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Court of Appeals
Division III
State of Washington

No. 314090

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

BRUCE M. BEATTY,

Appellant,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

Jessica E. Fogel, WSBA No. 36846
Assistant Attorney General
James R. Schwartz, WSBA No. 20168
Senior Counsel
PO Box 40100
Olympia, WA 98504
(360) 753-6287

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I. INTRODUCTION

The Washington Department of Fish and Wildlife (Department) issued a permit authorizing Appellant Bruce Beatty to mine gold in Fortune Creek. A high-elevation, cold-water stream, Fortune Creek has fish populations spawning or incubating within the gravel during much of the spring and summer when Mr. Beatty wants to mine. The Department authorized him to use certain gold mining methods during the times he requested but limited the suction dredge method to the August 1 through August 15 work window established in WAC 220-110-206. Suction dredging involves vacuuming up stream gravel and sediment, and filtering gold and other valuable materials. It has fatal impacts on incubating fish eggs.

Individual permits allowing suction dredging outside the default work window in WAC 220-110-206 are available based on project-specific and site-specific plans submitted by a mining applicant. RCW 77.55.021, .091. Mr. Beatty had the option of providing the Department with more specific information to enable evaluation of potential impacts on fish spawning and incubating eggs. Mr. Beatty declined to do so.

This appeal ultimately turns on whether an applicant seeking an extension of a timing window duly established by WAC 220-110-206

must provide information necessary for the Department to evaluate the potential impacts of extending the work window. Mr. Beatty argues that the Department bears the responsibility for calculating the risk of harm and should have allowed him to suction dredge using a six-inch nozzle anywhere along a 2.5 mile stretch of Fortune Creek from May 1 through September 30. The Pollution Control Hearings Board (Board) rejected this theory, concluding that an applicant cannot expect to obtain a Hydraulic Project Approval permit relaxing a previously adopted regulation protecting fish without providing any grounds or substantiation for the deviation.

II. COUNTERSTATEMENT OF THE CASE

A. The Department's Authority to Regulate Mineral Prospecting

The Department regulates construction and other work affecting state waters under the hydraulic code, RCW 77.55. In the hydraulic code, the Legislature directed the Department to develop rules that allow small scale mineral prospecting and mining activities in state waters without an individual permit. RCW 77.55.091. These rules are known as the Gold and Fish Pamphlet and are codified at WAC 220-110-200 through WAC 220-110-206. They authorize year-round prospecting and mining with hand-held tools and other low impact equipment in state waters without a permit. WAC 220-110-201. They also authorize prospecting

and mining with more intensive equipment including suction dredges in hundreds of watercourses during specified work windows. WAC 220-110-206. Miners may apply for an individual permit if they wish to prospect or mine outside the work windows or use equipment not authorized by the rules. RCW 77.55.021(2), .091.

B. Mr. Beatty Applied for an Individual Permit

On January 25, 2011, the Department received an individual permit application from Mr. Beatty to prospect and mine for placer materials in the Fortune Creek drainage system. Fortune Creek is a high-elevation, cold-water stream in the Wenatchee National Forest.

Fortune Creek is home to several fish populations: cutthroat trout and rainbow trout, which spawn in the spring, and brook trout, bull trout, and mountain whitefish, which spawn in the fall. CP 455 (TR 379:12-16). Spring spawning in the Yakima Basin may start as early as February and last until as late as June, sometimes into July. CP 459 (TR 383:23-25); *see also* R-25.^{1,2} Fall spawning in this region begins anywhere from the second or third week in August until November. CP 460 (TR 384:4-6);

¹ “The westslope cutthroat trout spawns from March to July, with time primarily related to water temperature.” R-25 at 9.

² Rainbow trout spawning in the Yakima River and its tributaries peaks about mid-April (late March to early May) with later spawning at the higher reaches. R-25 at 15.

see also R-25.^{3,4,5} Fortune Creek fish populations are relatively low, so destroying a few redds could have a dramatic effect on their populations. CP 489 (TR 413:14-17).

Mr. Beatty identified the project area as “Fortune Creek drainage, Tributary to Cle Elum River, [f]rom mouth of Fortune Creek up stream in an eastward direction.” R-1 at 2, 15 (Google map with hand-drawn arrow identifying Fortune Creek). He summarized the project as follows:

Small scale prospecting on numerous claims on Fortune creek. I plan to use a 6” dredge (if and when I get one or the need arises), and a 4” suction dredge and a 3” suction dredge. Small scale mineral prospecting equipment and activities will be used [in accordance with] WAC 220-110-201 and WAC 220-110-202. I will also need to use gasoline powered pumps for highbanking.⁶

Id. at 5. He requested to suction dredge a total of 300 linear feet within a 2.5 mile stretch of Fortune Creek for which he did not identify any specific location. *Id.* at 9.

³ “Mountain whitefish generally spawn in the fall as water temperatures are declining.” R-25 at 20.

⁴ “Depending upon location (elevation and latitude), bull trout spawn from late August to late December, with peak spawning in September and early October, when water temperature is declining from about 48°F to 41°F.” R-25 at 26.

⁵ “Brook trout spawn in the fall between August and December when water temperatures are dropping from 50°F to 40°F.” R-25 at 31.

⁶ A highbanker is a stationary device used to separate valuable mineral content from streambed materials that is operated outside the wetted perimeter of the body of water from which the water is removed, using water supplied by hand or by pumping. The miner supplies streambed material to the highbanker by means other than suction dredging. WAC 220-110-020(50). See Figure 1 in WAC 220-110-020(50) for an illustration of a highbanker.

Suction dredges enable miners to process a large volume of material. They float on the surface and with all the components weigh between 700 and 1,000 pounds. CP 104 (TR 28:13); CP 360 (TR 284:19-20). They are powered by small gasoline engines that drive a water pump, which is the source of the power for the suction. CP 104 (TR 28:15-19). Miners suction streambed materials through nozzles of varying sizes and process the material through a separator to recover gold and other materials. *See* WAC 220-110-020(95).⁷ Miners typically excavate to the bedrock below the gravel because that is where the gold would have settled. CP 111 (TR 35:1-6); CP 359 (TR 283:20-23). This means miners must excavate large areas to locate gold; for example, an excavation pit measuring four-feet deep with a one-foot diameter at the bedrock, will often measure eight-feet wide. CP 359-60 (TR 283:24-TR 284:10).

Impacts to fish life from suction dredging can be significant, particularly when fish are spawning and when eggs and sac-fry are incubating. Eggs run through a dredge soon after fertilization experience a mortality rate of 100 percent. CP 365 (TR 289:17-18) (discussing R-29). Mortality rates fluctuate somewhat during the incubation and development stages, but are nonetheless significant. CP 365-67 (TR 289-291). Negative impacts to fish life from suction dredging also arise from

⁷ See Figure 10 in WAC 220-110-020(95) for an illustration of a suction dredge.

entrainment during the excavation process, miners crushing redds while wading, artificial channel modification from excavation holes and sediment deposits, water quality modifications, temporary dams or water diversions, changes in food availability for fish, and disturbance from human activities. R-30 at 7-1 to 7-30.

