

STATE OF WASHINGTON FISH AND WILDLIFE COMMISSION

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6	)	Petition of The City of Forks, et al., for Amendment)
7	)	Statement by Petitioners Claiming "Substantial
8	)	Difference" between the Commission's proposed rules
9	)	and the Commission's adopted rules pursuant to RCW
10	)	34.05.340
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COMES NOW, the Petitioners, with the support of those identified in the proceeding documents, by and through their attorneys, WILLIAM R. FLECK and GREGORY OVERSTREET, and hereby file, pursuant to RCW 34.05.340(3), a demonstration of the Petitioners' belief that those portions of Washington Administrative Code (WAC) 232-12-619 with specific regard to creating a wild steelhead retention moratorium were substantially different from the adopted WAC 232-12-619 changes that created the moratorium.

In filing this statement, as part of the Petitioners' overall petition, the Petitioners' specifically request that based upon the arguments below, the Department and the Commission initiate rule-making proceedings on the Petitioners' proposed amendments to WAC 232-12-619.

**Brief Demonstration of the Petitioners**

***Wise and Slow. They stumble that run fast.***  
William Shakespeare (Fr. Laurence in *Romeo and Juliet*)

**Statement of Petitioners**

The Petitioners, and their supporters, believe that the two-year wild steelhead moratorium adopted by the Commission by a 5-3 vote on 6 Feb 2004 was substantially different from the proposed modifications, as proposed on 31 October 2003, to the fishing seasons and retention rules for the Bogachiel, Calawah, Dickey, Hoh, Hoko, Pysht, Quillayute, Quinault, and Sol Duc Rivers. The Petitioners point further, for the reasons

1 developed below, to the fact that numerous individuals who read through the proposed rules did not have  
2 reason to believe that a wild steelhead retention moratorium was a possible rule change from the WAPA  
3 notice provided to the general public by the Department and Commission. As a result, the Petitioners, their  
4 supporters, and others, were not given proper notice of the nature of the rule that was proposed by  
5 Commissioner Van Geytenbeek and considered by the Commission on 6 Feb 04. Nor, could the Petitioners,  
6 and their supporters, have understood that their interests in wild steelhead would be affected in the manner  
7 that the wild steelhead moratorium will affect them over the next two years. The Petitioners also argue that  
8 while the subject of wild steelhead management was a topic of the proposed rules, the concept of a proposed  
9 statewide moratorium was specifically identified by the Department as a "proposal not included for public  
10 comment" and one that "was too soon to re-address." Finally, the Petitioners, and their supporters, believe  
11 that the effects of the wild steelhead moratorium differ greatly from the effects associated with the published  
12 proposed rule at an individual, community, and possibly river basis.

13 Therefore, the Petitioners believe, for the reasons stated below, that the action by a majority of the  
14 members of the Commission resulted in a rule that is substantially different from that which was proposed,  
15 and as a result the Department and Commission must initiate rule-making proceedings on the Petitioner's  
16 attached, and incorporated herein as if fully set forth, proposed amendments to WAC 232-12-619.

17 **Applicable Law**

18 In adopting the Washington Administrative Procedures Act (WAPA), Title 34 RCW et al., the  
19 Legislature stated that it intended "to provide greater public and legislative access to administrative decision  
20 making." RCW 34.05.001. Washington's courts many times rely upon federal cases when construing the  
21 meaning of the WAPA and support for this can be found within legislative intent at RCW 34.05.001.<sup>1</sup> The  
22 reason for providing such access to the rulemaking process is to prevent offense or arouse suspicions about  
23 the manner in which the agency operates. As noted by one court:

24 [M]ost important of all, high-handed agency rulemaking is more than just offensive to our basic  
25 notions of democratic government, a failure to seek at least the acquiescence of the governed

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<sup>1</sup> "The legislature [] intends that the courts should interpret provisions of [the WAPA] consistently with decisions of other courts interpreting similar provisions of ... the federal government[.]" Accordingly, this Petition will occasionally cite and discuss federal APA cases.

1 eliminates a vital ingredient for effective administrative action .... Charting changes in policy direction  
2 with the aid of those who will be affected by the shift in course helps dispel suspicions of agency  
predisposition, unfairness, arrogance, improper influence, and ulterior motive.

3 *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980).

4 The Washington Fish and Wildlife Commission is mandated to conserve food and game fish "in a  
5 manner that does not impair the resource" but that also seeks "to maintain the economic well-being and  
6 stability of the fishing industry in the state." RCW 77.04.012. The Commission is further mandated "to  
7 attempt to maximize the public recreational game fishing and hunting opportunities of all citizens, including  
8 juvenile, disabled, and senior citizens." *Id.* The duties of the Commission include the maximizing of fishing  
9 opportunities that are "compatible with healthy and diverse fish...populations." RCW 77.04.055. One of the  
10 primary duties is the establishing of "fishing seasons and prescribe the time, place, manner, and methods that  
11 may be used to harvest or enjoy game fish and wildlife." *Id.* The scope of the Commission's rule making  
12 authority is further described and covers seasons, areas, ability to retain, and types of gear to be used, types  
13 (size, sex, species) of fish to be taken from the State's waters. RCW 77.12.047. It is also important to note  
14 that the Department, recognizing the importance of volunteers, is mandated to "work cooperatively with  
15 volunteer groups and individuals to achieve the goals" associated with management of all of the state's  
wildlife including game fish. RCW 77.04.012.

16 In adopting fishing rules, the Commission is mandated to follow the WAPA. RCW 34.05.010(2) and  
17 34.05.030(5). In bringing forward proposed rules, the Commission is required, at least twenty days prior to a  
18 rule-making hearing, to give notice of the hearing, information about the proposed rule to include its title,  
19 purpose, reasons for supporting the proposed action, and describe how the public can participate in the  
20 deliberations on that rule. RCW 34.05.320. In making its proposal, the Department must insure that a good  
21 faith effort is made to ensure that the published proposed rule "accurately reflects the rule to be presented  
22 and considered at the oral hearing on the rule." RCW 43.05.325. The Commission has adopted by practice a  
23 means in which its rule making activities are either associated with a "major cycle" or a "minor cycle." In a  
24 major cycle, which was the cycle associated with the issue being brought forward by the Petitioners, various  
25 aspects of the fishing rules are reviewed and proposals brought forward. Public participation in this process is  
reiterated at WAC 232-12-807. Petitioner's Exhibit No. 1 is the 2004-05 proposed sports fishing rules.

