

1  EXPEDITE  
2  No Hearing is set  
3  Hearing is set:  
4 Date: June 15, 2018  
5 Time: 9:00 am  
6 Judge/Calendar: Hon. Carol Murphy

7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 CENTER FOR BIOLOGICAL DIVERSITY, )

9 Petitioner, )

10 v. )

11 WASHINGTON DEPARTMENT OF FISH )  
12 AND WILDLIFE and JOE STOHR, in his )  
13 official capacity as Acting Director, )

14 Respondents. )

No. 18-2-02766-34  
MOTION FOR TEMPORARY RELIEF  
UNDER RCW 34.05.550

**TABLE OF CONTENTS**

|   | <b>Page</b> |
|---|-------------|
| I. INTRODUCTION .....   | 1           |
| II. RELIEF REQUESTED .....  | 1           |
| III. STATEMENT OF FACTS.....  | 2           |
| A. Washington Voters Ban Baiting, Hound Hunting, and Trapping .....                       | 2           |
| B. WDFW Employs Banned Hunting Methods to Protect Commercial<br>Timber .....              | 3           |
| C. WDFW Has Already Issued more than 60 Permits in 2018.....                              | 5           |
| IV. LEGAL ANALYSIS .....  | 5           |
| A. Petitioner Meets the Standard for Temporary Relief. ....                               | 5           |
| B. Petitioner is Likely to Prevail on the Merits.....                                     | 6           |
| 1. WDFW unlawfully issues Permits to private hunters to hunt with<br>bait and dogs.....   | 7           |
| 2. WDFW allows hunting over bait without a permit .....                                   | 8           |
| 3. WDFW fails to prioritize non-lethal methods to reduce property<br>damage.....          | 9           |
| 4. WDFW issues Permits without a connection to protecting private<br>property.....        | 10          |
| 5. WDFW issues and enforces the Permits in an arbitrary and<br>capricious manner.....     | 11          |
| 6. The Program does not prevent property damage.....                                      | 12          |
| 7. WDFW engaged in unlawful rule-making .....   | 13          |
| C. Petitioner’s Legal Rights Are Being Invaded and the Invasion Will<br>Continue .....    | 14          |
| D. Petitioner’s Members Have and Continue to Suffer Actual and<br>Substantial Injury..... | 14          |
| E. The Balance of Interests Favors Petitioner.....  | 15          |
| V. CONCLUSION .....   | 15          |

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Chapman v. Black*,  
49 Wn. App. 94, 741 P.2d 988 (1987)..... 7

*Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*,  
125 Wn.2d 488, 886 P.2d 147 (1994) ..... 13

*Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*,  
1 Wn.App.2d 712, 744, 406 P.3d 1199 (2017)..... 6

*Hillis v. State Dep’t of Ecology*,  
131 Wn.2d 373, 932 P.2d 139 (1997) ..... 6, 13

*Kucera v. State Dep’t of Transp.*,  
140 Wn.2d 200, 995 P.2d 63 (2000) ..... 15

*McLean v. Smith*,  
4 Wn.App. 394, 482 P.2d 798 (1971)..... 5

*Nw. Gas Ass’n v. Utils. & Transp. Comm’n*,  
141 Wn. App. 98, 168 P.3d 443 (2007)..... 6

*San Juan Cty. v. No New Gas Tax*,  
160 Wn.2d 141, 157 P.3d 831 (2007) ..... 6

*Sudar v. Dep’t of Fish & Wildlife Comm’n*,  
187 Wn. App. 22, 347 P.3d 1090 (2015)..... 6, 13

*Tyler Pipe Indus. v. Dep’t of Revenue*,  
96 Wn.2d 785, 638 P.2d 1213 (1982) ..... 6, 14

*Wash. Fed’n of State Emps. v. State*,  
99 Wn.2d 878, 665 P.2d 1337 (1983) ..... 14

**Statutes and Regulations**

RCW 7.40.010 ..... 1

RCW 34.05.010 ..... 13

RCW 34.05.570 ..... 6, 13

RCW 77.15.194 ..... 2, 3, 9

1 RCW 77.15.245 ..... 2, 7, 8  
2 WAC 220-417-040 ..... 3, 4, 9, 10  
3 WAC 220-440-070 ..... 3, 4, 9  
4 WAC 220-440-210 ..... 3, 7, 10  
5  
6  
7  
8  
9  
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1 **I. INTRODUCTION**

2 In 1996 and 2000, Washington voters approved two initiatives criminalizing the use of  
3 bait, traps, and hounds to kill black bears, with only narrow exceptions for the protection of  
4 personal safety and private property. Disregarding the intent of the voters, the letter of the law,  
5 and protests from its own staff, the Washington Department of Fish and Wildlife (“WDFW”)  
6 maintains a secretive program that issues permits for hundreds of bears to be killed each year  
7 using these cruel and inhumane hunting methods, purportedly to address bear damage to  
8 commercial timberland. WDFW’s unlawful rules and policies create an exclusive recreational  
9 hunting season using methods that would otherwise be criminal, with little pretense of adhering  
10 to the requirements of the voter initiatives.

11 From April 15 to May 15, 2018, WDFW issued nine Black Bear Timber Depredation  
12 Permits (“Permits”), which are challenged in the Petition for Judicial Review and Declaratory  
13 Judgment and Injunctive Relief (“Petition” or “Pet. ¶\_\_”), filed May 31, 2018. But WDFW  
14 substantially accelerated the issuance of Permits in the last two weeks of May, during which it  
15 issued more than 50 Permits. This motion asks the Court to maintain the status quo until the  
16 merits of this action are heard, by preventing more bears from being killed using illegal hunting  
17 methods. If relief is not granted, WDFW will continue to flout the law and the intent of the  
18 voters, and hunters will continue to kill bears using cruel methods the voters have criminalized.

