allow them to address  
15 concerns about the continuation of spring bear hunting, the Commissioners struggled  
16 throughout the December meetings to determine when the proper time would be to confront  
17 those issues. Commissioner Kehoe said he thought it was “in the three-year Game Package,”  
18 apparently under the belief that the spring bear hunt was authorized by that regular approval of  
19 other hunting seasons. AR 917. In response, Mr. Aoude did not clarify that WDFW had  
20 removed the spring bear hunt from consideration in its three-year hunting packages, but he  
21 suggested that the Commission postpone any such deliberations until it approved the next Game  
22 Management Plan (AR 918)—a “guidance document” taking effect in 2023 (AR 103).

23 Critically, at no point before the December 18 vote did any member of the Commission  
24 or WDFW management indicate that they understood that: (1) there is *no existing rule* that  
25 establishes the spring bear hunt as a continuous program; (2) the primary impact of the Rule  
26 before them was to authorize a new spring bear hunt for 2021; or (3) that the proper time to  
27 weigh whether to continue spring bear hunting was *before* they voted to approve this new hunt.

## 2. WDFW Did Not Consider Possibility of Not Allowing Spring Hunt

When there is “room for two opinions,” a court will not overturn an agency’s decision,

1 as long as it reflects a “choice between opinions taken after due consideration.” *See D.W. Close*  
2 *Co. v. Dep’t of Labor & Indus.*, 143 Wn. App. 118, 130, 132, 177 P.3d 143 (2008).The  
3 proposed Rule presented a choice: By approving the Rule, WDFW would authorize a spring  
4 bear hunt for 2021; by rejecting it, it would prevent a spring hunt from going forward this year.  
5 Spring bear hunting is controversial and heavily disfavored by the public (*see, e.g.* Ex. 10 at  
6 42), and several opponents to the hunt spoke and submitted written comments. In fact, some  
7 Commissioners indicated they might be swayed by the opposition voiced during public  
8 comment. *See, e.g.*, AR 999 (Commissioner Bradley Smith indicating desire to look at those  
9 issues in depth); AR 1000 (Commissioner Baker expressing concern over orphaned cubs).

10 In short, there clearly was ““room for two opinions”” on the issues presented by the  
11 proposed Rule. *See D.W. Close*, 143 Wn. App. at 130. Yet just minutes before the Commission  
12 vote, Mr. Aoude acknowledged that WDFW management “did not consider not having a [spring  
13 bear] season” in 2021. AR 993. And several Commissioners said they felt constrained to  
14 authorize the 2021 season because of how WDFW framed the Rule Notice. *See, e.g.*, AR 911-  
15 12, 917-18 (comments by Commissioners McIsaac and Kehoe). Even Commission Baker, who  
16 ultimately voted against the Rule (AR 1001), seemed to indicate that she thought it should be  
17 approved *because* of the notice deficiency:

18 [R]egardless of the legalities of this issue, I do not believe it is a good idea to make a  
19 big decision on any of these issues without people being notified that such a big  
20 decision is being considered and having the chance to weigh in. And we didn’t hear  
21 from very many people on the -- in the public testimony that -- that were on notice that  
22 this was -- that actually the question of having a spring hunt was -- was a question. I  
23 don’t feel that it would be fair to -- to eliminate something that has been going on for  
24 almost 20 years with no notice to the public[.]

25 AR 1000.

26 These concerns were validated and reinforced by Mr. Panesko’s comments on  
27 December 5. *Supra* at 13-14. Mr. Panesko attempted to clarify these comments before the final  
28 vote on December 18, telling Commissioners that he “did not intend to suggest that the  
29 Commission did not have the authority to vote no on this motion. The Commission has the --  
30 the Commission can vote either way on -- on this motion to amend the rule[.]” AR 992.

1 However, Mr. Panesko made no attempt—either then, or at any other time—to correct his  
2 suggestion that it would be improper for Commissioners to “repeal” the spring bear hunt, to  
3 clarify that voting against the proposed Rule would mean that no hunt would go forward in  
4 2021, or to inform Commissioners that they had a legal *responsibility* to fully consider the  
5 option of rejecting the rule, and not authorizing the 2021 hunt.

6 Indeed, at the same time it approved a spring bear hunt for 2021, WDFW *explicitly*  
7 delayed consideration of whether spring bear hunting was necessary or appropriate. *See* AR  
8 1001 (Commissioner Baker indicating she did not believe the question of whether to authorize  
9 spring bear hunting was “fairly presented right now,” but that she would “look forward to more  
10 conversation about this in the future.”); AR 929 (Commissioner Baker promising to figure out  
11 how to raise those issues in the “proper way”); AR 917 (Commissioner Kehoe suggesting they  
12 be considered at the next “three-year Game Package”); AR 919 (Commissioner Jim Anderson  
13 agreeing with Mr. Aoude that deliberations over the 2023 Game Management Plan were the  
14 “logical place to have that discussion”); AR 999 (Commissioner Kim Thorburn proposing the  
15 Commission “take the issue up in the wildlife committee” following the vote).