1 With regard to steelhead management, the Commission and/or Department are not the sole manager  
2 of the resource. Since the decision of U.S. v. Washington, commonly referred to as the **Boldt** decision  
3 (original decision at United States v. Washington, 384 F.Supp. 312 (W.D.Wash.1974), the management  
4 of all fisheries is done in co-management within the usual and accustomed areas of the treaty tribal nations of  
5 Washington. Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683 (W.D. Wash. 1981) at 685. Neither of the Co-  
6 Managers, (the State and its citizens nor the Tribal nations and their members), can fish in a manner as to  
7 deplete the resource and in order to prevent such a depletion, cooperation is required. *Id.* at 686.  
8 Management of the resources is required by court order to be based upon an "opportunity to harvest basis"  
9 calculated on "a river-system by river-system basis wherever practical" in Washington. *Id.* The rivers of the  
10 Quillayute system (Quillayute, Bogachiel, Calawah, Sol Duc and Dickey) are combined into one system  
11 requiring such river by river allocations. *Id.*

12 Steelhead are managed in these systems pursuant to an order adopted as part of the Boldt progeny  
13 that requires a determination in the fall of each year by the co-managers as to the number of harvestable fish  
14 to be allocated equally river by river between the State and the appropriate tribal nation. U.S. v. Washington  
15 459 F. Supp. 1020 (W.D. Wash. 1978), 1118-1120. The Commission is required to provide the number of  
16 steelhead that can be safely harvested and done in a manner as to: (1) protect wild steelhead stocks to as  
17 great an extent as possible; and (2) still allow for the sport harvest of steelhead. *See Id.* Statistical  
18 information has been kept by the Department since the entering of the above order. *See Petitioners' Exhibit*  
19 *No. 2 at its 1*. Each year, the Department and the appropriate tribal representative agree to an annual  
20 harvest management plan for winter steelhead both wild and hatchery.

21 An example of the 2003-04 plan for the Quillayute River System's wild steelhead can be found at  
22 *Petitioners' Exhibit No. 2 at its 2*. In this example, the Quillayute River System has an agreed upon and  
23 established escapement goal of 5,900 for wild winter steelhead. When the co-managers reach agreement on  
24 the number of wild steelhead expected in the Quillayute River System, the fish not needed to meet the  
25 escapement goal of 5,900 wild steelhead are then deemed "surplus" fish. The opportunity to harvest these  
surplus fish is allocated equally to the tribal fishery and the state sports fishery. The state's allocation is then  
subject to the rules of the Commission and the Department.

1           Once the fishing rules are adopted, a person may request that the rule be amended or repealed by  
2 petition in a manner described within the WAPA and by the Office of Financial Management pursuant to RCW  
3 34.05.330. The Department and the Commission have sixty days to determine whether or not they are willing  
4 to: (1) initiate rule-making on the petition with notice of a proposed rule; or (2) deny the petition for specific  
5 reasons in writing related to the issues raised by the petitioner. RCW 34.05.330(1).

6           Another option available to any person in the state is a petition claiming that the rule adopted by the  
7 Commission is "substantially different" from the proposed rule distributed to the public. The Commission may  
8 only adopt a rule that varies in content from the proposed rule provided that the subject matter remains the  
9 same. RCW 34.05.340(3). However, the WAPA notes that the Commission "may not" adopt a rule that is  
10 substantially different from that which was proposed. RCW 34.05.340(1). If such an approach is  
11 contemplated by the Commission, it can file a "supplemental notice" that describes the proposed substantial  
12 variant of the originally proposed rule and allow the public to comment on that variant proposal. *Id.* If such  
13 supplemental variance notice is not filed, the WAPA provides a means of relief to interested parties. *Id.*

14           Within sixty days of publication of the adopted rule, any interested person can petition the  
15 Commission to "amend any portion of the adopted rule that is substantially different from the proposed rule."  
16 RCW 34.05.340(3). The WAPA requires that three general factors, not all conclusive, be considered by an  
17 agency to determine when an adopted rule is "substantially different" from the proposed rule:

- 18           1. The extent to which a reasonable person affected by the adopted rule would have understood the  
19 published proposed rule would affect his or her interests;
- 20           2. The extent to which the subject of the adopted rule or the issues determined it are substantially  
21 different from the subject or issues involved in the published proposed rule;
- 22           3. The extent to which the effects of the adopted rule differ from the effects of the published  
23 proposed rule.

24           RCW 34.05.340(2)

25           It is important to note, that the definition of "substantially different" is (1) inclusive of the very same term  
that it is trying to define, and (2) somewhat ambiguous. See *Washington Administrative Law Practice* (WALP)  
at 7-24.

1 Under this option, if it is demonstrated that the adopted rule was substantially different, and the  
2 petition meets the requirements of RCW 34.05.330, the Commission must initiate rule-making proceedings on  
3 the petitioner's proposed rule within sixty-days. RCW 34.05.340(3) This is not a discretionary decision by the  
4 Commission with regard to initiating rule-making on the proposed amendments, however, the actions of the  
5 Commission following the public comment process on those proposed amendments remains discretionary.  
6 WALP at 7-24, 25. In this process, the purpose is to "ensure a full opportunity for public comments on any  
7 substantial changes made by the agency in its adopted rules." *Id.* at 7-25.

8 The Petitioners are proceeding under **both** aspects of the WAPA described above. The filing of this  
9 petition is timely in that the CR-103/publication of the adopted rule occurred on the 7<sup>th</sup> of April 2004, and the  
10 Petitioners filed their requests and supporting materials two days later.

11 **Argument regarding 'substantial difference'**

12 The City incorporates by reference the arguments noted within the "Statement by Petitioners  
13 regarding other reasons for the Commission's consideration of the Petitioner's proposed amendment." The  
14 arguments noted therein are not restated herein as a result.

15 On 31 Oct 2003, the Department provided interested parties with a "package of proposed changes to  
16 the rules governing recreational fisheries for game fish, food fish, and shellfish." *Petitioners Exhibit No. 1.*  
17 The introductory letter, signed by Lew Atkins, explained that the package consisted of "a large number of  
18 proposals" for a "major cycle" of rule changes to be considered by the Commission in February 2004. *Pet. Ex.*  
*No. 1 at 1.* In that letter, Mr. Atkins noted that:

19 There are two parts to the mailout. The first portion, printed on white paper, lists all of the  
20 proposals that have the approval of the WDFW to go forward for public comment. Each  
21 proposal has a description and an explanation. ***The second part of the mailout, printed  
22 on colored paper and in table form, contains the proposals that were not  
23 supported by staff to go out for public comment.*** Each of these proposals is described  
24 briefly, and a reason for the lack of support is noted.

