No. 100112-6

SUPREME COURT OF THE STATE OF WASHINGTON

PROTECT ZANGLE COVE; COALITION TO PROTECT PUGET SOUND HABITAT; AND WILD FISH CONSERVANCY,

Petitioners,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE; JOE STOHR; and PACIFIC NORTHWEST AQUACULTURE, LLC,

Respondents, and

TAYLOR SHELLFISH COMPANY, INC.,

Respondent-Intervenor.

PACIFIC NORTHWEST AQUACULTURE, LLC AND TAYLOR SHELLFISH COMPANY, INC.'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Administrative Decisions

I. INTRODUCTION

The Court of Appeals, like the trial court and the Attorney General, appropriately gave effect to the plain language of RCW 77.115.010(2), which limits the Washington Department of Fish and Wildlife's ("DFW") authority to regulate aquatic farmers and private sector cultured aquatic products to a discrete list of statutes that does not include the Hydraulic Code, chapter 77.55 RCW.

This case does not involve an issue of substantial public interest warranting review by this Court. Petitioners' arguments to the contrary are unsupported and undermined by record evidence. Accordingly, the Court should decline to grant review.

II. ANSWERING PARTY

This answering brief is filed by Respondent Pacific Northwest Aquaculture, LLC ("PNA") and Respondent-Intervenor Taylor Shellfish Company, Inc. ("Taylor").

III. COUNTERSTATEMENT OF THE ISSUES

This case is not appropriate for review by this Court under RAP 13.4(b). If review were granted, the issues presented would be:

1. Can DFW require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, when that hydraulic statute is not included in a short list of statutes that the legislature has said "constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers . . . ."? RCW 77.115.010(2).

2. If DFW lacks authority to require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, does WAC 220-660-040(2)(l) violate the law when it states that no hydraulic permit is required for an aquatic farmer to install or maintain aquaculture facilities?

IV. COUNTERSTATEMENT OF THE CASE

A. The Hydraulic Code and the Aquatic Farming Act

The hydraulic project approval ("HPA") program was first established in 1943. Laws of 1943, ch. 40 (CP 506-07). For its first several decades, HPA permits were only required for freshwater projects. CP 1208. The Department of Fisheries did not have explicit authority to require HPA permits for marine projects until the Hydraulic Code was revised in 1983. Laws of 1983, 1st Ex. Sess., ch. 46, § 75 (CP 613-15); CP 1209. DFW Answer at 7-9. While shellfish farming has long been a prominent activity in Washington, there is no evidence that the legislature (or the Department of Fisheries) identified a need to regulate shellfish farming pursuant to HPA permits in extending the program to the marine environment. Rather, the State was focused on using the Hydraulic Code to address impacts from shoreline residential development and bulkheads. CP 1202-03.

Two years after HPA permitting was extended to marine waters, the legislature enacted the Aquatic Farming Act ("AFA"). Laws of 1985, ch. 457. Subsection eight of the AFA ordered the directors of Fisheries and Agriculture to jointly develop a program of disease inspection and control for aquatic farmers. The second subsection of section eight ordered the director of Fisheries to adopt rules implementing the section, and then stated as follows: "The authorities granted the department of fisheries by these rules and by RCW 75.08.080(1)(g), 75.24.080, 75.24.110, 75.28.125, and sections 9, 10, and 11 of this act constitute the only authorities of the department of fisheries to regulate private sector cultured aquatic products and aquatic farmers as defined in section 2 of this act." Laws of 1985, ch. 457, § 8. This language has since been amended to reflect the merger of Fisheries and Game and to reflect the newer codifications of the six cited statutes, but the substantive language remains the same and is currently codified in the fourth sentence of RCW 77.115.010(2).

The Hydraulic Code is not one of the statutes listed in RCW 77.115.020(2) under which DFW retains authority to regulate aquatic farmers and their products. RCW 77.115.010(2). Consistent with this limitation of authority, there is no record evidence that HPA permits were required or issued for the cultivation of commercial shellfish subsequent to 1985.