With respect to how the project would be designed to avoid and minimize adverse impacts to the aquatic environment, Mr. Beatty answered the application as follows:

I will follow the provisions in the Gold and Fish Pamphlet, in compliance with WAC 220-110-202. This will minimize any adverse impacts to the aquatic environment. When the [permit] arrives, I will determine how the listed conditions will impact my ability to prospect and protect the aquatic environment.

Id. at 8. He requested an annual work window of May 1 through September 30, with four months for suction dredging and five months for highbanking. The Gold and Fish Pamphlet rules allow prospecting with highbankers or suction dredges with nozzles measuring no greater than four and one-quarter inches in Fortune Creek during the work window of August 1 through August 15. WAC 220-110-202, -206. When Department biologist William Meyer requested clarification as to which area of Fortune Creek Mr. Beatty sought to prospect, Mr. Beatty responded as follows:

I'm looking to prospect Fortune Creek including the North and South Forks. I have only been up about 1/3 of a mile from the bridge. Don't know what the rest is like except that I do know that this area had been prospected and mined a lot by our forefathers. All this previous mining was placer mining in nature. I aim to prospect more for the source of the placer gold therefore necessitating use of a highbanker moreso rather than dredging.

R-4. With regard to his desired work window, Mr. Beatty clarified:

In regards to the dredging, it is very unlikely to occur in May due to high and unsafe water and lots of turbidity. June is also iffy as to being able to get into the water safely but if there is a drought year, June may be able to get into very few locations. So June through September 30 is the dredge time for sure. After September this country is no place to be caught in the snow type of weather so I'm out of there. Even September on a good water year may not have enough water to run a 4" dredge, but a highbanker, yes to maybe.

Id.

On March 2, 2011, the Department issued Hydraulic Project Approval No. 122729-1, which authorized Mr. Beatty to mineral prospect on numerous claims in Fortune Creek using six-inch, four-inch, and three-inch suction dredges during the work window of August 1 through August 15. R-2. The permit also authorized him to use a highbanker with a battery-operated or gas-powered pump, and a processing area not exceeding ten feet. For this work, Mr. Beatty received his requested extended work window to use a highbanker operated outside the stream channel from May 1 through September 30, which was consistent with his

statement that he aimed to “prospect more for the source of the placer gold,” requiring “use of a highbanker moreso rather than dredging.” R-4.

At Mr. Beatty’s request, Department biologist William Meyer explained the basis for the permit’s conditions. First, with respect to the two-year permit length, Mr. Meyer explained:

I issued a 2 year permit at this time, as we are allowing a larger sized highbanker outside the normal work window in a relatively small stream and I would like to conduct a site visit to evaluate the impact to fish life from these mineral prospecting activities. Fortune Creek does not have a lot of area for settling ponds to keep sediment laden water or spoils from entering the stream.

R-6. With respect to the August 1 through August 15 work window for suction dredging, Mr. Meyer explained:

Fortune Creek has both spring and fall spawning fish species. Because both spring and fall spawning fish are present, fish eggs are in the gravel prior to and after the approved work windows. Therefore, we cannot approve suction dredging during these spring and fall periods. However, if you were to provide us with site-specific information where we can conduct a site assessment regarding the impacts to fish life, we may be able to issue a permit to allow work with a suction dredge outside the standard work window.

Id. Mr. Beatty opted not to provide the Department with site-specific information, and instead filed this appeal with the Board focusing on the work window for suction-dredging. The Board upheld the permit after a two-day hearing, concluding the imposition of the work window provided in the Gold and Fish Pamphlet rules was reasonable, particularly in light

of Mr. Beatty's refusal to provide more information on his intended work areas for suction dredging. CP 71.

On judicial review, the Kittitas County Superior Court upheld the Board's Final Order.⁸ The court found that substantial evidence supported the Board's factual findings, that the statutory scheme is neither unconstitutionally vague nor preempted by federal law, and that the Final Order did not erroneously interpret or apply the law. CP 775-77. The court focused on Mr. Beatty's refusal to provide site-specific information:

This court finds the petitioner's refusal to meet and discuss his specific site information as the most critical fact in these proceedings. In fact, this court finds that most arguments raised by the petitioner in this appeal could have been avoided had he been willing to meet with the department. As stated previously, it is very likely the department would have granted the petitioner permission to mine exactly where he wanted to mine. The agency followed its regulations as required and did not engage in any unlawful procedure and the agency correctly interpreted and applied the statutes and hydraulic regulations.

CP 777. This appeal followed.

III. COUNTERSTATEMENT OF THE ISSUES

1. Were the Board's findings of fact regarding evidence of bull trout, suction dredging impacts to fish life, Mr. Beatty's inability to detect redds, and absence of retaliation supported by substantial evidence?

⁸ Mr. Beatty included in his Amended Petition for Review a challenge to the Gold and Fish Pamphlet rules. CP 769. He subsequently asked the Department to stipulate to bifurcate the issues allowing the permit challenge to proceed first. The Department agreed, CP 557, 780, and thus the rule challenge is not before this Court.

2. Is state regulation of mining for protection of fish life consistent with federal law when the state regulation allows certain mining techniques year-round and places timing restrictions on other equipment with exceptions based on site-specific and project-specific details?

3. Did the Board properly construe the Department's authority to regulate hydraulic projects as requiring protection measures in each permit under RCW 77.55.021?

4. Was the Department's permit condition imposing the default work window for suction dredging reasonable and consistent with RCW 77.55.021 and RCW 77.55.231 when Mr. Beatty refused to provide information justifying an exception?

5. Does the Department's implementation of the protection of fish life standard satisfy the constitutional standard prohibiting vagueness?

6. Did the Board properly reject Mr. Beatty's challenge to the Department's mitigation policy because the policy does not meet the definition of rule, the concept of mitigation is defined by rule, and Mr. Beatty did not offer any mitigation plan?

IV. ARGUMENT

A. Standard of Review

The Administrative Procedure Act governs this Court's review of the Board's decision. RCW 34.05.570. Mr. Beatty bears the burden of proving the invalidity of the Board's decision. RCW 34.05.570(1)(a).⁹

The substantial evidence standard requires the Court to uphold the Board's factual findings if they are supported by "evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Courts have interpreted this phrase as meaning "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *See Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). This standard is highly deferential to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Reviewing courts do not substitute their judgment for that of the Board with regard to the credibility of witnesses or the weight to be given conflicting evidence. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510

⁹ The Court should reject Mr. Beatty's attempt to shift the burden of proof to the Department. Mr. Beatty's reliance on *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 622 P.2d 892 (1981), is misplaced. That case, which did not involve the Administrative Procedure Act, held that a city council decision lacking findings of fact and conclusions of law was not entitled to the presumption of reasonableness and, in that circumstance, the city's decision was arbitrary and capricious. Here, the Board's Order constituted the final agency decision and included findings of fact and conclusions of law.

(1997). Rather, in reviewing the entire record, courts will uphold the findings even if they would have made a different finding based on their reading of the record, so long as there are sufficient facts in the record from which a reasonable person could make the same finding as the Board. *Id.*

The error of law standard requires the Court to review the Board's legal conclusions de novo. *Ames v. Health Dep't Medical Quality Health Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009).