25 *Id.* – emphasis added.

The proposed rules packet was divided into three sections – Statewide Rules, Marine Rules, and  
Freshwater Rules. The Freshwater Rules section was divided into the applicable six regions and Region 6  
includes the Olympic Peninsula. In the Statewide Rules section of the packet there is no reference to a wild

1 steelhead retention prohibition, moratorium, or requiring "catch and release" of all wild steelhead. See *Pet.*  
2 *Ex. No. 1 at its pages 1-2*. In the Freshwater Rules Section's "general freshwater rules" there was one  
3 proposal regarding the removal of steelhead and salmon from fresh water that was required to be released.  
4 *Id. at its page 10*. Wild Steelhead in the state, prior to the action being questioned by the Petitioners, were  
5 to be released when captured by anglers "except as provided in exceptions to statewide rules." WAC 232-12-  
6 619(13)(b) (2003 ed.). The exceptions permitted an angler to retain only one wild steelhead per day and no  
7 more than five wild steelhead per angler per year in total. WAC 232-12-619(3) and (14) (2003 ed.).

8 Exceptions that existed included:

- 9 1. Bogachiel River – one wild steelhead per day between 1 Dec and 30 Apr;
- 10 2. Calawah River – one wild steelhead per day between 1 Dec and 30 Apr;
- 11 3. Clearwater River – one wild steelhead per day between 1 Dec and 15 Apr;
- 12 4. Dickey River – one wild steelhead per day between 1 Dec and 30 Apr;
- 13 5. Goodman Creek outside the Olympic National Park – one wild steelhead per day between 1  
14 Dec and the last day in February;
- 15 6. Green River (Duwamish) – four segments are described all which deal with a summer run  
16 steelhead population:
  - 17 a. In the first segment, one wild steelhead per day between 1 and 31 Jul and between  
18 16 Sep and 30 Nov;
  - 19 b. In the second segment, one wild steelhead per day between 1 and 31 Jul and  
20 between 1 Oct and 30 Nov;
  - 21 c. In the third segment, one wild steelhead per day between 1 May and 31 Jul and  
22 between 16 Oct and 30 Nov;
  - 23 d. In the fourth segment, one wild steelhead per day between 1 Jul and 30 Nov;
- 24 7. Hoh River – one wild steelhead between 1 Dec and 15 Apr;
- 25 8. Hoko River – one wild steelhead between 1 Dec and 15 Mar;
9. Pysht River – one wild steelhead between 1 Dec and the last day in February;
10. Quillayute River – one wild steelhead between 1 Dec and 30 Apr;

1 11. Quinault River, Upper – one wild steelhead between 1 Dec and 31 Mar;

2 12. Sol Duc River – one wild steelhead between 1 Dec and 30 Apr from area between mouth and  
3 concrete pump station at the Soleduck Hatchery.

4 In addition, wild steelhead retention was permitted on three creeks in Western Clallam and  
5 Jefferson counties – Kalaloch, Cedar, and Mosquito Creek. It is important to point out that while  
6 an exception exists, the angler is still limited to retaining a total of five wild steelhead for the  
7 entire license period.

8 The Department’s proposed rules for the above twelve identified streams either made no proposed  
9 changes to some of the above systems (Nos. 2, 5, 6, and 7); or, minor modifications to season lengths or  
10 harvest rules in the others (Nos. 1, 2, 4, 8, 10, 11, and 12). *See Pet. Ex. No. 1 at its i-iii and 28-37.* In  
11 addition, the idea of preventing the retention of wild steelhead on the exceptions noted above was a proposal  
12 “not included for public comment.” *See Pet. Ex. No. 1 at its page 49-51.* The reason that such a proposal, or  
13 variations on the same, was not included for public comment was in the opinion of the Department:

14 “NOTE: This rationale applied to all of the proposals in this section. The Commission  
15 considered this during the last major regulation change cycle and did not adopt it. It is too  
16 soon to re-address this issue. In addition, not allowing wild steelhead under any circumstances  
17 will complicate allocation issues with treaty tribes.”

18 *Id. at its page 49.*

19 Public review began shortly after the release of the rules in preparation for a public hearing on the 5<sup>th</sup>  
20 and 6<sup>th</sup> of December in Port Townsend.

21 Dan Leinan, Clerk/Treasurer for the City of Forks received the rule packet shortly after the 31<sup>st</sup> of  
22 October. Mr. Leinan is a 20 year senior management government employee who has been very active on  
23 behalf of the Forks community in issues associated with the establishment of marine fishing regulations. In  
24 addition, Mr. Leinan purchased a license for the 2003-2004 period, and is intending to purchase a fishing  
25 license for the 2004-2005 period. Mr. Leinan has and intends to fish for steelhead and other game fish in the  
rivers in and about Forks. Equally important in the eyes of the Petitioners is the fact that during the last

1 "major cycle," when a wild steelhead retention ban/moratorium was actually a published proposal<sup>2</sup>, Mr. Leinan  
2 was the sole and lead City staffer that coordinated the opposition to the wild steelhead retention  
3 ban/moratorium. *See Declaration of R. Daniel Leinan, paras. 1-3.*

4 As a result of his personal and professional interests in the rule process, Mr. Leinan read through the  
5 proposed regulations. He also, in a manner encouraged by the Department of its various advisors, circulated  
6 the rules packet to a few local fishing guides to ask their advice and perspectives on the proposed rules. As  
7 Mr. Leinan understood the rule proposals, only the season for wild steelhead harvest/retention would be  
8 modified. In his reading of the proposed rules, he was not aware that a "moratorium on retaining wild  
9 steelhead from these rivers was being proposed." *Id. at para. 4.* As a result of his understanding of the  
10 proposed rules, Mr. Leinan advised the Mayor of the City of Forks that "there did not seem to be any issue  
11 with the Commission's proposed wild steelhead rules." Based upon that assessment, and a similar  
12 assessment from those he contacted, Mr. Leinan and the Mayor agreed that there was no need for the City to  
13 participate in the Commission's public hearings in December. No further action was taken by the Petitioners,  
14 (Leinan, Reed, and the City of Forks), as a result of that understanding. In addition, the individuals contacted  
15 by Mr. Leinan also decided not to participate in the December hearing process as a result of their reading of  
16 the proposed rules. *Id. at para. 5.*

17 Nedra Reed, at 62, is the Mayor of Forks having been elected to that position in 2001 after serving  
18 three years on the Forks City Council. She possessed a valid fishing license for the 2003-2004 season and  
19 intends to purchase one for the 2004-2005 season to continue fishing with her husband in and about the  
20 Forks area. Mrs. Reed is a retired state employee having worked with the Department of Corrections for over  
21 23 years. In that capacity she had responsibility for managing a 350 bed facility at two separate locations, as  
22 well as working with various entities associated with the siting of multi-million dollar facilities within the State.  
23 Mayor Reed did not read the proposed rules packet from the Department, rather she relied upon the  
24 evaluation and assessment of that packet by Dan Leinan. She discussed the proposed rules packet with Mr.