19 **II. RELIEF REQUESTED**

20 Pursuant to RCW 34.05.550(2), 7.40.010, 7.40.020, and 34.05.574, and CR 65(a),  
21 Petitioner requests that the Court grant a temporary restraining order until the hearing on the  
22 motion for a preliminary injunction, and a preliminary injunction until the ruling on the merits:

- 23
- Preventing Respondents from continuing to issue Permits authorizing the hunting of black bears using bait, dogs, and traps through the Black Bear Timber Depredation Program;
  - Preventing Respondents from taking any additional action to facilitate the use of, or renew, any Permits issued by the Program during the 2018 season; and
  - Preventing more bears from being unlawfully killed under the Program by directing Respondents to suspend existing Permits.
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1 **III. STATEMENT OF FACTS**

2 **A. Washington Voters Ban Baiting, Hound Hunting, and Trapping.**

3 In 1996 and 2000, Washington voters passed Initiative 655 and 713, respectively,  
4 banning cruel and inhumane hunting methods (collectively, the “Initiatives”). Pet. ¶4. Initiative  
5 655 banned hunters from using bait to hunt black bears, and hounds to hunt bears, cougars,  
6 bobcats, and lynx. Pet. ¶ 4; RCW 77.15.245 (codifying Initiative 655). Initiative 713 banned  
7 hunters from using traps to kill mammals. Pet. ¶ 4; RCW 77.15.194 (codifying Initiative 713).

8 Baiting, hound hunting, and trapping are widely regarded as cruel and inhumane. Only  
9 Maine allows hunters to use traps to kill bears, while 32 states ban hunters from using hounds,  
10 and 37 states ban the use of bait. Pet. ¶4. Baiting uses high-calorie foods and attractants to draw  
11 bears to a site, such as donuts, garbage, fish, and animal carcasses. It is often used in conjunction  
12 with traps, or hunters hide nearby to shoot bears at close range. Pet. ¶ 5. Initiative 713 banned  
13 steel-jawed leghold traps and other body-gripping traps, which frequently cause severe injury  
14 and suffering, including broken bones. Bears caught in traps have no food, water, or protection  
15 from elements or predators, and may chew off their own feet in desperation. Traps are  
16 indiscriminate, and pose a danger to endangered species, domestic animals, and children. Pet.  
17 ¶ 6. Hound hunters use dogs to pick up a bear’s scent, and then turn the dogs loose to chase the  
18 terrified bear until it is treed, cornered, or exhausted. Meanwhile, the hunters often return to  
19 their vehicles and wait, later locating the bear based on GPS from the dogs’ collars. Bears are  
20 either mauled by dogs or shot by the hunter, often dying prolonged and painful deaths. Pet. ¶ 7.

21 The Initiatives outlaw these inhumane hunting methods with narrow exceptions. Pet. ¶  
22 8. Initiative 655 allows hunting with bait or hounds by “employees or agents of county, state,  
23 or federal agencies while acting in their official capacities for the purpose of protecting  
24 livestock, domestic animals, private property, or the public safety,” and hunting with hounds  
25 under a WDFW permit by “the owner or tenant of real property.” RCW 77.15.245(1)(a) &  
26 (2)(a). Initiative 713 allows for traps to be used by a “person who . . . establishes that there  
27 exists on a property an animal problem,” only after WDFW “mak[es] a finding in writing that

1 the animal problem has not been and cannot be reasonably abated by nonlethal control tools or  
2 if the tools cannot be reasonably applied.” RCW 77.15.194(4)(b).

3 **B. WDFW Employs Banned Hunting Methods to Protect Commercial Timber.**

4 Black bears reside primarily in forested areas in western, northern, and southeastern  
5 Washington. After emerging from hibernation, some black bears “peel” trees, removing bark  
6 with their teeth and claws to reach the sugar-rich sapwood. Pet. ¶ 25. Bears primarily peel  
7 during early spring when food is scarce, and the damage can impact the value of timber. Pet. ¶¶  
8 24-26. Peeling stops as food becomes more readily available, often by mid-June. Ex. 25 at 2.  
9 Peeling is more common in intensively managed timberland, which deprives bears of other food  
10 sources, and often has even-age stands of 15-30 year-old trees that bears prefer. Pet. ¶ 25.

11 Washington has a regular fall bear hunt, as well as a special spring hunt on commercial  
12 timberlands. Pet. ¶ 28. It is a crime to use banned hunting methods in these hunts. Pet. ¶ 4.  
13 However, WDFW makes Permits privately available for select hunters to use bait, traps, and  
14 hounds to kill bears through the Black Bear Timber Depredation Program (“Program”). Pet. ¶  
15 9. These Permits are primarily issued between April 15 and June 30, with some later. Ex. 17 at  
16 1. Between 2010 and 2017, WDFW issued 1,008 Permits that resulted in 941 bears being killed  
17 using banned hunting methods. Ex. 48 at 7 (2010-15); Ex. 11 at 16-18, 21-23 (2016-17).