B. The Board's Findings of Fact Are Supported by Substantial Evidence

Mr. Beatty essentially challenges four aspects of the Board's findings: (1) that bull trout are present in Fortune Creek (Finding of Fact No. 7 (CP 54-55)); (2) that his dredging in Fortune Creek can harm fish by destroying eggs in spawning nests (redds) (Finding of Fact Nos. 13, 14, and 15 (CP 58-60)); (3) that he is not skilled at detecting redds (Finding of Fact No. 11 (CP 58)); and (4) that there was no evidence that the Department's imposition of the default August 1 through August 15 work window resulted from retaliation for a prior contact between a Department employee and Mrs. Beatty (Finding of Fact No. 16 (CP 60-61)).

1. The Record Demonstrates the Presence of Bull Trout in Fortune Creek

The record supports the Board's finding regarding the presence of several fish species in Fortune Creek, including bull trout. Specifically, the Board found that species including "spring cutthroat, rainbow trout, fall brook trout, and whitefish" are known to reside in the creek and that "bull trout redds and limited numbers of bull trout have also been observed in Fortune Creek." CP 52. The Board relied on the 2000 Bull Trout Spawning Ground Surveys, conducted by the United States Fish and Wildlife Service. This survey identified 13 total bull trout redds in Fortune Creek. R-26 at 11 (*see also* A-27 at 11). Department biologist William Meyer explained the results of this October 3, 2000, survey as follows:

A It looks like they found 13 redds total. There are 11 definite redds, two probable redds and zero possible redds in Fortune Creek. And they just surveyed it this one time to find that number of redds.

CP 459 (TR 383:4-8). Mr. Meyer noted this survey was an effort to identify new areas to use as bull trout spawning ground, not a survey specifically designed to identify all existing bull trout redds. CP 458 (TR 382:20-22); *see also* R-26 at 7 and A-27 at 7 ("[Fortune Creek] was

surveyed in an effort to identify new areas to use as bull trout spawning ground index reaches in the future”).¹⁰

2. Suction Dredging Can Significantly Harm Fish Life

The Board’s findings on potential impacts from suction dredging are supported by substantial evidence. Studies on the impact of suction dredging demonstrate that it can harm fish life by destroying incubating fish eggs. R-29 at 26-28; R-30 (Executive Summary at 3 (ES-3)); R-31 at 8-9. In small streams, smaller trout generally lay eggs in areas with small gravel known as “aggregate.” CP 372 (TR 296:6-14). The trout then cover the eggs with the aggregate so the eggs and sac fry are protected beneath the surface from predators and from being washed downstream. CP 372 (TR 296:6-25). The eggs and fry develop within the interstitial spaces of aggregate below the surface of the redd. CP 378-79 (TR 302:21-303:1); CP 380 (TR 304:6-15). These interstitial spaces need to be free from silt and sediment to allow oxygen to move freely through the aggregate to the eggs and fry. CP 369 (TR 293:13-21). Suction dredges suck up large amounts of aggregate and sediment and run the materials through a sluice. CP 358 (TR 282:5-25); CP 359 (TR 283:6-11). The silt

¹⁰ Mr. Beatty’s emphasis on bull trout because of its Endangered Species Act protections is misplaced in the context of the hydraulic code. The hydraulic code requires protection for all fish life, regardless of a species’ federal protection status. Accordingly, to the extent that Exhibit A-28’s notation that the redds could have been brook trout calls into doubt the Board’s finding regarding the presence of bull trout, any error would be harmless, as the Board’s findings regarding the presence of fall spawning brook trout and whitefish have not been challenged.

and aggregate are then placed back into the stream with the heavier aggregate falling to the bottom and sediment washing downstream. CP 358 (TR 282:11-18).

The fish in Fortune Creek are generally small and produce small redds that are difficult to spot. CP 378-79 (TR 302:21-303:7). If a redd is sucked up by the dredge, the eggs and sac fry have a high mortality rate. R-29 at 26-27; R-31 at 9; CP 278-79 (TR 202-203); CP 366 (TR 290:17-21). The Board correctly described the potential impacts of suction dredging. Finding of Fact 10 explains: “The impact of running eggs through a suction dredge has been studied.” CP 57 (citing R-29 and R-31). The magnitude of the impact depends on the stage of egg development, with nearly 100 percent mortality during the very early stage of egg development. Eggs in the second stage of development are more resilient, but mortality levels rise again when the eggs develop into sac fry. Eggs surviving entrainment in a suction dredge are deposited onto the streambed and are unlikely to survive because of predation or lack of proper incubation conditions. *Id.* (citing R-29, R-31, and Meyer Testimony (CP 424-97) (TR 348-421)).

Destroying eggs in a delicate system such as Fortune Creek would significantly impact the population of fish within this creek system. CP 196 (TR 120:21-24); CP 485 (TR 409:16-18); CP 489 (TR 413:12-16

“[I]f you wiped out a few redds, you could have a dramatic effect on their population.”). The remaining eggs and fry from other redds would run the gauntlet of environmental risks that confront all fish, including predation, but with far fewer fry available to survive the gauntlet. CP 380 (TR 304:6-15); CP 483-84 (TR 407:20-408:1). Removing eggs decreases the survival rate. CP 485 (TR 409:16-18) (“No eggs in the gravel, then you don’t produce another generation.”).

Substantial evidence also demonstrates that various species of fish would likely be spawning or eggs would be incubating when Mr. Beatty sought to suction dredge in Fortune Creek.

Q Okay. So this brings me back to the question that I started off down this line with, which is how do you know that the restriction that you’re imposing on Mr. Beatty, this two weeks only in the water, is remotely related and proportionate to the impact he’s causing? [Buchal]

A Well, because he’s working during the time that we would expect redds and alevins to be incubating in the gravel, and certainly we know that suction dredging has a very significant impact on fish life.

CP 410 (TR 334:10-19).

The Board properly discounted testimony by Dr. Crittenden on behalf of Mr. Beatty that destruction of spawning redds presents only

minimal risk of harm to fish.¹¹ On cross-examination, Dr. Crittenden admitted that he had little personal knowledge of Fortune Creek other than having driven along the road near the creek.

Q So let me just confirm what I think I'm hearing.
So you have not actually set foot into the main stem of Fortune Creek? [Schwartz]

A Well, that's right, except for at the ford at the top.

...

Q So you don't have any personal knowledge about what the substrate is here other than to see it from this road?

A No, other than what I saw from the road and of course what I read in the reports that I saw

Q And you hadn't been up the north fork?

A No.

Q Or down the south fork?

A. No. I just went up the road, and that was it.

CP 305 (TR 229:6-21). The Board found that the "assumptions Dr. Crittenden made in reaching this conclusion were not based on scientific data or reliable estimates of spawning area available in Fortune Creek." (Finding of Fact No. 15 (CP 60).)

¹¹ Conclusion of Law No. 11 ("The Board concludes that the statistical approximations presented were not based on valid assumptions for Fortune Creek.") (CP 68).