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25 <sup>2</sup> Then the proposal was identified as a statewide catch and release requirement similar in effect to the moratorium and  
one of two wild steelhead harvest proposals before the Commission in 2001-2002 major rule cycle. See Leinan  
Declaration.

1 Leinan and recalls being told by Mr. Leinan that it was the general consensus of those he talked with that  
2 "everyone could live with" the proposed changes. As a result of the discussions with Mr. Leinan, the City did  
3 not take a formal position at the hearings. *Declaration of Nedra Reed at paras. 1-3.*

4 John Kelly is a Federal Way resident and plans on purchasing his 2004-05 fishing license "only if wild  
5 steelhead retention is available on the coastal streams." *Declaration of John Kelly at paras 1 and 2.* Mr. Kelly  
6 is a retired research manager having retired from Boeing in 1986. Since then, he has played an active role in  
7 various fishing related organizations such as Steelhead Trout Club of Washington (Past President), Salmonid  
8 Foundation (Director), King County Outdoor Sports Council (past president) and was appointed in 1993 as a  
9 member of the Department's own Steelhead/Cutthroat Advisory Group. *Id.* He currently serves in numerous  
10 roles in the King County Sports Council as a director, its past president, and chair of its Steelhead committee.  
11 In 1997, Mr. Kelly was the plaintiff in litigation that challenged the adoption of an emergency wild steelhead  
12 catch and release rule on the Chehalis River and Humptulips River when both had "surplus fish" as described  
13 above. Mr. Kelly was successful in having this emergency rule declared invalid because of the Department's  
14 failure to comply with notice provisions, the existence of fish over the established escapement numbers, and  
15 therefore the lack of an emergency. *See Kelly v. Shanks, Order Declaring WAC 232-28-61900A Invalid,*  
16 *Thurston County Cause No. 97-2-00064-2.* It is fair to say that Mr. Kelly is very familiar with the  
17 Department's regulatory process and rule-making actions regarding wild steelhead. In addition, his  
18 interaction with the Department/Commission, as well as that of the committee he chairs, is based upon the  
19 "WDFW supplied documents and information." *Declaration of John Kelly at para. 4.* Mr. Kelly has had  
20 numerous opportunities to learn about the manner in which steelhead are managed with regard to the "Boldt  
21 Case" (*U.S. v. Washington*) requirements to know that the Department utilizes the concept of maximum  
22 sustained harvest escapement pursuant to the "Joint Steelhead Harvest Management Plan for Washington  
23 Department of Game and Treaty Tribes." *Id at para. 8.*

23 Mr. Kelly received a copy of the Department's rule packet, *Pet. Ex. No. 1*, and read the proposed rule  
24 packet. His reading of the packet resulted in his belief that the proposed rules for many of the above noted  
25 rivers was an attempt to align the last retention date for wild steelhead on coastal rivers. *Declaration of John  
Kelly at para. 4.* He did not perceive any potential of a moratorium and noted that "if mandatory release of

1 Wild Steelhead was to be an acceptable proposal for public comment, then the Oct. 31 document would not  
2 have excluded public comment on Wild Steelhead Retention from the public process." *Id.* Based upon that  
3 understanding of the proposed rules, Mr. Kelly and the King County Outdoor Sports Council's steelhead  
4 committee did not provide written comments on the proposed rules, nor did Mr. Kelly or the steelhead  
5 committee actively participate in the December public hearing. *Id.*

6 Bob Reid is a resident of Toledo, Washington. He is the founder and president of Cowlitz Plan for  
7 Restoration – Fish (CPR-FISH), a group involved in fish restoration and public fishing access issues. Mr. Reid  
8 was a former steelhead fishing guide from 1989-1996 operating as Toledo Cowlitz River Charters. At 57 and  
9 retired, Mr. Reid is pursuing efforts associated with CPR-FISH and had hopes of finally being able to fish the  
10 rivers of the West Olympic Peninsula. Mr. Reid was invited to participate in the mid-1990s in the effort to  
11 combine the former RCW Title 75 and Title 77 regarding fishing and hunting. Mr. Reid was also asked by a  
12 member of the Department to "proof" the 2004-2005 sport fishing regulations pamphlet before it is published.  
13 Mr. Reid purchased his 2003-2004 and 2004-2005 fishing license. *Declaration of Bob Reid at paras. 1-4.*

14 Mr. Reid received a copy of the proposed 2004-2005 rules from an office of the Wild Steelhead  
15 Coalition on the same date that the rules were released to the general public. Mr. Reid was told that said  
16 Coalition had been given the proposed rules a week prior to date of their release on 31 October 2003. Mr.  
17 Reid read through the proposed rule packet and understood that with regard to wild steelhead and the  
18 Olympic Peninsula's coastal waters that the proposal would allow "a limited take and some harvest." In Mr.  
19 Reid's reading of the proposed rules, he noted that there was no mention of a moratorium on wild steelhead  
20 retention. Based upon Mr. Reid's reading of the public notice attached to the proposed rules, "one would  
21 certainly not believe that any proposal that was not listed in the package would then be considered for  
22 adoption." Mr. Reid did not testify, as he had in the past, nor did his organization submit testimony regarding  
23 the proposed steelhead rules as a result of his reading of the proposed rules. *Declaration of Bob Reid at  
paras. 5-6.*

24 Steve Mathews, a retired fisheries University of Washington professor, is now working part time as a  
25 commercial fisherman in Alaska. *See Resume/CV of Prof. Mathews attached to his Declaration.* He purchased  
a 2003-2004 license and plans to purchase a 2004-2005 license. He has fished the rivers of the West Olympic