18 In 2016, WDFW adopted three rules to regulate the Program (“2016 Rules”). *See* WAC  
19 220-440-210; WAC 220-417-040; WAC 220-440-070. Under WAC 220-440-210, WDFW may  
20 issue a Permit to kill two bears with the use of bait or hounds, upon a request by a “landowner  
21 or the landowner’s designee.” WAC 220-440-210(2)(a). The Permit can then be used by “select  
22 hunters authorized by” WDFW. *Id.* at (1)(a)&(3)(a). The rule requires a Permit area to have  
23 “bear caused timber damage,” and indicates WDFW “will verify reported damage,” but does  
24 not explain how. *Id.* at (2)(b)&(c). “Damage to timberlands” is defined circularly as “evidence  
25 that bears have damaged private commercial timber.” *Id.* at (1)(a). Through WAC 220-440-070  
26 and WAC 220-417-040, WDFW purports to implement the restrictions of Initiative 713. Under  
27 WAC 220-440-070, hunters may obtain a Permit to use traps by stating “the threat or damages,

1 the nonlethal control methods attempted or why they cannot be applied.” WAC 220-440-  
2 070(2)(b). Under WAC 220-417-040, WDFW may issue a permit for the use of traps to “abate  
3 an animal problem.” *Id.* at (e). WDFW may, but need not, deny a Permit if “[o]ther appropriate  
4 nonlethal methods to abate damage have not been utilized,” or the “alleged animal problem  
5 either does not exist or the extent is insufficient to justify lethal removal.” *Id.* at (13)(a) & (b).

6 WDFW has filled the gaps in its rules with frequently shifting guidance made available  
7 only internally and to Program participants. Pet. ¶¶ 40-41;<sup>1</sup> *see, e.g.*, Exs. 10; 14; 16; 17. In  
8 addition, significant policy statements are found in the single application form WDFW uses for  
9 all Permits (“Application”), or in the Affidavit that Permittees are supposed to submit before a  
10 Permit is active. *See, e.g.*, Exs. 1-9; Ex. 13. Constantly shifting guidance sets the stage for a  
11 chaotic and irrational Program, and staff have raised frequent concerns about its failure to meet  
12 internal goals or comply with the law. *See, e.g.*, Exs. 20-23; 26; 29-32; 34-36. WDFW failed to  
13 respond to these concerns with meaningful changes, and hid the Program and its dysfunction  
14 under a shroud of secrecy. Pet. ¶ 13; Ex. 25 at 21. WDFW knew the Program would be deeply  
15 unpopular on many fronts: Not only does it allow hunting methods banned by voters, but a 2014  
16 WDFW poll revealed that 70% of Washingtonians oppose the killing of black bears to prevent  
17 damage to commercial timberlands *using any means*, with only 17% in support. Ex. 47 at 46.

18 However, a year-long investigation by KING 5 news brought the Program out of the  
19 shadows in spring 2017, resulting in a public outcry and demands for reform. *See* Exs. 45; 46.  
20 In response, WDFW agreed to modest adjustments, such as banning hunters from retaining any  
21 portions of the bears they killed, and purportedly requiring applicants to show fresh damage  
22 from the current year to gain a Permit, rather than authorizing Permits based on damage done  
23 the prior year. Pet. ¶ 48; Ex. 12. As before, WDFW did not enact these changes through formal  
24 rulemaking procedures or make its new guidance publicly available. Pet. ¶ 49.

25  
26  
27 <sup>1</sup> Even WDFW staff has difficulty tracking Program changes. *See, e.g.*, Ex. 18 at 31 (noting information on  
Program is historically “scattered”); Ex. 26 at 1 (confusion about shifting definitions of “damage”); Ex. 37  
(consternation about decision to override policy); Ex. 20 at 3 (management altered policy without telling staff).

1 **C. WDFW Has Already Issued more than 60 Permits in 2018.**

2 Between April 15 and May 15, 2018, WDFW issued only nine Permits, which  
3 Petitioners obtained from a public disclosure request. Exs. 1-9. This pace was slower than  
4 previous years, but any hope that WDFW was proceeding with more caution in response to  
5 recent criticism was short-lived. On June 1, Assistant Attorney General Martha Wehling told  
6 Petitioners that WDFW had issued a total of 62 Permits, with 4 more pending—meaning 53 to  
7 57 Permits were issued between May 15 and June 1.<sup>2</sup> This far exceeds the 33 Permits issued  
8 during the same timeframe in 2016, or the 39 issued during that time in 2017 (Ex. 11 at 17, 21-  
9 22), and suggests WDFW is ramping up its 2018 Program. Each Permit allows two bears to be  
10 killed within 30 days, and is subject to renewal, so these Permits could result in up to 124 bears  
11 being killed with bait, traps, and hounds in the coming weeks. Ex. 12 at 5(c)-(e), 6; Ex. 18 at  
12 36 (in one year, 257 extensions were granted to allow bears to be killed through July).

13 **IV. LEGAL ANALYSIS**

14 **A. Petitioner Meets the Standard for Temporary Relief.**

15 Preliminary relief is available in Administrative Procedure Act (“APA”) judicial review  
16 cases. RCW 34.05.550(2);<sup>3</sup> see RCW 7.40.020 (preliminary relief available to “restrain[] the  
17 commission or continuance of some act”). The purpose of this relief is to “preserve the status  
18 quo” until a hearing on the merits. *McLean v. Smith*, 4 Wn. App. 394, 399, 482 P.2d 798 (1971).  
19 Both temporary restraining orders and preliminary injunctions are subject to similar standards.  
20 A party seeking relief must show “(1) a clear legal or equitable right, (2) a well-grounded fear

21 \_\_\_\_\_  
22 <sup>2</sup> Petitioners are awaiting a response to their public disclosure request seeking copies of these additional Permits,  
but will amend the Petition to add information regarding these Permits after they are received.

23 <sup>3</sup> Where a party seeks “a stay or other temporary remedy from agency action based on public health, safety, or  
24 welfare grounds,” a somewhat different standard applies. RCW 34.04.550(3). Here, WDFW issues the Permits  
purportedly to protect private property, not public health, safety, or welfare. Accordingly, this motion is governed  
by RCW 34.04.550(2), which does not include requirements distinct from the ordinary injunction standard.