On appeal, Mr. Beatty continues to argue that the risks to spawning fish from suction dredging can be reduced to simple calculations performed for the first time by Dr. Crittenden while on the stand. The Board rejected this “back of the envelope” analysis, finding it “simply too general to establish any meaningful statistical insight into the Beatty application for relief from established work windows.” *Id.* This Court should affirm the Board’s well-founded skepticism. The Board explained its reasons for rejecting Dr. Crittenden’s analysis—his lack of familiarity with the system he purports to characterize and the lack of scientific rigor associated with his analysis.

3. Mr. Beatty Is Not Skilled at Detecting Redds

Mr. Beatty testified that he could simply follow the Gold and Fish Pamphlet’s direction to relocate operations if he observes or encounters redds or actively spawning fish. He argues this requirement will ensure adequate protection for fish life while he suction dredges from May 1 through September 30. Self-enforcement was not an option in this case. Mr. Beatty testified that he has been mining for many years, but then admitted he is not skilled at identifying redds:

Q Tell me, based upon your own experience being in these creeks, what do redds usually look like?
[Schwartz]

A From what I understand, Mr. Harvester pointed some out at the stakeholder meeting [during the

rulemaking process], and they're relatively flat. A new redd will be light-colored. One that's been there for a couple of weeks will have turned dark, and they're consisting of gravel that primarily is, oh, fingernail size down to heavy sand up to small rocks. I really don't know. But that's what you see. And it's usually in a quiet area.

Q Quiet area. And do these redds vary in size?

A Well, the ones that he pointed out with the big salmon can be big, and the trout can be this big.

Q I'm just really trying to get at what you know about redds.

A That's what I know.

Q And so do the color of eggs vary, depending upon the fish or when they're laid?

A I do not know.

Q Are the eggs sitting on top of the redd or the gravel, or are they intermixed?

A It's already been testified that they're probably under the gravel. For some reason in my mind, there's one species of freshwater fish that just scatters their eggs on top of gravel, and I don't know what the species is.

...

Q Do they ever go into other types of substrate where there's not a lot of gravel?

A I don't know.

CP 164-65 (TR 88:5-89:13).¹²

The Board heard testimony indicating just how hard it is for a trained fish biologist to spot a fish redd. CP 372-73 (TR 296:6-297:7); CP 378-79 (TR 302:21-303:1); R-23.¹³ The Board heard testimony that fish may create redds in a variety of creek bottom substrates. CP 439-40 (TR 363:18-364:4); CP 441 (TR 365:1-16); CP 443-44 (TR 367:18-368:12). If the ideal aggregate is not plentiful, then fish will create redds wherever possible. CP 451 (TR 375:15-24). The Department biologist, who had actually snorkeled Fortune Creek as part of a survey team, testified “fish will often surprise you by spawning in some place that you think is unlikely.” CP 212 (TR 136:6-9). Even Mr. Beatty’s expert, Dr. Crittenden, testified that it was undeniable that it is difficult to find a redd. CP 318 (TR 242:14). The Department’s biologist described the concerns as follows:

¹² Mr. Beatty offered into evidence the declarations of numerous other people who stated they could spot a fish nest. The declarations were properly excluded based on the state’s objection because the case before the Board only involved an individual permit to Mr. Beatty. In this case, Mr. Beatty’s ability to detect fish nests is unique to his experience and observational skills. The observational skills of others are not relevant and written statements on that issue are hearsay. Evidentiary rulings will not be disturbed absent abuse of discretion. *Port of Seattle v. PCHB*, 151 Wn.2d 568, 642, 90 P.3d 659 (2004) (citing *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979)). The Court should affirm the Board ruling excluding the declarations.

¹³ Mr. Beatty introduced a picture of a fish egg on a stream bottom. A-49. He testified that the egg was a commercial egg purchased from a store as bait and thrown into the creek specifically for the picture. CP 142 (TR 66:14-23). He acknowledged such eggs are artificially dyed. *Id.* (TR 66:21-22). The Department biologist testified that the picture did not accurately reflect spawning because an exposed egg would not survive long due to predation or other environmental factors. CP 462 (TR 386:8-387:25).

A As you can see in these vials [R-23], that once you mix the eggs with the gravels, it becomes quite difficult to see. Also these fry before they emerge, they're quite dark in color, and they're mottled. Part of that is protective coloration. These fry actually try to blend in with the gravel so they're not eaten.

CP 378-79 (TR 302:21-303:1) [Department biologist Harvester].

A So it would be very difficult to identify since it's very difficult to identify the redd; that would be almost impossible. The egg would be extremely difficult, and then once you saw it, you would already have damaged the redd. I mean, you already have exposed the eggs within the gravel. They've either gone through the dredge or, in the process of exposing them, you've exposed them to predators. But on those smaller redds, you could dredge them up and not even know it.

CP 380 (TR 304:6-15).

If Mr. Beatty makes a mistake and sucks up a redd, then the danger of destroying many fish eggs and sac fry is very real. Stopping after he disturbs the redd is too late. Accordingly, the Board's conclusion that Mr. Beatty has no experience detecting fish redds is well supported as is the Board's determination that promising to avoid redds is not a sufficient form of mitigation justifying a departure from the default work window for Fortune Creek established by regulation.

4. There Was No Evidence of Retaliation

Mr. Beatty argues that the agency refused to grant him an exception to the default work window in part because of a letter sent from

a Department manager to Mr. Beatty in January 2008. This letter apologized for an interaction between Department biologist Perry Harvester and Mr. Beatty's wife during a workshop in the rulemaking process.¹⁴ But as both the Board and the trial court concluded, the reason Mr. Beatty was denied a variance was his refusal to provide the Department with more specificity on his intended dredging operations. Mr. Harvester testified that he was not personally involved with Mr. Beatty's permit until after the decision to condition the permit was made. CP 171-72 (TR 95:15-96:2). The Board found Mr. Harvester's testimony on this point credible and found no other testimony to support active engagement by Mr. Harvester that would influence the permit conditions.¹⁵

C. The Department's Regulation of Mineral Prospecting Is Consistent With Federal Law

State regulation is preempted by federal law only in limited circumstances, none of which are present here. First, a federal law may contain an express preemption provision. *Arizona v. United States*, 132 S.

¹⁴ Mr. Harvester denied that he had a personal conflict with Mrs. Beatty and explained to the Board that he did "nothing other than asking Mrs. Beatty if she had a question, and she said she did not have a question regarding the rules, and so [he] asked her to sit down if she had no question regarding the rules." CP 204 (TR 128:16); CP 205 (TR 129:14-18).

¹⁵ Finding of Fact No. 16 (CP 60-61).

Ct. 2492, 2501 (2012). No federal law expressly preempts all state regulation of mineral prospecting.

Absent express preemption, state law may be impliedly preempted under two other circumstances. First, federal law may “occupy the field,” thereby precluding state regulation of conduct subject to exclusive federal regulation. *Id.* Such “field preemption” can be inferred either from a framework of federal regulation so pervasive that it leaves no room for state supplementation or from a federal interest so dominant that it is assumed to preclude state regulation. *Id.* Mr. Beatty does not argue field preemption, as the applicable federal laws clearly contemplate state regulation. *See, e.g.,* 30 U.S.C. § 26 (recognizing an exclusive right of possession for mining locators “so long as they comply with the laws of the United States, and with the State, territorial, and local regulations not in conflict with the laws of the United States”).