1 Peninsula for wild steelhead, occasionally eats one which he finds to be "great table fare." *Declaration of*  
2 *Steve Mathews at paras. 1-3.*

3 Diane Schostak is the director of the Forks Chamber of Commerce and has been for over seven years.  
4 The Chamber represents over 250 businesses in Western Clallam and Jefferson counties and Mrs. Schostak is  
5 very familiar with the tourism industry in our area including its various lodging providers operating within the  
6 region. She did not read the 2004-2005 proposed fishing regulations. Rather, the Chamber responds to  
7 requests associated with direct impacts upon its members, or requests by the City to participate in issues that  
8 affect the community. In 2001-2002, the Chamber ultimately decided to oppose the concept of "catch and  
9 release only" for wild steelhead. The Chamber did not participate in the December 2003 hearing. *Declaration*  
10 *of Diane Schostack at paras. 1 – 7.*

11 Ruby Swagerty has owned and operated the Three Rivers Resort, located near Forks, since 1991.  
12 During the steelhead season, 90% of the resort's business is associated with fishing. Mrs. Swagerty was not  
13 aware of the potential of a moratorium on retaining wild steelhead, and had she been she would have  
14 contacted the Department. In the past, when she had heard rumors of such proposals affecting the rivers  
15 near her business, she contacted the Department to discuss her concerns. *Declaration of Ruby Swagerty*  
16 *paras. 1-2.*

17 Mr. Leinan, Mayor Reed, Mr. Kelly, Mr. Reid, Mr. Mathews, Mrs. Schostak, and Mrs. Swagerty all  
18 learned of the decision of the Commission to adopt the wild steelhead moratorium shortly after the  
19 Commission's vote on 6 February 2004. Mr. Leinan "literally felt sick" to his stomach when he read the press  
20 release from the Department announcing the decision on 9 Feb 2004. *See Pet. Ex. No. 3 and also Declaration*  
21 *of Dan Leinan at para. 7.* His feelings were based upon the fact that no such moratorium was a part of the  
22 rule packet, and had it been he would have once again championed an effort to oppose such a moratorium.  
23 In addition, his feelings were also based upon the fact that he advised the Mayor that there was no need for  
24 the City to be engaged in the rule making process. *Declaration of Dan Leinan at para. 7.*

25 Mayor Reed learned of the moratorium shortly after the 6<sup>th</sup> of February when she began getting  
phone calls about whether or not she knew that "steelhead fishing would close April first for two years for all  
retention." She immediately requested her staff to evaluate the City's various options and to determine the

1 nature of the impacts such a rule would have on the community. Mayor Reed also contacted the Quileute  
2 Tribal Chairman, Russell Woodruff to learn more about the Quileute Tribe's perspective on this proposal and  
3 whether or not WDFW asked for any consultation with the Co-manager of the Quillayute River system. Mayor  
4 Reed received a letter from the Tribal Chairman attached as one of the exhibits to her declaration. She also  
5 made a request of the Forks Chamber for information about the impact of the moratorium upon the local  
6 business community. *Declaration of Mayor Reed at paras. 4-7.*

7 Mr. Kelly learned of the moratorium from one of the members of the King County Sports Council that  
8 was in attendance at the 6 Feb 2004 adoption meeting of the Commission. Mr. Kelly noted that "our council  
9 was livid that the commission would conduct such an illegal public process." *Declaration of John Kelly at  
10 para. 5.*

11 When Mr. Reid learned of the Commissions' decision, he was "outraged" because the "general public  
12 was never notified that the Commission was considering adopting a state wide wild steelhead retention  
13 moratorium." Mr. Reid was further "outraged" when he learned that in fact two other proposed moratoriums  
14 were brought forward for consideration and a vote by the Commission "without any prior public notice" and  
15 he became determined to "overturn this outrageous action." *Declaration of Bob Reid at para 8.*

16 Professor Mathews learned of the moratorium a week after its passage while in Forks for a fishing trip  
17 during Presidents Day weekend. He was surprised at the decision because of his belief and understanding  
18 that the runs affected "were in good shape and well managed in terms of both net and sport." In an effort to  
19 better understand the nature of the runs, Mr. Mathews contacted a member of the Department and obtained  
20 escapement and run size data. These numbers affirmed his initial belief and resulted in his having a firmly  
21 negative reaction to the decision because the runs were healthy, generally stable, well managed; and,  
22 changes had already occurred regarding the sports fishery. *Declaration of Steve Mathews at para. 4.*

23 Diane Schostak learned of the moratorium through a combination of sources that included her board  
24 members, fishing guides and the Mayor. As she worked to find out more about the moratorium, she was  
25 contacted by the City for information regarding the impact of the adopted rule upon hotel, motel, bed and  
breakfasts, possible restaurants. In responding to this request for information, Mrs. Schostak conducted a  
quick telephone survey of various members of the Forks Chamber of Commerce that provide lodging during

1 the November – April period. She learned that a “vast majority of winter business is related to fishing.”  
2 *Declaration of Diane Schostak at para. 9.* In the letter the Chamber provided it was noted that on average  
3 over 60% of the lodging stays in the December through March period are associated with the steelhead  
4 fisheries with some lodging entities having up to 90% of their stays associated with the steelhead fishery.  
5 The letter also indicated that between 20-90%, depending upon the establishment, of the restaurants’  
6 business was related to fishing during that period of time. Based upon information associated with lodging  
7 tax reports, it was estimated that the total lodging expenditures in Nov 02 through Mar 03 totaled about  
8 \$685,000. *Declaration of Nedra Reed, Letter of Chamber of Commerce dated 3 Mar 2004.* Mrs. Schostak and  
9 the members of the Chamber Board were, and remain, concerned that the moratorium may result in a  
10 “serious loss of winter business” for the lodging and hospitality industry. *Declaration of Diane Schostak at*  
11 *para. 10.*

12 Mrs. Swagerty “could not believe” that the rumor of an adopted moratorium by the Commission in  
13 fact was true. Clients contacted her following the action of the Commission seeking fishing reservations. She  
14 was told by those contacting her “that once the new rules are set they never change it back (that is what  
15 happened on their rivers).” Mrs. Swagerty had no reservations for the services provided by the resort in April,  
16 however, when the date for the start of the moratorium was moved back to 1 May, the Resorts’ “calendar for  
17 April began to fill up quickly.” In her opinion, the moratorium would “devastate our business.” *Declaration of*  
18 *Ruby Swagerty at para 4.*

19 The Petitioners believe that the above facts overwhelmingly demonstrate that reasonable people did  
20 not know, nor could have known, that the Commission was considering or would be permitted to consider the  
21 adoption of the statewide wild steelhead moratorium similar to the one that the City of Forks had worked very  
22 hard to defeat in the last major cycle of rule making (2001-2002 Cycle). As noted above, in the legal  
23 authority section of this petition, RCW 34.05.340(2) provides some general concepts of how to define  
24 substantial difference between a proposed rule and that which is adopted. The Petitioners, and their  
25 supporters, would argue that the first of those general concepts has been met by the showing of the various,  
but near universal, readings Mr. Leinan, those he sought counsel from, Mr. Kelly, Mr. Reid and others had  
regarding the nature of the proposed rules.