25 If the RCW 34.04.550(3) standard did apply, however, Petitioner would likewise meet it, because (a) Petitioner is  
26 likely to prevail, for the same reasons discussed in IV.B; (b) without relief bears will be killed, causing irreparable  
injury to Petitioner’s interests as discussed in IV.C and IV.D; (c) no other party will be substantially harmed by  
27 delaying the irreparable step of killing bears, especially given the peak season for tree peeling is past, and killing  
bears is not shown to decrease peeling; and (d) the “threat” that WDFW’s actions are designed to mitigate is to  
private commercial interests, not public health, safety, or welfare.

1 of immediate invasion of that right, and (3) that the acts complained of either have or will result  
2 in actual and substantial injury.” *San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 153, 157  
3 P.3d 831 (2007). A court will also examine the relative interests of the parties and the public.  
4 *Tyler Pipe Indus. v. Dep’t of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

5 **B. Petitioner is Likely to Prevail on the Merits.**

6 To “establish the existence of a clear legal or equitable right” under the first prong, “the  
7 moving party must show that it is likely to prevail on the merits.” *San Juan Cty.*, 160 Wn.2d at  
8 154. However, the Petitioner need not prove, nor does the court resolve, the actual merits of the  
9 underlying claims. *Nw. Gas Ass’n v. Utils. & Transp. Comm’n*, 141 Wn. App. 98, 116, 168  
10 P.3d 443 (2007). Here, Petitioner is likely to prevail on its challenges to agency action as  
11 arbitrary and capricious, exceeding statutory authority, and violating rulemaking procedures.

12 Administrative agencies only have the authority expressly granted to them by statute or  
13 impliedly delegated to them. *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1  
14 Wn.App.2d 712, 744, 406 P.3d 1199 (2017). Agency actions that exceed statutory authority are  
15 invalid. *See* RCW 34.05.570(2)(c), 4(c). An agency action or rule is also invalid if it is arbitrary  
16 and capricious, or “willful and unreasoning and taken without regard to the attending facts or  
17 circumstances[.]” *Hillis v. State Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

18 Petitioner challenges three types of agency actions. First, Petitioner challenges nine  
19 Permits issued between May 1 and 15, 2018, which authorize hunters to use dogs to kill 14  
20 bears, and the use of bait and traps to kill 4 bears. Pet. ¶¶ 2, 74-78, 81-85 & n.1; Pet. Ex. A-I.  
21 For the reasons discussed below, the issuance of the Permits exceeded WDFW’s statutory  
22 authority under the Initiatives, and was arbitrary and capricious. Second, Petitioner challenges  
23 the guidance under which the Permits were issued; such guidance is appropriately reviewed  
24 with a challenge to an action taken in reliance upon it. Pet. ¶¶ 2, 97-101. *See Sudar v. Dep’t of*  
25 *Fish & Wildlife Comm’n*, 187 Wn. App. 22, 33 347 P.3d 1090 (2015). Petitioner also alleges  
26 WDFW failed to comply with rulemaking procedures in adopting Program policies that are, in  
27 fact, rules. Pet. ¶¶ 2, 15, 41, 97-101. Third, Petitioner challenges the 2016 Rules, because they

1 exceed statutory authority and are arbitrary and capricious. Pet. ¶¶ 2, 88-93.

2 ***1. WDFW unlawfully issues Permits to private hunters to hunt with bait and dogs.***

3 WDFW's rules and policies are unlawful because they allow Permits to be issued to  
4 private hunters to kill bears using bait and dogs. Initiative 655 only allows "employees or agents  
5 of county, state, or federal agencies" to use bait to hunt bears, and only "employees or agents  
6 of county, state, or federal agencies" or an "owner or tenant of real property" may use dogs.  
7 RCW 77.15.245(1)(a) & (2)(a). But under WAC 220-440-210, a landowner or lessee may  
8 designate hunters "authorized by" WDFW, even if they lack an agency relationship with  
9 WDFW. In practice, WDFW only requires that hounds be used by "designated hound handlers,"  
10 while bait and traps may be used by "Master Hunters and trappers." *Id.*; *see, e.g.*, Ex. 1, Pet.  
11 Ex. A. The Program does not define a trapper or hound handler. One of the initial 2018 Permits  
12 thus authorizes a private citizen as a "trapper" to use bait to hunt bears. *See* Pet. Ex. I (Permit);  
13 Ex. 9 at 4 (Application). Seven of the initial 2018 Permits grant Permits to private "hound  
14 handlers" Permits to hunt with dogs. Pet. Ex. A-G (Permits); Ex. 1-7 (Applications).

15 These Permittees are not government agents. The sole apparent relationship between the  
16 state and the trappers and hound handlers is through the Permit,<sup>4</sup> which does not carry the  
17 crucial indicia of the principal/agent relationship: the right to control day-to-day aspects of the  
18 work. *See Chapman v. Black*, 49 Wn. App. 94, 99, 741 P.2d 988 (1987). WDFW does not  
19 exercise day-to-day control over Permittees, and furthermore, it expressly disclaims such  
20 control by designating them as "independent contractors." *See* Ex. 13 (Affidavit); Ex 1 at 2  
21 (Application); Pet. Ex. A at 1 (Permit). By definition, an independent contractor is "not subject  
22 to the other's right to control his physical conduct." *Ebling v. Gove's Cove, Inc.*, 34 Wn. App.  
23 495, 498, 663 P.2d 132 (1983). In contravention of Initiative 655, the Permits thus authorize  
24 "hound handlers" who are not landowners, lessees, or government agents to hunt bears with  
25 dogs, and grants Permits to use bait to "Master Hunters" and "trappers" who are not government

26 \_\_\_\_\_  
27 <sup>4</sup> Master Hunters may also receive bait Permits. Master Hunters are hunters who applied for and received a Master Hunter Permit from WDFW, which also does not create a principal/agency relationship with the state.