16 WDFW has a responsibility to give both sides of an issue “due consideration” *before*  
17 deciding on a course of action—not after. *See D.W. Close*, 143 Wn. App. at 132. Its admitted  
18 refusal to give any consideration to the “facts or circumstances” weighing against approval of  
19 the Rule is the epitome of a “willful and unreasoning” decision. *See Hillis*, 131 Wn.2d at 383.

### 20 3. Commission Did Not Consider Purpose of Rule or Reasons Supporting It

21 Before taking action such as adopting a rule, an agency “must examine the relevant  
22 data and articulate a satisfactory explanation for its action including a rational connection  
23 between the facts found and the choice made.” *Neah Bay Chamber of Commerce v. Dep’t of*  
24 *Fisheries*, 119 Wn.2d 464, 471, 832 P.2d 1310 (1992) (*citing Motor Vehicle Mfrs. Ass’n of*  
25 *U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983)) (some  
26 internal citations omitted). The legislature has directed that agency rules “should be justified  
27 and reasonable, with the agency having determined, based on common sense criteria established

1 by the legislature, that the obligations imposed are truly in the public interest[.]” *Hunter*, 101  
2 Wn. App. at 292 (*quoting* Legislative Findings, 2 LAWS OF 1995, ch. 403, § (1)(b)).

3 Not only did the Department fail to make the purpose and rationale of the proposed Rule  
4 clear through its public notices, but the agency record does not indicate that either the  
5 Commission or WDFW management had a clear understanding. Following weeks of  
6 investigation, Petitioner Hall wrote several letters to the Commission detailing her attempts to  
7 discover the reasons for the 2021 hunt, and conveying extensive, and contradictory  
8 correspondence from WDFW representatives. *See, e.g.*, AR 680-88 (November 30 letter  
9 describing differences between what she was told by district staff and Mr. Aoude, and  
10 discrepancies between the purported reasons for the hunt and WDFW’s own science and  
11 policies); AR 655-65 (December 1 letter detailing Mr. Aoude’s recent admissions that the bear  
12 hunt was primarily for recreation). But as Ms. Hall observed (and repeatedly asked Mr. Aoude),  
13 none of the Department’s purported reasons for the 2021 spring hunt were disclosed in any  
14 public materials about the Rule. *See* AR 655, 658, 644; *see also* AR 665 (Mr. Aoude conceding  
15 WDFW “did not identify a reason for each hunt because it is nuanced,” but that he had described  
16 to her in conversations “some of the general rational[e] in addition to recreational hunting”).  
17 After she had struggled to understand the reasoning for several weeks, Mrs. Hall wondered on  
18 December 1 whether “the commissioners are still in the dark about this too[?].” AR 663.

19 When Commissioner Baker asked about the rationale for the 2021 hunt on December 3,  
20 Mr. Aoude flailed in his attempt to respond:

21 So our spring bear season and the Game Management Plan says that we’ll -- you  
22 know, it can be used for recreational harvest to supplement the fall. And so that’s  
23 clear in there. And it also is used to deal with emerging issues. So it could, you  
24 know – and it puts a couple of examples in the Game Management Plan, but it’s  
25 not exclusive, things like bear timber damage, conflict issues, or, you know, maybe  
26 if there are ungulate issues. And so the combination of all those things can be used  
to have a spring bear hunt. . . . and so it is an opportunity, you know, a recreational  
opportunity. . . . So that’s -- I guess those are the reasons or rationale we give for  
having a spring bear season. I know some people conflate these sometimes and say  
it has to be only for this or only for that, but that’s not reality. I mean, these are  
multi-faceted, nuanced reasons.

27 AR 851-52. Commissioner Jim Anderson acknowledged this response left the rationale for the

1 hunt in “this nuance realm without the purposes being articulated and communicated and talked  
2 about[.]” AR 856. Meanwhile, Commissioner Kim Thorburn said she believed the hunt  
3 “basically is for opportunity.” *Id.*

4 However, apart from the investigation performed by Mrs. Hall, the record contains no  
5 clear statement that the 2021 spring hunt is for recreational opportunity, or that it is justified by  
6 any of the type of “management needs” envisioned by the Management Plan. *See* AR 52.  
7 Because the Commission thus failed to consider the rationale for the 2021 hunt, or how it fit  
8 into the Management Plan, its decision was arbitrary and capricious. *See Puget Sound*  
9 *Harvesters Ass’n v. Dep’t of Fish & Wildlife*, 157 Wn. App. 935, 949-50, 239 P.3d 1140 (2010)  
10 (“When an agency makes rules without considering their effect on agency goals, it acts  
11 arbitrarily and capriciously.”).