1 As noted in their affidavits, these gentlemen are all very familiar with the various aspects of fishing  
2 regulations and all were left with the understanding that a minor adjustment in the change of seasons  
3 associated with wild steelhead retention was all that was being considered during this rule making cycle. This  
4 position, in the opinion of the Petitioners, was further affirmed by the fact that suggestions to create a  
5 moratorium by the Commission were classified as proposals "not for public comment" pursuant to the rules  
6 packet provided to the public. The common read of reasonable people seeking to understand the nature of  
7 the rules being promulgated by the Commission and the Department would be that a moratorium on wild  
8 steelhead retention was not before the Commission, nor would a moratorium be a legitimate topic of public  
9 comment or promotion during this rule making cycle.

10 There is no Washington case law on the guide lines, somewhat circular it should be noted, for  
11 determining whether an adopted rule is "substantially different." But, an underlying principle carried forward  
12 from previous versions of the WAPA is that of a fair notice to the public of what the governmental agency is  
13 proposing to do. This concept can be seen in the legislative intent of the WAPA to "provide greater public and  
14 legislative access to administrative decision making." RCW 34.05.001. The reason for encouraging active  
15 participation is to ensure the development of a sound rule. As Prof. Andersen wrote in the seminal scholarly  
16 article on the WAPA:

17 Technically sound, lawful, and politically responsive rules are more likely if there is ample  
18 advance notice of the terms of proposed rules, full opportunity for comment [.]

19 William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64  
20 Wn. L. Rev. 781, 795 (1989) (footnote omitted).

21 Other commentators have stressed the importance of notice requirements in rule making as a means of  
22 ensuring the involvement of an engaged public. In the commentary associated with the model Administrative  
23 Procedures Act, of which the WAPA is nearly a carbon copy, it is noted that:

24 Notice requirements in rule making are essential to assure affected persons an effective  
25 opportunity to participate in the process. Without adequate notice, persons will not know of  
the existence of pending rules whose adoption may affect them and, therefore, will be  
unable to voice their concerns or to submit useful data to the agency contemplating such  
action. In short, persons who will be affected by proposed rules must know about them in  
order to react to them.

Arthur Earl Bonfield, *State Administrative Rule Making*, § 6.3.1 at 169 (1986 & 1993 Suppl.)  
(footnote omitted). See also *id.*, § 6.4.1 at 182 ("An opportunity for public participation

1 facilitates the vigorous representation of otherwise unrepresented interests. It also helps to  
2 ensure that agencies obtain the fairest and most complete presentation of opposing views.  
All of this is likely to result in more balanced and better informed agency decisions.").

3 Prof. Bonfield continues his commentary with stressing that the reason for public participation in the rule  
4 making process is to "assure agency accountability." *State Administrative Rule Making*, § 6.7.1 at 232.

5 Here, the general public, as well as those familiar with the rule making process, would not have  
6 understood that the ability of retaining a wild steelhead was to be removed in its entirety by the Commission.  
7 Anglers, fishing guides, sport fishing organizations, as well as those that derive a secondary benefit from the  
8 fishing activities of these individuals and entities, could not have known that their individual and collective  
9 interests in wild steelhead were to be totally curtailed on rivers that had populations that exceed the  
10 escapements established by court order between the Department and the appropriate tribal nations. At the  
11 very best, the Department could argue that the Petitioners and their supporters should have had some  
12 understanding that season length and retention periods were being altered. However, such limited impact  
13 associated with the proposed rules upon the Petitioners interest is substantially different from a two year  
14 moratorium. Regardless of how the efforts to explain the moratorium enacted by a majority of the  
15 Commission are put forward, it would be a significant turn of both the English language, and basic  
16 astronomical observations, to turn a two week reduction in season in which a wild steelhead could be retained  
17 into a two year moratorium on retention of the same.

18 The second guideline provided by RCW 34.05.340(2) is self defining in its attempt to clarify when an  
19 adopted rule is "substantially different" from the proposed rule. Here the emphasis appears to rest upon both  
20 the subject and the issues involved with the proposed rule versus that which was adopted. All concede that  
21 the rule proposed and the rule adopted dealt with sports fishing regulations. However, to defend the action  
22 of the Commission based solely upon the concept that "the Commission was considering sport fishing  
23 regulations and therefore it could do what it wanted" would in fact defeat the concept of substantial  
24 difference being protected within RCW 34.05.340. The Courts note that in construing statutes and their  
25 meanings, one is to avoid creating absurdity of a statute when a reasonable interpretation would carry out the  
intent of the legislature. *Martin v. Dept. of Social Sec.*, 12 Wn. 2d. 329 (1942) at 331. In addition, Prof.

1 Bonfield's commentary on the model APA, of which the WAPA is a nearly identical copy, notes that public  
2 participation becomes meaningless:

3 if an agency were allowed to adopt a rule that had no substantial relationship to the rule  
4 originally proposed in the required published notice. Under those circumstances an agency  
5 could circumvent opposition to a proposed rule by intentionally omitting from its text, at the  
6 time it was initially published as a proposal, those portions that are likely to be  
7 controversial. Then, at the time of its adoption, the agency could rewrite the rule to  
8 incorporate the controversial provisions that would have provoked a public outcry had they  
9 been known at the time the rule was originally proposed. To avoid evasive tactics of this  
10 kind, [a state's APA] should establish some limits on the variance allowed between the text  
11 of a published proposed rule and the text of the rule that is actually adopted at the end of  
12 the rule-making proceeding.

13 *State Administrative Rule Making*, § 6.7.1 at 232.