1 agents. These policies continue despite repeated staff objections, and the fact that the Attorney  
2 General’s office has advised WDFW that the issuance of these Permits to hunters who are not  
3 agents of the government is contrary to the law. Ex. 32 at 2; *see also* Exs. 22; 23.

4 **2. WDFW allows hunting over bait without a permit.**

5 WDFW’s rules and policies allow landowners and hunters to use supplemental feeding  
6 stations in a manner akin to bait sites, in violation of Initiative 655. RCW 77.15.245(1).  
7 Initiative 655 preserved the right to continue to operate “feeding stations for black bear in order  
8 to prevent damage to commercial timberland.” RCW 77.15.245(1)(b). But WDFW fails to  
9 regulate feeding stations to ensure they are not used as bait sites. *See* Ex. 14 (regulating and  
10 defining bait, but not supplemental feed). WDFW requires the removal of supplemental feeders  
11 prior to the Permit start date and prohibits the killing bears by hunters using dogs within a mile  
12 of an existing feeder. Ex. 12 at (5)(f). However, what is a “supplemental feeding station” one  
13 day may become the center of hunting activities the next—including being transformed into a  
14 bait site. Ex. 20 at 5. As a result, a bear routinely eat at a supplemental feeder instead of peeling  
15 trees, as intended, only to return to the same site one day to be caught in a trap, shot, or chased  
16 and treed by hounds.<sup>5</sup> Staff have urged WDFW to address the issue, insisting timber companies  
17 should not participate in the feeding program and then get Permits to kill bears in the same area:  
18 “You can do one or the other but not both.” Ex. 32 at 1. Nevertheless, “the Agency has no  
19 protocol about ‘baiting’ bears under the guise of ‘supplemental feeding.’” Ex. 20 at 5.

20 Supplemental feeding is designed to feed bears in protected areas to keep them from  
21 peeling trees, and not attract outside bears. But WDFW fails to regulate the content of  
22 supplemental feed to ensure it does not include attractants that act as bait. Ex. 20 at 5 (noting  
23 that timber representative advises using beaver carcasses at feeding stations to “attract the bear.  
24 . [and] get the barrels started”). While WDFW may not ban supplemental feeders under  
25 Initiative 655, it is *obligated* to ensure these feeders are not bait sites in disguise. When

26 \_\_\_\_\_  
27 <sup>5</sup> Two of the challenged 2018 Permits indicate that the applicants used supplemental feeding before submitting Applications to use dogs to kill bears on the same property. *See* Pet. Ex. D & E (Permits); Ex. 4 & 5 (Applications).

1 landowners use animal carcasses to lure bears into an area, and kill them the day after a “feeding  
2 station” is removed, they are no longer providing “supplemental feeding.” They are baiting  
3 bears to kill them, without a Permit and in violation of Initiative 655.

4 **3. WDFW fails to prioritize non-lethal methods to reduce property damage.**

5 The Program fails to prioritize the use of non-lethal methods, as required by Initiative  
6 713 and WDFW’s policies. Initiative 713 requires WDFW to make a written finding that the  
7 “animal problem” has not been and cannot be reasonably abated by non-lethal tools. RCW  
8 77.15.194(4)(b). But WAC 220-440-070 requires only that the applicant “stat[e] the threat or  
9 damages, the nonlethal control methods attempted or why they cannot be applied,” and does  
10 not make any provision for WDFW to make the required finding, or require Permittees to  
11 exhaust non-lethal alternatives. WAC 220-417-040 also does not require the use of nonlethal  
12 alternatives, except for authorizing WDFW to deny a permit *in its discretion* where “other  
13 appropriate nonlethal methods to abate damage have not been utilized.” WAC 220-417-  
14 040(13)(a). Indeed, WDFW issued two of the challenged 2018 Permits to use traps without any  
15 such written findings. Pet. Ex. H-I. Given the requirement under Initiative 713 to exhaust  
16 nonlethal methods, WDFW’s rules cannot lawfully allow such a denial to be discretionary.

17 In addition, WDFW’s goals state that “non-lethal options are the priority for addressing  
18 tree damage from bear.” Ex. 16 at 2-3; *see* Ex 19 at 43 (WDFW to develop a “program that  
19 includes proactive non-lethal prevention measures”). WDFW is aware of effective non-lethal  
20 methods to prevent peeling, including silvicultural approaches (Ex. 25 at 20), but the Program  
21 ignores these alternatives. Ex. 33 at 5 (WDFW’s bear specialist: “If non-lethal are preferred  
22 shouldn’t there be more guidance?”). The Program does not even require Permittees to try non-  
23 lethal methods. Bizarrely, the Application allows landowners to mark “public hunting  
24 opportunities” as one *non-lethal* option they tried—and some applicants get Permits after only  
25 checking this box. Exs. 1 at 1, 6 at 1, 7 at 1. WDFW’s failure to match its policies to its goals  
26 is arbitrary and capricious. *See Puget Sound Harvesters Ass’n v. Wash. Dep’t of Ecology*, 157  
27 Wn. App. 935, 949-50, 239 P.3d 1140 (2010) (agency action “must be viewed in light of its

1 impact on the objectives that WDFW properly set for itself”).