Alternatively, state laws may be preempted when they produce results that conflict with federal law. Such “conflict preemption” occurs when compliance with both federal and state law is “a physical impossibility” or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona*, 132 S. Ct. at 2501.

Furthermore, in any preemption analysis, courts should begin with the presumption that the historic police powers of states are not superseded unless that was the clear and manifest purpose of Congress. *Id.*

The Department's regulation of mineral prospecting within fish-bearing streams consists of stream-specific work windows for suction dredging requiring no additional regulatory review, combined with options for enhanced dredging activity based upon a miner's development of site-specific plans to address impacts to fish. WAC 220-110-200 through WAC 220-110-206. Nothing in this approach stands as an obstacle to any federal mining objectives because federal law does not preclude state regulations limiting environmental impacts from mining so long as the regulatory approach is not effectively a ban on mining. The default work windows allow mining. And Mr. Beatty's inability to obtain additional mining opportunities was the product of his steadfast unwillingness to work with the Department on a site-specific proposal rather than the product of the Department's regulatory scheme.

1. Federal Law Contemplates State Regulation of Mining Activities

The United States Supreme Court has held that there is no evidence of federal intent to preempt all state permit requirements for

mining operations in national forests. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987). In *Granite Rock*, the Court reviewed several federal laws in evaluating and ultimately rejecting Granite Rock mining company's preemption challenge to a California permit requirement. In that facial challenge to the state permit requirement, the Court reviewed the Mining Act of 1872 and other federal land management laws.¹⁶ Granite Rock conceded that the Mining Act of 1872, as originally passed, expressed no legislative intent on the subject of environmental regulation. *Id.* at 582.

Nevertheless, Granite Rock argued that Forest Service regulations governing the occupancy and use of national forests under the Multiple Use Mining Act of 1955 preempted any state permit requirement. Rejecting this argument, the Supreme Court noted that not only are the Forest Service regulations devoid of any intent to preempt state law, they “rather appear to assume that those submitting plans of operations will comply with state laws.” *Id.* at 583. Such references to state laws include state air quality standards, state water quality standards, state regulations for disposal and treatment of solid wastes, as well as references to “timely compliance with the requirements of federal and *state laws*” and “certification or other approval issued by *state agencies*.” *Id.* (quoting

¹⁶ Granite Rock filed the lawsuit without first applying for a permit, so the record did not include what requirements may have been included in the permit.

36 C.F.R. §§ 228.8, 228.5) (emphasis in *Granite Rock*). Accordingly, the Court found it was “impossible to divine” an intention to preempt all state regulation of unpatented mining claims in national forests. *Id.* at 584.

The Court next rejected Granite Rock’s argument that federal land management statutes preempt the state permit requirement. Distinguishing between state *land use* regulation and state *environmental* regulation, the Court concluded that neither the Federal Land Policy and Management Act of 1976 nor the National Forest Management Act precludes states from environmental regulation on federal land. Environmental regulation, the Court explained, does not mandate particular uses of the land, but requires only that, however the land is used, damage to the environment is kept within prescribed limits. *Id.* at 587. The Court could find no indication that either the federal statutes or their implementing rules contemplated the preemption of state environmental regulation of mining activity on federal lands. *Id.*

Because Granite Rock challenged the state’s regulation on its face rather than as applied in a particular setting, the Supreme Court did not explicitly declare the permissible extent of state environmental regulation. However, the Court accepted the California Coastal Commission’s allegation that “it will use its permit requirement to impose *reasonable* environmental regulation.” *Id.* at 593 (emphasis added). Thus, the

question remaining after *Granite Rock* is: what constitutes a reasonable environmental regulation of mining activities?

The Eighth Circuit held that a county ordinance banning all forms of surface metal mining was unreasonable and impermissibly conflicted with federal mining laws. *South Dakota Mining Ass'n v. Lawrence Cnty.*, 155 F.3d 1005 (8th Cir. 1998). In that case, the ordinance banned all new or amended permits for surface metal mining, which the record demonstrated was the only practical way for the plaintiff companies to mine the valuable mineral deposits. *Id.* at 1011. The court concluded the ordinance conflicted with federal law because its “defacto ban” on all mining was “prohibitory, not regulatory, in its fundamental character.” *Id.* Significantly, the court noted that “unlike *Granite Rock*, we are not faced with a local permit law that sets out reasonable environmental regulations governing mining activities on federal lands.” *Id.*

This case involves state regulation that does not ban all mining. The hydraulic code regulations applied to Mr. Beatty’s mining proposal specifically allow mining without further regulatory control within default windows unique to each stream. Additional mining opportunities are possible based on the development of a site-specific plan to avoid harm to fish life.

2. Frustration of Congressional Purpose Is the Proper Standard

The appropriate standard for reviewing Mr. Beatty's challenge under conflict preemption is whether the regulation so frustrates the purpose of federal law that the federal goals cannot be achieved. *Granite Rock*, 480 U.S. at 581 (recognizing that conflict preemption occurs when state law stands as an obstacle to Congressional purposes and objectives). The Court should reject Mr. Beatty's use of a "material interference" standard because that standard is unique to the Surface Resources Act, 30 U.S.C. § 612. The Surface Resources Act is not applicable to this case, and its standards are not the basis for a preemption analysis.

The Surface Resources Act reserves to the federal government certain uses of federal land subject to mining claims, so long as such uses do not materially interfere with prospecting, mining, or processing operations. The "material interference" standard in that federal law addresses potential conflicts between two *uses* of federal land: management of surface resources and legitimate uses of the land by a mining claimant. It does not address potential conflicts between state regulation of mining and federal mining laws.

The administrative case upon which Mr. Beatty relies is neither precedential nor relevant to the preemption analysis. *In re Shoemaker*,

Interior Board of Land Appeals (IBLA) No. 87-340 (1989). The *Shoemaker* decision involved a conflict between the federal government's desired use of the land and a miner's use of the same land. The Bureau of Land Management installed anchored logs and gravel to serve as fish habitat, covering at least 20 percent of the streambed. The administrative law judge ordered removal of the logs and gravel, agreeing with Mr. Shoemaker that their installation materially interfered with his mining activities. Accordingly, the case did not address the interplay between state regulation and federal mining laws.

Applying the correct preemption standard, the Department's regulatory scheme does not frustrate the purpose of the mining laws. The Mining Act of 1872 was intended to "reward and encourage the discovery of economically valuable minerals located on public lands." *South Dakota Mining Ass'n*, 155 F.3d at 1010 (citing *United States v. Coleman*, 390 U.S. 599, 602, 88 S. Ct. 1327, 20 L. Ed. 2d 170 (1968)). The Eighth Circuit Court of Appeals summarized the purposes of the mining law as follows:

[T]he encouragement of exploration for and mining of valuable minerals located on federal lands, providing federal regulation of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals, and allowing state and local regulation of mining so long as such regulation is consistent with federal mining law.

Id.