14 To interpret the WAPA so broadly as to say the notice of proposed rule provided sufficient information  
15 as to allow those affected to know that a moratorium was being considered by the Commission would render  
16 absurd the concept of (1) providing public notice regarding the regulatory efforts of the Commission; and, (2)  
17 the process of filing notice of a variance articulated within RCW 34.04.340. In addition, such an expansive  
18 interpretation would not comport with the written notice put forward for public review which specifically noted  
19 that the idea of a statewide catch and release/wild steelhead retention moratorium was "not included for  
20 public comment" because "the Commission considered this during the last major regulatory change cycle and  
21 did not adopt it. It is too soon to re-address this issue." *See Pet. Ex. No. 1 at its page 29*. Finally, reliance  
22 upon an argument that "well the fishing rules were open, so the moratorium was properly enacted" would  
23 allow the Commission to do that which Prof. Bonfield cautions against doing because such actions undermine  
24 the public process integral to the APA/WAPA.

25 The Petitioners would argue that the issue advanced by the Department, and upon which debate was  
carefully limited, was that of the seasons for retaining wild steelhead in the rivers identified earlier in this  
Petition. The issue that was put forward in the proposed rule was in most cases a modification of the harvest  
season, or in the case of a few limited streams the closure of that stream from harvest where the information  
regarding escapement and production remains uncertain. *See Pet. Ex. No. 1 at its page 29 for example*. This  
interpretation also comports with the federal court order associated with wild steelhead management that  
requires the management of the state's resources on a river by river basis and imposing conservation

1 measures by closing the steelhead fishery only after consultation with affected groups in order to maintain  
2 “escapement” necessary to maintain said resource. *U.S. v. Washington*, 459 F. Supp. 1020 at 1118-1120.

3 The Petitioner’s argument was foreseen in the comments of at least one Commissioner who noted when the  
4 proposal was being debated to establish Van Geytenbeek’s moratorium on a permanent basis:

5 “One of the things, at this point, that I’m uncomfortable with in this whole process is that  
6 when the original rule change proposals were brought to us early on in this process, this is a  
7 subject that was not included within those proposals. They did pop up and were addressed  
8 to some degree at Port Townsend, but they weren’t – I don’t feel – brought to the public  
9 because of the way that the subject was ultimately broached to the Department and the  
10 Commission, and to my knowledge, I don’t feel that there really has been a balanced  
11 testimony process in regards to a motion that we’re on the cusp of dealing with...it was not  
12 part of the original testimony process. And I think we would be setting ourselves up for a  
13 really significant public relations problem if we addressed any motion in regards to this  
14 subject at this point. I don’t think it’s appropriate, and I think the reaction we would get  
15 would bear me out on this....”

16 *See Petitioners Exhibit No. 2, its No. 4, pg. 5 – Commissioner Ozment’s statement.*

17 Commissioner Van Geytenbeek could have pursued his specific political/conservation objectives within  
18 the confines of the WAPA by simply proposing that the Commission file a notice of the Commission’s want to  
19 consider a variant proposal regarding wild steelhead in the manner found within RCW 34.05.340. Such a  
20 motion, if offered and adopted, would have brought Commissioner Van Geytenbeek’s agenda/issue forward  
21 for formal public consideration in an advertised process. Instead, the Petitioners would argue, the adopted  
22 rule varied in such a substantial degree in both extent and effect, that saying it was within the realm of what  
23 the public understood to be before the Commission for consideration is to say that Mars is within the physical  
24 confines of Earth now that we see pictures from its surface on a daily basis. The latter would be labeled,  
25 rightly so, as absurd, and the former should be labeled equally absurd in light of the WAPA, commentary  
associated with it, and the complicated issue being discussed.

26 The third remaining guiding concept associated with defining “substantially different” is the  
27 measurement of effects between that which was proposed and that which was adopted. The proposed rule  
28 would have reduced the statewide wild steelhead harvest by a mere fraction. On the Quillayute System for  
29 example, sport harvest of wild steelhead for 2002-03 were projected to be approximately 1,230 wild  
30 steelhead. *See Petitioners Exhibit No. 2, its No. 1, noting that Sports totals are based upon harvest from Nov-*  
31 *Apr.* In addition, April appears to be a period when the wild steelhead harvested by both native and sports

1 fishers is substantially lower than other periods within the season. *See Petitioners Exhibit No. 2, at its No. 1,*  
2 *noting that the tribal harvest for April 2004 of wild steelhead was expected to be approximately 84 fish – no*  
3 *number is given for sport harvest.*

4 Thus, it could be argued that the effect of the published proposed change in season duration  
5 (reducing the harvest period from 30 April to 15 April) would have at most resulted in a loss to the sports  
6 anglers' opportunity to harvest approximately 50 fish or less on the Quillayute. Such a loss would amount to  
7 less than 2% of the total opportunity provided for sports harvest from the Quillayute system. While that  
8 would remove some opportunities by the individual petitioners to harvest fish, and may have had a slight  
9 impact upon tourism related visits to Forks (presuming no offset for Spring break visits), the impact would be  
10 relatively slight and the Petitioners had determined that they could live with the extremely limited effects of  
11 the proposed rule.

12 However, the adopted rule's effect is substantially different. First, and foremost, the Petitioners in  
13 their individual capacity will lose the ability to take any wild steelhead whatsoever from numerous rivers  
14 during the next two years. In addition, the opportunity to harvest about 7,100 steelhead would be lost to all  
15 of the State's sports anglers from just the Quillayute River system alone. This number is based upon a  
16 projected run size of approximately 13,000 wild steelhead (similar to 2002-03 season) of which 5,900 would  
17 be committed to meet escapement goals for sustainability of the resource. This would leave about 7,100 wild  
18 steelhead available to share between the co-managers' allocations, or ~3,550 wild steelhead per year in the  
19 Quillayute System for sport anglers to have the opportunity to harvest. Substantial difference appears to  
20 demonstrated by simply comparing approximately 50 steelhead no longer being available for the opportunity  
21 for harvest by sport anglers in 2004-05 with 7,100 steelhead no longer available for the opportunity for  
22 harvest on the Quillayute system 2004-2006.