2 **4. WDFW issues Permits without a connection to protecting private property.**

3 In defiance of the language and intent of the Initiatives, WDFW has allowed the  
4 Program to turn into a recreational hunt to reduce bear populations. In keeping with the  
5 Initiatives, WDFW proclaims the Program’s purpose is “to aid landowners in reducing damage  
6 to commercial timber and to target those bears most likely to be causing the damage.” Ex. 16  
7 at 6. Yet, as WDFW’s bear specialist observes, the Program is not “targeting the ‘offending  
8 bears’ and bears not doing damage are being killed unnecessarily.” Ex. 31 at 1. Indeed,  
9 WDFW’s own tests show only about *one quarter* of the bears killed by hound hunters have bark  
10 in their stomachs indicating they had been peeling trees. *Id*; Ex. 25 at 17.

11 This is because the Program’s rules, guidance, and Permits do not target bears causing  
12 property damage. WAC 220-440-210 requires only that “[a]reas permitted for black bear timber  
13 depredation action must have confirmed bear caused timber damage, while WAC 220-417-040  
14 requires there be “an animal problem,” but contains no criteria to ensure traps target that  
15 problem. And WDFW has failed to adopt meaningful policies to target peeling bears. Peeling  
16 bears could be targeted with traps set at the damage location and monitored by government  
17 trappers. *See* Ex. 33 at 4, 13; Ex. 18 at 9. But instead of giving WDFW the discretion to select  
18 the method most likely to target a peeling bear, the Program allows the Permittee to select  
19 whether to kill bears with hounds, traps (which includes authorization to use bait), or by using  
20 Master Hunters. Exs. 1-9 (Applications); Ex. 13 at 1(E) (bait authorized with trapping Permit);  
21 *see also* Ex. 15 (report admitting this process means less effective methods may be used).

22 The overwhelming majority of Permits for hound hunting. WDFW policy allows bears  
23 to be “struck” within one mile of damage, and pursued and killed for up to three miles, during  
24 which time the dogs may be distracted by the scent of 3-4 additional bears. Ex. 25 at 17. And  
25 WDFW allows for the overlap of the three-mile radiuses, allowing hunters to “manipulate[]”  
26 the system to create large areas to chase bears for recreation and to maximize kills. Ex. 34 at 1-  
27 2; *see* Ex. 35 at 2 (in one area in 2015, a handful of hound hunters killed one-fourth the number

1 of bears killed by 3,600 conventional hunters). Even worse, WDFW allows hunters to “find”  
2 and report damage, and they may then even pay a substantial “access fee” to hunt. Exs. 25 at  
3 15-16, 19; 42 at 1. This is like having the “fox watching the hen house.” Ex. 25 at 16; *see* Ex.  
4 42 at 1 (similar). In one case, a hunter used three overlapping Permits to run hounds and chase  
5 the same bears all spring. Ex. 20 at 3 (“He stated he killed around 7 bear but treed 17. Most of  
6 them were the same bears being treed multiple times.”).

7 While hunters are looking to enjoy a recreation that would otherwise be forbidden, the  
8 timber companies are “viewing the bear damage program as a means to suppress the overall  
9 bear population.” Ex. 35 at 2. Indeed, WDFW Game Division Manager Anis Aoude concedes  
10 that WDFW views the Program the same way—because WDFW is “never going to know what  
11 bears are peeling,” he admits its real strategy is to use banned methods to reduce bear  
12 populations on commercial timberland.<sup>6</sup> WDFW thus ignores clear voter intent. Although  
13 killing lots of bears indiscriminately might eventually reduce bear property damage, that is  
14 clearly not what the Washington voters had in mind. Ex. 27 at 6 (Voters’ Pamphlet for I-655:  
15 “The wording of I-655 is clear and unmistakable. A ‘Yes’ vote on I-655 bans bear baiting and  
16 hounding.”); Ex. 28 at 8 (Voters’ Pamphlet for I-713: I-713 “prohibits the use of cruel traps for  
17 commercial and recreational purposes”). When interpreting an initiative, a court’s primary goal  
18 is to give effect to the “collective intent of the people who enacted the measure.” *McGowan v.*  
19 *State*, 148 Wn.2d 278, 288, 60 P.3d 67, 72 (2002). Because the Program’s rules, policies and  
20 Permits violate the letter and the intent of the Initiatives, they exceed WDFW’s statutory  
21 authority. Because WDFW’s failure to target peeling bears is contrary to its own expressed  
22 goals, it is also arbitrary and capricious. *See Puget Sound Harvesters*, 157 Wn. App. at 949-50.

23 **5. WDFW issues and enforces the Permits in an arbitrary and capricious manner.**

24 To appease commercial timber interests, WDFW fails to enforce even its own meagre  
25 requirements. Ex 41 at 1 (if Permit was denied, powerful timber companies would “press the

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27 <sup>6</sup> *See* Interview with KING 5’s Alison Morrow, Aoude and Conflict Specialist Stephanie Simek, at minute 58:00 (Spring, 2017), available at [https://www.youtube.com/watch?v=0c9jWmbPP\\_E](https://www.youtube.com/watch?v=0c9jWmbPP_E).

1 point with the senior leadership here in Olympia”); Ex. 24 at 1 (urging Permit be granted despite  
2 lack of actual bear damage to “develop a good working relationship” with landowner). Before  
3 it had even issued ten permits in 2018, WDFW had already violated the provisions of its 2018  
4 guidance. It issued Permits for eight Applications that did not have the required Affidavits (Exs.  
5 1-8); seven that contained photos of standalone trees that did not allow WDFW to ascertain  
6 whether they were “within a stand of Douglas-fir or hemlock trees less than or equal to 30 years  
7 of age” as required by its internal definition of “damage,” (Ex. 12 at 29(e)) (damage definition);  
8 Exs. 1 at 3, 2 at 3-4, 3 at 3, 4 at 5, 5 at 5, 6 at 4, 7 at 4-5, and 9 at 7-8 (Permit photos)); and one  
9 Permit on an Application with no photos at all (Ex. 8).<sup>7</sup> This sort of enforcement failure is a  
10 hallmark of the Program. Ex. 35 at 1-2 (rules disregarded with “absolutely no consequences”).  
11 In recent years, for example, WDFW has failed to revoke Permits after discovering illegitimate  
12 overlapping hunting areas (Exs. 20 at 3; 36 at 1, 12); that multiple bears had been killed in the  
13 area (Ex. 41 at 1); that supplemental feed was not removed before hunting (Exs. 40 at 1; 20 at  
14 10-11); and damage was minimal or not caused by bears (Exs. 20 at 9; 29; 30 at 1).