The Department, as the agency responsible for protecting fish life from potentially damaging work, authorizes several mineral prospecting techniques statewide without any application or timing restrictions. WAC 220-110-201. These low-impact techniques include hand-held equipment, such as pans, spiral wheels, sluices, concentrators, mini rocker boxes, and mini highbankers. Techniques with the potential for more significant impacts to fish life and habitat, such as motorized suction dredges, are authorized in watercourses throughout the state without an application, so long as they are used during the timing windows established by rule. WAC 220-110-202. Individuals who seek exceptions to the rule-based timing windows must submit an application with information about the nature and location of the proposed activity. WAC 220-110-200(2). This approach carefully balances the federal mining law's purposes of encouraging exploration and extraction of valuable minerals with the environmental interest in protecting fish life and habitat.

The fact that the Department imposed the default timing window for the motorized suction dredging technique, when Mr. Beatty requested blanket approval to dredge 300 linear feet anywhere “from mouth to headwaters” in a stream measuring 2.5 miles, does not mean that the Department frustrated the purpose of the federal laws. Mr. Beatty remains

free to engage in mineral prospecting using a variety of techniques during the appropriate timing windows, including highbanking during the extended window. He also retains the option to provide more details to justify an exception to the duly enacted timing windows. As the trial court noted, “had he been willing to meet with the department . . . it is very likely the department would have granted the petitioner permission to mine exactly where he wanted to mine.” CP 777.

D. The Board Correctly Interpreted the Hydraulic Code

The Legislature charged the Department with ensuring that hydraulic projects are adequately conditioned for the protection of fish life. RCW 77.55.021(1). The Department adopted regulations in WAC 220-110 to implement the Legislature’s mandate for the “protection of fish life” in connection with common hydraulic projects. Included in the regulations are work windows that limit the timing during which certain hydraulic projects may be undertaken. The work windows in WAC 220-110-206 represent the general times when suction dredging may occur without damage to fish spawning activity in hundreds of watercourses throughout Washington. Applicants who seek exceptions to the work windows may apply for individual permits. WAC 220-110-200(2).

Mr. Beatty's position, that "activities adversely affecting fish life are supposed to be permitted" under the hydraulic code misses the point. It is effectively an argument that fish protection is the exception under the law rather than an objective of the law. In fact, while the law does not prohibit hydraulic activities, it does contain explicit legislative direction requiring "adequate" and "proper" protection of fish life in connection with hydraulic projects. RCW 77.55.021(1), .231(1).

Mr. Beatty argues that the agency has adopted a "protect every egg" approach to application of the hydraulic code. But this characterization of the hydraulic code regulations as hyper-strict and unyielding is not well-founded. The work windows provide a baseline measure of protection without any need for further regulatory control. Furthermore, these default windows can be modified or extended when justified by site- or project-specific circumstances. The Board correctly summarized the regulatory scheme as follows:

An applicant cannot expect to obtain approval of [a hydraulic project approval permit] relaxing a duly adopted regulation protecting fish without providing any grounds or substantiation for the deviation. Mr. Beatty has argued it is [the Department's] responsibility to calculate risk of harm and investigate the specifics of the proposed activity. The Board disagrees and concludes that the applicant is responsible for providing the information necessary to fully evaluate the impact of extending a duly adopted work window.

CP 71.

Mr. Beatty's "protect every egg" characterization of the Department's regulatory stance should also be rejected because it is inconsistent with the evidence in the record. Department biologists, who have the responsibility for ensuring that hydraulic project approval permits provide adequate protection for fish life, responded to the "protect every egg" theory as follows:

A I think if all we were doing was killing a few eggs, I would agree with you that it is not a significant impact to protecting fish life, if it was just a few eggs.

Q Okay.

A In an entire system.

Q Okay.

A But as I mentioned, it really depends. If it's the last fish that's spawning in that system, maybe a few eggs makes a difference.

CP 258-59 (TR 182:20-183:4). With respect to the regulation of mineral prospecting through work windows, Mr. Harvester explained:

A But the idea was to protect most of the fish most of the time over most of the conditions that we have observed. So the intent was not to protect every fish. We knew that.

CP 178 (TR 102:13-16). Considering this testimony, the Board properly rejected Mr. Beatty's attempt to challenge the agency's regulatory

approach as inflexible and irrational. The Board explained that the Department's work windows reflect a policy decision to protect fish life by identifying the fish residing in each of hundreds of watercourses throughout the state and calculating the incubation periods necessary to protect the redds and eggs developing through emergence. CP 68. To the extent Mr. Beatty wanted to challenge the default work windows, he needed to do so via a petition seeking invalidation of the rule under RCW 34.05.570(2).¹⁷

Instead, Mr. Beatty sought to obtain an exception to the default work windows. The problem with that approach is that Mr. Beatty was unwilling to provide the Department with project- and site-specific information that would have enabled the Department to evaluate impacts and develop targeted conditions to avoid harm to fish life. Accordingly, Mr. Beatty's application provided no unique situation to warrant deviating from the established work windows. CP 68. The Board properly characterized Mr. Beatty's appeal as follows: "This case is a challenge to the permit conditions placed on Mr. Beatty's application to extend the timing windows contained in the Gold and Fish Pamphlet. The case is not an appropriate vehicle for attacking the administrative rules the Department adopted and incorporated into the Pamphlet." CP 67.

¹⁷ To date, he has not pursued the rule challenge he filed in superior court.

1. The Department Must Regulate Each Hydraulic Project for Fish Protection, Not Wait Until Resource Level Impacts Occur

Mr. Beatty argues that the Department must allow individual projects to adversely impact fish life, so long as fish are not jeopardized on a resource level. App. Br. at 23 (“[W]hile protection is required, activities adversely affecting fish life are supposed to be permitted.”). He also argues it is irrational to protect fish that are ultimately destined to be killed by recreational harvest.

These arguments fail for several reasons. First, the “protection of fish life” standard was intended to protect the fish “resource,” not every egg as discussed above. With respect to mineral prospecting, the starting point for the Department’s regulations for the protection of fish resources was the establishment of work windows on a stream-by-stream basis.¹⁸ These work windows were not intended to eliminate any and all risk. With respect to the mining activities allowed year-round, such as pans, spiral wheels, rocker boxes, sluice boxes, and various types of concentrators, the Department acknowledges “there is some risk

¹⁸ Mr. Harvester described the work window development process as follows: identifying the streams throughout the state, identifying the fish species present within each stream, breaking out the spring spawning fish and the fall spawning fish, and evaluating the onset of spawning and the time of emergence for each fish species. CP 349 (TR 273:4-10). He explained that the incubating eggs and alevins (newly hatched salmon still attached to the yolk sac) need protection from the time the eggs are initially laid by the adults until they are fully incubated and hatched through full emergence. CP 249 (TR 273:11-16).

activities alone.” CP 347 (TR 271:10-15). “The intent of the pamphlet was to provide as much opportunity as the resources could provide without adversely impacting or significantly impacting fish life.” CP 353 (TR 277:15-18). When individuals seek exceptions to the default work windows, the Department needs site-specific information because it would have been virtually impossible to try to envision all of the variety of locations and circumstances in a single pamphlet. CP 354 (TR 278:20-23); CP 355 (TR 279:22-25) (“[Y]ou have to know something about the site to be able to evaluate what the potential risks or impacts might be to a specific location within the stream.”).