12 4. WDFW Did Not Consider Facts and Circumstances Raised by Public Comment

13 The APA is not satisfied if an agency allows public comment as an empty formality on  
14 the way to a predetermined conclusion—it requires that the agency *actually consider*, and  
15 respond, to the comments provided. *See* RCW 34.05.325(6)(a)(iii) (CES requirement).

16 Just as the Commissioners explicitly refused to consider the facts that weighed against  
17 approval of the 2021 spring bear hunt, the Concise Explanatory Statement confirms that WDFW  
18 simply refused to consider large categories of public comment. *See* RCW 34.05.325(6)(a)(iii)  
19 (CES must summarize “all” comments and indicate “how the final rule reflects agency  
20 consideration of the comments, or why it fails to do so”); *see Anderson, Leech & Morse, Inc.*  
21 *v. Liquor Control Bd.*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978) (CES’s purpose is to facilitate  
22 court review and assure public that the agency actually considered all arguments made).

23 The CES ignores all the comments except the 328 received through WDFW’s online  
24 survey, and 504 “form letter[s]” expressing opposition to the spring bear hunt. AR 105. As a  
25 result, it omits all the most extensive and meaningful written comments sent to WDFW, and it  
26 does not discuss *any* of the extensive oral testimony provided during Commission meetings. In  
27 total, there were 34 distinct written comments received before the December 18 vote, and five

1 more received before the Rule was adopted on December 28. *See* AR 612-766. In addition, 17  
2 people spoke about the Rule on December 4 and 5. *See* AR 872-949. But the CES demonstrates  
3 all this effort was in vain, because WDFW did not consider any of these comments.

4 The CES also fails to address many of the *substantive* issues raised in oral and written  
5 comments. For example, it does not address detailed challenges as to whether the 2021 spring  
6 bear season was necessitated by any of the management needs WDFW had previously raised,  
7 including information discrediting these prior justifications for hunting in most of the spring  
8 locations. *See, e.g.*, AR 886-88, 895-97, 680-88 It also ignores the concern raised in multiple  
9 written and oral comments that spring hunting would facilitate the illegal baiting of bears, given  
10 the simultaneous operation of hundreds of supplemental bear feedings stations on commercial  
11 timberlands. *See, e.g.*, AR 891-92, 902-3, 939. The CES also shows no effort by WDFW to  
12 reconcile its outdated claims about the health of the state’s black bear population with recent  
13 studies by its own scientists, which show it has been overestimating the bear population by 50%  
14 in many areas. *See, e.g.* AR 59, 619, 634. By the same token, WDFW does not respond to  
15 concerns that WDFW is not adequately calculating the toll the spring bear hunt takes on the  
16 bear population, when considering animals who are wounded but not immediately killed, the  
17 death of orphaned bear cubs, or the strain the hunt puts on vulnerable animals. *See, e.g.* AR 614-  
18 17, 891, 942. Finally, the CES also fails to address the repeated concern about the impact that  
19 the spring season has on other recreational pursuits. *See* AR 652, 896-97.

20 An agency cannot adequately consider all the facts and circumstances related to a  
21 decision if it disregards serious and repeated concerns raised by public comment. *See Mahoney*  
22 *v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987) (“Full consideration of public comment  
23 prior to agency action is both a statutory and constitutional imperative.”). Such a refusal to  
24 consider substantive public comment renders a decision arbitrary and capricious.

#### 25 IV. CONCLUSION

26 For the foregoing reasons, Petitioners ask the Court to invalidate the Rule because it is  
27 arbitrary and capricious and not adopted in compliance with statutory rulemaking procedures.

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DATED: March 2, 2021

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Attorney for Petitioners

1 **CERTIFICATE OF SERVICE**

2 Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under  
3 the laws of the State of Washington, that on the 2nd day of March 2021, the document attached  
4 hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system,  
5 and that it was served on all parties or their counsel of record via email in accordance with an  
6 Electronic Service Agreement:

<p>8 <b>Attorneys for Defendant:</b> 9 Bob Ferguson, Attorney General 10 Attn: Division of Fish, Wildlife and Parks 11 1125 Washington Street SE 12 Olympia, WA 98501 13 14 Amy.Dona@atg.wa.gov 15 Jeanne.Roth@atg.wa.gov 16 Danni.Friesner@atg.wa.gov 17 fwdef@atg.wa.gov</p>	<p><input type="checkbox"/> by <b>Thurston County ECF</b> <input checked="" type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b></p>
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18 Executed on the 2nd day of March 2021, at Vashon, Washington.

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20 \_\_\_\_\_  
21 Claire Loeb Davis