15 **6. *The Program does not prevent property damage.***

16 Finally, there is no evidence that killing bears using the banned hunting methods reduces  
17 peeling, and both WDFW and the timber owners have consistently refused to track the  
18 effectiveness of the Program. In 2013, the WDFW bear specialist tried to partner with the  
19 Washington Forest Protection Association (“WFPA”) to study the extent and cost of peeling  
20 and new ways to address the problem, but WFPA declined to participate. Ex. 31 at 2. In January  
21 2016, a WDFW bear subcommittee noted that “[s]ince 1985, WDFW has managed timber  
22 damage without collecting data on the effectiveness of the program.” Ex. 18 at 12; *see* Ex. 25  
23 at 15 (WDFW has made “little effort” to “[e]valuate the effectiveness of removals”); Ex. 31 at  
24 3 (similar). One of the subcommittee’s recommendations was that “WDFW needs to assess

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25 <sup>7</sup> Even when correct photographs are submitted, WDFW staff believe it is impossible to use them to accurately  
26 verify damage, calling it a “rubber stamp,” and insisting that “bear damage cannot (and should not) be validated  
27 by anything short of a site visit.” Ex. 38 at 2; *see also* Ex. 25 at 22; Ex. 25 at 18. Indeed, WDFW’s bear specialist  
concedes WDFW makes “little effort” to verify damage or confirm it as current damage. Ex. 25 at 15.

1 BTDM practices to ensure the program is effective, defensible, transparent, accountable, and  
2 fair to the timber industry and the public.” *Id.* No such assessment was done. In fact, WDFW  
3 does not even access data collected by timber companies. Ex. 33 at 12.

4 Indeed, even though Permittees are killing large numbers of bears, the Program may  
5 actually be making the problem worse. As the WDFW bear and cougar specialist has explained,  
6 feeding and bait stations increase the bear population in the areas the Program seeks to protect,  
7 by luring bears in and increasing their ability to reproduce. Ex. 25 at 9; *see also* Ex. 31 at 1; Ex.  
8 47 at 6. The specialist noted the Program has been “revolving now for 25+ years” and, according  
9 to a timber representative, “the problem now is worse than it’s ever been.” *Id.* Concluded the  
10 WDFW specialist: Ultimately, I don’t think the solution is killing bears...its finding a way to  
11 deter them, or a better way to do business silviculturally.” *Id.*; *see also* Ex 25 at 20.

12 If killing bears does not reduce property damage, it is not permissible under the  
13 exceptions in the Initiatives, and the Program exceeds WDFW’s statutory authority.

#### 14 **7. WDFW engaged in unlawful rule-making.**

15 All agency actions meeting the definition of a rule must be adopted in compliance with  
16 statutory rulemaking procedures. RCW 34.05.570(2)(c). A rule is “any agency order, directive,  
17 or regulation of general applicability . . . which establishes, alters, or revokes any qualification  
18 or requirement relating to the enjoyment of benefits or privileges conferred by law.” RCW  
19 34.05.010(16)(c). An agency action is “generally applicab[le]” if it applies “uniformly to all  
20 members of a class.” *Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wn.2d 488, 495,  
21 886 P.2d 147 (1994). The right to apply for a permit is a “benefit[] or privilege[] conferred by  
22 law.” *Hillis*, 131 Wn.2d at 398-99. An agency policy operates as a rule when it imposes an  
23 independent regulatory mechanism that operates with the force of law by adding or altering  
24 requirements to the statutory basis for obtaining a benefit. *Sudar*, 187 Wn. App. at 33-34. The  
25 Program guidance and policies adopted in 2016 and 2018 are “rules” under the APA. They are  
26 “generally applicable” because they apply to all applicants and Permittees, and they govern the  
27 requirements for obtaining and using Permits, which are “benefits or privileges conferred by

1 law.” WDFW cannot adopt such requirements without complying with rulemaking procedures.

2 **C. Petitioner’s Legal Rights Are Being Invaded and the Invasion Will Continue.**

3 Before entering a preliminary injunction, courts require that the moving party have “a  
4 well-grounded fear of immediate invasion” of the legal or equitable right on which they are  
5 likely to succeed on the merits. *See No New Gas Tax*, 160 Wn.2d at 153. This prong is rarely  
6 contested. *See, e.g., Tyler Pipe Indus.*, 96 Wn.2d at 794; *Wash. Fed’n of State Emps. v. State*,  
7 99 Wn.2d 878, 891, 665 P.2d 1337 (1983). Nor should it be here, because it is satisfied if a  
8 defendant has already taken action and is likely to continue. *See, e.g., Spokane Sch. Dist. No.*  
9 *81 v. Spokane Educ. Ass’n*, 182 Wn. App. 291, 312, 331 P.3d 60 (2014). WDFW has issued  
10 more than 1,000 Permits since 2010, and absent an injunction, it will continue to issue Permits.