Thus, Mr. Beatty’s characterization of the Department’s regulatory options as a dichotomy between protection at a resource level and protection of every egg is simply not accurate. The Department regulates for protection of fish life by implementing work windows by rule and authorizing exceptions when the project- and site-specific circumstances justify them.

Second, the fact that the Department is also responsible for managing the recreational and commercial harvest of fish does not eliminate the Department’s statutory duty to regulate and condition hydraulic projects for the protection of fish life and habitat. One of the purposes for resource protection is so that fishing opportunities will be

maintained into perpetuity. *See, e.g.,* RCW 77.04.012 (mandating resource conservation together with the enhancement of fishing opportunities). These are separate but complementary statutory duties, each of which must be given weight. As Mr. Harvester explained:

A Well, on one hand, as habitat biologists, we are to preserve, protect and perpetuate the resource, and that's what the hydraulic code is primarily focused on, is protecting fish life. . . . On the other hand, our fish program does manage fish for recreational opportunity and commercial opportunity.

CP 345-46 (TR 269:18-270:1). In fact, the regulation of hydraulic projects is necessary to sustain fishing opportunities:

A [W]e need to protect fish within the redds to maintain harvestable opportunity We don't manage fish just to look at them only. We manage them for harvest opportunity as well as the ecological benefits that they provide.

CP 346 (TR 270:8-13).

Third, Mr. Beatty's quantification of risk theory is simply not how regulations work. Regulations that are designed to reduce risk, whether that risk is to public safety or health or to the environment, establish minimum requirements that must be uniformly followed. Speed limits are imposed to reduce risk of injury and death, even though the likelihood of each driver getting into an accident may be relatively low. Fire codes are imposed to reduce the risk of injury from fire, even though the likelihood of each building catching fire is relatively low. The government entities

imposing such requirements do so by carefully balancing the risk of harm with the likelihood such harm actually coming to fruition.

The Department determined its work windows by balancing the undisputed harm of motorized suction dredges impacting fish redds and incubating eggs against the likelihood of such harm occurring. CP 178 (TR 102:13-15) (“[T]he idea was to protect most of the fish most of the time over most of the conditions that we have observed.”). The Department decided that, absent site- or project-specific information, motorized suction dredging would be allowed only during the times when the Department could be relatively certain that eggs would not be impacted. Exceptions are authorized when applicants provide project information sufficient for the Department to evaluate impacts. Accordingly, the problem here is not the Department’s level of risk management, it is Mr. Beatty’s aversion to the development of site-specific plans and corresponding mitigation conditions given that he wants to mine outside the default work windows for Fortune Creek.

Finally, no legal principle requires that the Department mathematically quantify the precise likelihood of impacts to fish life before imposing conditions. The statute requires conditions to be “reasonably related” to a project’s impacts. RCW 77.55.231. Analyzing the risk of harm to fish redds and loss of eggs does not lend itself to a

precise formula: “Quantitative, uniform guidelines and regulations that are truly . . . scientifically supportable for a variety of bases probably will never be found.” R-31 at 15. This risk of harm, however, can be reduced by identifying the portion of stream potentially impacted by the suction dredge. The Department biologist described the process on cross examination as follows:

Q But the way you determine whether the conditions are out of proportion with the impact is essentially whether you’re subjectively comfortable with it? [Buchal]

A No. It’s based on a site assessment, on what the risks are and what is observed at that specific location. And so an assessment is based on a variety of things that a biologist goes to look at to take into account of the various risks based on what is proposed and how it’s done and either conditions, denies or approves the permit based on that information.

CP 405 (TR 329:5-15). This regulatory scheme requires applicants to discuss projects with the Department biologists to assess the portions of stream that would be subject to dredging. Absent that cooperative approach to assessing the risk, the Department must balance the uncertainty of relying on untrained eyes to spot redds versus the significant harm that may come from mistaking or not identifying a redd.¹⁹

¹⁹ Dredging in a cluster of redds could be catastrophic. CP 472 (TR 396:15-25).

2. The Permit Work Window Was Reasonable in Light of Mr. Beatty's Refusal to Provide Site-Specific Information

The Department met the standards in the hydraulic code requiring that permit conditions be reasonably related to the project and that approval not be unreasonably conditioned. RCW 77.55.231, .021(7)(a). The Department authorized Mr. Beatty to suction dredge during the work window set forth in the Gold and Fish Pamphlet as a default condition because Mr. Beatty did not provide project-specific information justifying an exception. His application identified the project area as the entire Fortune Creek drainage system within a 1,280-acre area, seeking to excavate a total of 300 linear feet "wherever necessary to follow the gold" "from Mouth to Headwaters." R-1; R-4; CP 163 (TR 87:16-21).

The Department was reasonable in rejecting Mr. Beatty's proposal to suction dredge for five months and to simply follow the regulatory requirement in WAC 220-110-202(23) to not disturb redds and relocate operations if he observes or encounters redds or actively spawning fish. This rule does not obviate the need for work windows; the requirement is located within the rule establishing the work windows and serves as additional protection in the event fish are spawning outside the established work windows. *See* CP 279 (TR 203:5-17). The Department does not

rely solely on this measure of protection, as the ability to detect redds varies based on the experience and observation skills of applicants.

The Department was also reasonable in requesting that Mr. Beatty identify potential locations where he intended to dredge in order to consider extending the established work window. CP 469 (TR 393:7-16). The Department had shown such flexibility in other hydraulic project approval permits for placer mining. CP 261 (TR 185:8-11); CP 376 (TR 300:20-25). But Mr. Beatty failed to provide the Department with the requested follow-up information to show that his proposed use of suction dredges would not harm fish life or habitat based on his specific operations or specific locations in Fortune Creek.

Finally, the Department was also reasonable in authorizing an extended work window for Mr. Beatty's desired prospecting technique of highbanking, as the August 1 through August 15 work window applied to suction dredging only. Highbanking occurs on the bank, outside the stream channel and poses less risk to spawning fish. Mr. Beatty could also use other mining techniques authorized year-round by the Gold and Fish Pamphlet.

E. The Statutory Standard “Protection of Fish” Is Not Unconstitutional

RCW 77.55.021(2)(c) provides that “protection of fish life” is the only ground upon which approval of a permit may be conditioned or denied. The regulations define “fish life” as “all fish species, including but not limited to food fish, shellfish, game fish, and other unclassified fish species and all stages of development of those species.” WAC 220-110-020(36). As discussed above, the rules define “protection of fish life” as “prevention of loss or injury to fish or shellfish, and protection of the habitat that supports fish and shellfish populations.” WAC 220-110-020(79). Mr. Beatty argues this standard is unconstitutionally vague. To the contrary, the above guidelines are all that is legally required to be enforceable.

The court in *State v. Crown Zellerbach Corporation*, 92 Wn.2d 894, 900-01, 602 P.2d 1172 (1979), held the standard in RCW 77.55 is constitutionally enforceable under the delegation of powers principle. The court found the general standards to be adequate, “particularly in light of our stated view that *environmental factors are not readily subject to standardization or quantification.*” *Id.* (emphasis added).