23 In addition, the impact could be even greater in that there is still an unresolved question as to the  
24 moratorium's impact upon the Snider Creek wild steelhead hatchery program run by volunteers working in  
25 conjunction with the Department. If the moratorium does in fact apply to that program as well, the impact to  
the sports and tribal angler increases dramatically. *Declaration of Nedra Reed at para. 10, and that of Dan  
Leinan in the footnote.*

1 In addition, the materials and declaration of Diane Schostak, as well as the declaration of Dan Leinan,  
2 illustrate that there was little expectation of significant loss associated with a closure of the retention season  
3 two weeks earlier than in the past. However, the moratorium caused a great deal of concern. For if only one  
4 out of every ten sports angler that would have come to Forks would no longer come as a result of the  
5 moratorium, the impact would be a ~\$100,000 reduction in gross spending for lodging, food and beverages in  
6 the November through April period. In addition, some lodging entities could see an even greater impact upon  
7 their businesses due to the percentage of the clientele associated with sports fishing between November and  
8 April. The reaction to the moratorium, and the change in the start date of the same, in the case of Mrs.  
9 Swagerty and her Three River Resort seems to indicate that the concerns of Mrs. Schostak and Mr. Leinan are  
10 very real. Mrs. Swagerty's concern about a devastating impact to her 13 year old business associated with a  
11 moratorium on wild steelhead retention appears to be grounded in truth based upon the statements of other  
12 supporters of the Petitioners' proposed amendments.

13 The statements of Mr. Reid would indicate to the Petitioners that there is a very real potential of a  
14 loss of revenue associated with anglers no longer coming "3-4 hours one way" to Forks to fish for wild  
15 steelhead that cannot be retained as a result of this moratorium. *Declaration of Bob Reid at para. 11.* It is  
16 also interesting to note that a life-time angler such as Mr. Kelly would probably modify his own fishing  
17 behavior resulting in spending funds in other states to fish for steelhead in order to have the potential to  
18 retain such fish. *Declaration of John Kelly at para. 6.* In addition, there are some within the state that  
19 probably harvest steelhead and salmon, pursuant to their license, for consumption be that an occasional  
20 delicacy as "great table fare", or in some cases as a means of augmenting their family's diet. *Declaration of*  
*Steven Mathews at para. 3, and the Declaration of Mayor Reed at para. 13.*

21 Finally, there is another affect that needs to be weighed, albeit delicately, in association with the  
22 proposal and the adopted rule. That is the impact upon the legal standing of the State's interest in its future  
23 allocation of wild steelhead during the moratorium period. Commissioner Shiosaki noted that if the State  
24 "forgoe[s] the opportunity to take wild fish, then they may say that is a foregone opportunity on our part and  
25 then they feel they should have the opportunity to take also our share of the steelhead." *See Petitioners*  
*Exhibit No. 2, at its No. 4, pg. 4 – Commissioner Shiosaki's statement.* The issue being raised is that of

1 "foregone opportunity" whereby one co-manager of the resource refuses to take their allocation of the  
2 resource thereby creating an opportunity for the other co-manager to harvest that "foregone opportunity" in  
3 that year if escapement goals can still be met. The concern raised by Shiosaki that some tribal nations could  
4 argue that the moratorium was in effect the creation of a foregone opportunity appears to be a concern  
5 implicit in the Departments explanation as to why a moratorium was not before the Commission for  
6 consideration. The Department stated that: "In addition, not allowing wild steelhead under any  
7 circumstances will complicate allocation issues with treaty tribes." Apparently, such a scenario regarding the  
8 argument of foregone opportunity was litigated before, but the results were inconclusive with regard to  
9 steelhead. See *Petitioners' Exhibit No. 4, Department Briefing on Fish and Wildlife Commission Request, page*  
10 *"15/18"*. This could have been the basis for the concerns Commission Shiosaki shared with his fellow  
11 Commissioners during the debate on the Van Geytenbeek proposal. While no tribal nation has brought  
12 forward a claim that the action by the Commission on 6 February has in fact created a foregone opportunity,  
13 the very real potential exists for such a claim to be raised.

14 In addition, the Quileute Tribal Chairman voiced another concern regarding the wild steelhead  
15 moratorium on the Quillayute and its potential to "raise racial criticism towards tribes that do not adopt similar  
16 management restrictions." *Letter of Quileute Tribal Chairman Russell Woodruff, attached to Declaration of*  
17 *Mayor Reed*. If one thinks that such a concern as raised by a respected Tribal politician and elder is  
18 hyperbole, one need only spend some time on one of the many fishing related message boards to see that  
19 such a concern appears to be somewhat based in reality. See [www.piscatorialpursuits.com](http://www.piscatorialpursuits.com) – *Outdoor*  
20 *Forums – "Is it Time for a Protest?" – a copy of said discussion topic is attached as Petitioner's Exhibit No. 5.*

21 Thus, when the Commission's actions are viewed in their entirety, as noted in this statement and the  
22 other statement attached hereto and incorporated by reference as if fully set forth, it is easy to compare the  
23 actions of Commissioner Van Geytenbeek and his colleagues to those of the ill-fated lovers observed by Fr.  
24 Laurence in the great bard's telling of Romeo and Juliet. Both those lovers, and the Commissioners, would  
25 have benefited from heading the good friar's advice "**Wise and Slow. They stumble that run fast.**"  
*(William Shakespeare, Romeo and Juliet, II, iii).*

### **Conclusion and Request for Relief**

1           1. Based upon the above facts, legal authorities and arguments, the Petitioners and their  
2 supporters, respectfully request and require a determination that the adopted moratorium on the retention of  
3 wild steelhead in the rivers delineated earlier was substantially different as defined in RCW 34.05.340 from  
4 that which was proposed in the 31 October 2003 notice to the public.

5           2. The Petitioners further request and require that the Department and the Commission undertake  
6 the rulemaking process on the Petitioner's proposed amendments to the adopted rules regarding wild  
7 steelhead published by the Department for the 2004-2005 season, as well as those rules that would be put  
8 into effect in 2005-2006 as a result of the 6 Feb 2004 action by the Commission. The Petitioners believe that  
9 such an approach would comport with the letter and intent of the mandate of the Commission, the  
10 Washington Administrative Procedures Act, and, the concept of meaningful involvement of the public in the  
11 Commission's and the Department's rule making processes.

12           3. The Petitioners further note, and clearly understand, that the opening up of this issue to rule-  
13 making does not assure any party – the Petitioners and their supporters, nor Commissioner Van Geytenbeek  
14 and his colleagues – of any specific outcome. However, it is fair for the Petitioners to state that such an  
15 approach would at least allow all with an interest in the issue of wild steelhead management to participate in  
16 the discussion of that issue – something that the Petitioners and their supporters were deprived of by the  
17 manner in which the Commission considered the moratorium proposal of Commissioner Van Geytenbeek.

18           Respectfully submitted on behalf of the petitioners this 9<sup>th</sup> day of April 2004.

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