11 **D. Petitioner’s Members Have and Continue to Suffer Actual and Substantial Injury.**

12 Petitioners also meet the prong of the injunctive relief standard, that “the acts  
13 complained of have or will result in actual and substantial injury.” *No New Gas Tax.*, 160 Wn.2d  
14 at 154. Petitioner’s members enjoy seeing bears and signs of bears, and this is part of why they  
15 regularly hike in western Washington and live in rural areas. *See* Declaration of Tim Coleman  
16 ¶¶ 5, 7, 8; Declaration of Kurt Beardslee ¶¶ 6, 8, 9. The aesthetic and recreational pleasure that  
17 Petitioner’s members take in seeing bears and signs of bears is tempered by their distress in  
18 knowing that bears “continue to die in traps and at bait stations” (Beardslee Decl. ¶ 6) and in  
19 encountering “big disgusting piles of trash, donuts, apples and fruit [left as bait] that clearly  
20 indicate[] any lack of ethics or respect for the bears . . . being targeted” (Coleman Decl. ¶ 4).<sup>8</sup>  
21 Petitioner’s members are so committed to humane treatment of bears that they campaigned for  
22 the very Initiatives that WDFW now violates. *See* Beardslee Decl. ¶¶ 2–3; Coleman Decl. ¶¶ 2–  
23 3. These injuries are actual and substantial. *Cf. Humane Soc’y of the U.S. v. Hodel*, 840 F.2d  
24 45, 52 (D.C. Cir. 1988) (explaining harm from “depleting the supply of animals” is a “classic”  
25 aesthetic interest which has “always enjoyed protection under standing analysis”). There is no

26 \_\_\_\_\_  
27 <sup>8</sup> WDFW documents indicate hunt locations are often close to public property and residential areas, such that kills on public property are “likely.” Ex. 20 at 3-4; *see* Ex. 45.

1 legal remedy for the injuries that Petitioner’s members will suffer. *See Kucera v. State Dep’t of*  
2 *Transp.*, 140 Wn.2d 200, 210–11, 995 P.2d 63 (2000) (“activities causing harm to the  
3 environment are frequently enjoined due to the irreparable nature of the environmental injury”).

4 **E. The Balance of Interests Favors Petitioner.**

5 A court also “weigh[s] competing interests when asked to enjoin a challenged action.”  
6 *Kucera*, 140 Wn.2d at 224. Petitioner’s interest in securing the benefits of Washington’s  
7 wildlife for its members aligns with “the well-established ‘public interest in preserving nature  
8 and avoiding irreparable environmental injury.’” *See All. For the Wild Rockies v. Cottrell*, 632  
9 F.3d 1127, 1138 (9th Cir. 2011). Washington voters strongly supported the Initiatives banning  
10 bait, dogs, and traps, and the public has an interest not only in the state’s wildlife but also in  
11 ensuring that WDFW does not flout the will of voters. Indeed, the interests of Petitioner and  
12 the public are also those of WDFW, whose mission is to “preserve, protect, and perpetuate”  
13 wildlife. RCW 77.04.012. Yet WDFW staff have voiced concern that the Program’s high kill  
14 rate may be endangering the state’s bears. Ex. 16 at 2; Ex. 46 at 7. WDFW has failed to study  
15 the effects of the Program on bear populations (Ex. 25 at 17), and WDFW’s bear specialist  
16 indicates state bear populations may be much lower than previously thought (Ex. 46 at 6).

17 No interests compete with equal strength. WDFW has no evidence that killing bears  
18 using banned hunting methods decreases timber damage—and many within the agency believe  
19 the Program may even increase damage.<sup>9</sup> In any case, any harm that commercial timberland  
20 owners would suffer by allowing bears to live without the threat of illegal hunting is merely  
21 economic and is insufficient to overcome the broader public interest in preserving wildlife and  
22 giving effect to the will of the voters. The public interest favors the issuance of an injunction.

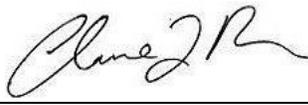
23 **V. CONCLUSION**

24 Petitioner respectfully requests this Court grant the requested temporary relief.

25  
26  
27 <sup>9</sup> WDFW has also failed to collect any information showing the economic harm caused by peeling—and its bear expert has conceded that sometimes peeled trees “live and do fine,” and sometimes when trees die, it opens up the surround canopy and causes the surrounding trees to “do better and get bigger.” Ex. 31 at 2.

1 DATED: June 6, 2018

2 LANE POWELL PC

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11 (*pro hac vice* to follow)

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 7th day of June, 2018, 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:  
7

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|--|--|
| <p>8 <b>Attorneys for Defendant:</b><br/>9 Bob Ferguson, Attorney General<br/>10 Attn: Division of Fish, Wildlife and Parks<br/>11 1125 Washington Street SE<br/>12 Olympia, WA 98501<br/>13 William C. Frymire – <a href="mailto:billf@atg.wa.gov">billf@atg.wa.gov</a><br/>14 Martha F. Wehling – <a href="mailto:marthaw@atg.wa.gov">marthaw@atg.wa.gov</a><br/>15 Jeanne Roth - <a href="mailto:jeanner@atg.wa.gov">jeanner@atg.wa.gov</a><br/>16 <a href="mailto:fwdef@atg.wa.gov">fwdef@atg.wa.gov</a></p> | <p><input type="checkbox"/> by <b>Thurston County ECF</b><br/><input checked="" type="checkbox"/> by <b>Electronic Mail</b><br/><input type="checkbox"/> by <b>Facsimile Transmission</b><br/><input type="checkbox"/> by <b>First Class Mail</b><br/><input type="checkbox"/> by <b>Hand Delivery</b><br/><input type="checkbox"/> by <b>Overnight Delivery</b></p> |
|--|--|

17 Executed on the 7th day of June 2018, at Seattle, Washington.

18 *s/Patti Lane*  
19 \_\_\_\_\_  
20 Patti Lane, Legal Assistant