Mr. Beatty nevertheless argues that the standards set forth under the hydraulic code and rules are unconstitutional.²⁰ He relies on building permit cases where courts reversed government denials of permits for such reasons as not “harmonious” or “compatible.” Those cases are not applicable. First, the Department did not deny Mr. Beatty a permit. It approved the permit authorizing certain prospecting techniques year-round, highbanking from May through September, and motorized suction dredging during the default work window because Mr. Beatty refused to provide information that would enable the Department to grant a larger work window for that technique.

Second, the Department conditions hydraulic permits based on the environmental context of each situation: the size of waterbody, the location of work on that waterbody, the degree of planned disturbance, the type of fish present, and the spawning seasons. CP 354-55 (TR 278-279); *see also* WAC 220-110-010 (“Each application shall be reviewed on an individual basis.”) and WAC 220-110-040 (“Certain technical provisions

²⁰ He alleges that standardless statutes or rules may violate due process, equal protection, or be unconstitutionally vague. App. Br. at 53. Our Supreme Court has already ruled the standards are adequate in the context of the hydraulic code as set forth above. Mr. Beatty does not articulate the due process or equal protection arguments so they need not be considered by this Court. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 807-08, 225 P.3d 213 (2009) (quoting *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990) (brief should include, “The argument in support of the issues presented for review, *together with citations to legal authority* and references to relevant parts of the record.” RAP 10.3(a)(6) (emphasis added)). “Without adequate, cogent argument and briefing, this court should not consider an issue on appeal.” *Schmidt*, 115 Wn.2d at 160).

shall be required depending upon the individual proposal and site specific characteristics. Additional special provisions may be included as necessary to address site-specific conditions.”).

While the hydraulic code rules establish common technical provisions for many project types, they are dependent on site- and project-specific review and conditioning. Environmental variables do not lend themselves to a pro forma rule that fits all situations. Motorized suction dredge mining warrants no different approach. The testimony at the hearing indicated that high-elevation streams have fish populations that are small in number and size, that the redd sizes are smaller, and that redds may be located in small scattered areas where gravel exists. CP 436 (TR 360); CP 438-41 (TR 362-365). The Department attempts to identify suitable areas for mining by evaluating the site-specific considerations once the miner indicates the locations to be disturbed. CP 354-55 (TR 278-280); CP 469 (TR 393:7-11). The Department did not condition the permit for lack of “harmony” or other subjective basis. The standard “protection of fish life” provides an appropriate benchmark and level of flexibility to take into account site-specific and project-specific conditions,

and works with cooperation from the miner. CP 470-71 (TR 394:12-395:23).²¹

F. The Mitigation Policy Is Not a Rule

Mr. Beatty argues that the Department's mitigation policy is illegal on the theory that the Department adopted the policy without following the rule-making process in the Administrative Procedure Act. This argument fails because the mitigation policy does not meet the definition of a rule. An agency action only constitutes a rule if it meets the requisite elements: (1) order, directive, or regulation of general applicability, and (2) one of the five qualifiers in RCW 34.05.010(16). Mr. Beatty only argues the policy is a directive of general applicability. But the policy is not a directive; it is a guideline. In addition, the policy does not fit any of the five qualifiers. Accordingly, the mitigation policy is not a rule.

Furthermore, the concept of mitigation is addressed by rule at WAC 220-110-020(66), which defines mitigation as "actions that shall be required as provisions of [a hydraulic project approval permit] to avoid or compensate for impacts to fish life resulting from the proposed project activity." The rule establishes a hierarchy of mitigation as follows:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action;

²¹ Mr. Meyer has, on prior applications by Mr. Beatty, deviated from the Gold and Fish Pamphlet default work windows for Mr. Beatty. CP 471 (TR 395:7-20).

- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;
- (e) Compensating for the impact by replacing or providing substitute resources or environments; or
- (f) Monitoring the impact and taking appropriate corrective measures to achieve the identified goal.

Id. The policy referenced by Mr. Beatty supplements this rule as an implementation guideline, and need not have been adopted as a rule.

Finally, the Department did not invoke the mitigation policy in this case, as Mr. Beatty refused to develop and submit a mitigation plan for the Department to consider. CP 261 (TR 185:4-7) (“[W]e couldn’t even get to the point of talking about any kind of mitigation. I offered to discuss these things with Mr. Beatty, and he refused, as I mentioned, to come to the table.”). Mr. Meyer explained further:

Q So him telling you that he was going to dig up 60 feet, you couldn’t just say, okay, that’s 60 feet of habitat lost? [Buchal]

A The other thing he told me is, “We’re going to go anywhere in Fortune Creek that we want,” at a time when I know fish are spawning, and I know it’s very difficult, even for a trained biologist, to spot these redds.

So that is what I wanted to take into consideration as to where he might want to go and work, and if we could co-locate, like he could tell me some places, being there or not, I could go out and take a

look and see if it might be a place where we could avoid, which is our first responsibility, any impact and get him a permit to work things out.

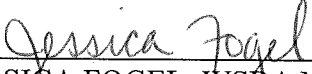
CP 261-62 (TR 185:17-186:3). Unless an applicant provides the Department with adequate information to evaluate potential impacts of the proposed activity, it need not authorize compensatory mitigation.

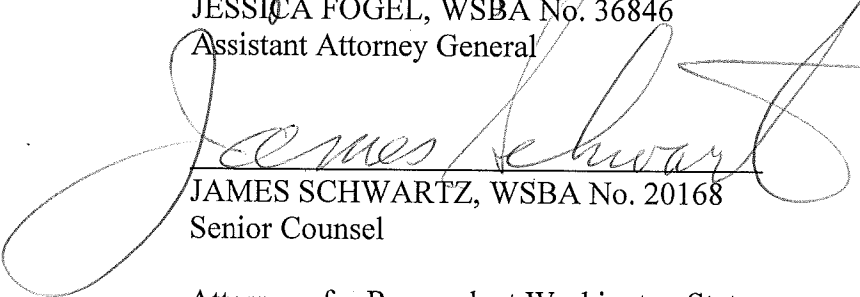
V. CONCLUSION

The Board heard the evidence, evaluated the credibility of the witnesses, and found that the Department's decision to impose the default work window for suction dredging in Fortune Creek was reasonable. For the reasons discussed above, the Court should affirm the Board's decision.

RESPECTFULLY SUBMITTED this 3rd day of June, 2013.

ROBERT W. FERGUSON
Attorney General


JESSICA FOGEL, WSBA No. 36846
Assistant Attorney General


JAMES SCHWARTZ, WSBA No. 20168
Senior Counsel

Attorneys for Respondent Washington State
Department of Fish and Wildlife

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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James L. Buchal
Murphy & Buchal LLP
3425 SE Yamhill Street, Suite 100
Portland, OR 97214

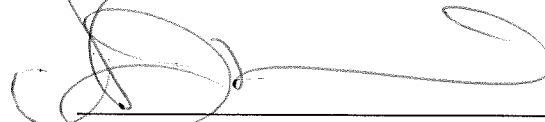
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of June, at Olympia, Washington.



NANCY J. HAWKINS
Legal Assistant