B. Attorney General Opinion and Department Rule

In 2006, Representative Patricia Lantz submitted a request to the Attorney General for a formal opinion "concerning the application of the hydraulic project approval and the substantial development permit to intertidal geoduck aquaculture operations." CP 532. Representative Lantz stated the opinion "is vital as I consider moving forward with potential legislative action in this arena." *Id*.

The Attorney General responded with a formal opinion on January 4, 2007, AGO 2007 No. 1 (AR 949-58), answering the HPA question with a firm no. "RCW 77.115.010(2) limits application of Washington Department of Fish and Wildlife

(WDFW) regulatory powers with respect to private sector cultured aquatic products. The limitation prevents WDFW from requiring a hydraulic project approval permit to regulate the planting, growing, and harvesting of geoducks grown by private aquaculturalists." AR 950. The Attorney General provided a more nuanced response with respect to the substantial development permit ("SDP") question, concluding farm-raised geoducks may require an SDP in some cases and that conditional use permits may be used to manage this activity. AR 950.

The Attorney General issued the opinion in time for Representative Lantz to pursue legislation concerning these issues in the 2007 legislative session, AR 949-58, and she did so to a limited extent. Representative Lantz sponsored a bill, SSHB 2220, that resulted in statutes establishing a geoduck aquaculture scientific research program (RCW 28B.20.475) and account (RCW 28B.20.476); requiring Ecology to adopt guidelines addressing geoduck aquaculture operations under the

Shoreline Management Act (RCW 43.21A.681); setting rents, fees, and limits for geoduck aquaculture on state-owned tidelands (RCW 79.135.100); and amending DFW aquatic farm registration provisions (RCW 77.115.040). Laws of 2007, ch. 216. Notably absent from SSHB 2220 was any attempt to reverse the firm conclusion in AGO 2007 No. 1 that RCW 77.115.010(2) prevents DFW from requiring an HPA permit to regulate the planting, growing, and harvesting of geoducks grown by aquatic farmers. *Id*. As the Court of Appeals correctly noted, the legislature chose to focus on the Shoreline Management Act, chapter 90.58 RCW ("SMA"), rather than the Hydraulic Code, as a means of advancing environmental protection for activities related to shellfish aquaculture. Pet. at A-29.

In 2011, DFW commenced rulemaking to update its rules governing HPAs, noting the rules had not been substantively updated since 1994. AR 1. The new rules became effective in July 2015. AR 173-344. The 2015 rule states, consistent with

the Attorney General opinion, that hydraulic permits are not required for the "[i]nstallation or maintenance of tideland and floating private sector commercial fish and shellfish culture facilities (RCW 77.12.047)." WAC 220-660-040(2)(l).

C. Shellfish Farming in Washington State

Washington State has a long history, pre-dating statehood, of supporting a successful commercial shellfish farming industry. DFW Answer at 3. Shortly after statehood, the legislature enacted the Bush and Callows acts, authorizing the sale of tidelands to private individuals for shellfish cultivation to foster this activity. RCW 79.135.010; chapter 24, Laws of 1895 (Bush act); chapter 25, Laws of 1895 (Callow act). Some families, including Taylor, have been farming shellfish in the State for over 120 years, growing nutritious food and supporting rural economies. CP 116.

A 2015 programmatic biological assessment ("PBA") prepared by the U.S. Army Corps of Engineers provides an authoritative review of continuing (or, existing) and anticipated

new shellfish farming activities in the State over a 20-year period. CP 322-411.[1] The PBA documents that 10 percent (22,196 acres), of the State's tidelands are in active cultivation, and an additional seven percent are fallow aquaculture areas. CP 353. The Corps projected that only 0.6 percent of the state's tidelands (1,401 acres) would be put into new aquaculture over the following 20-year period. CP 353-54. This equates to less than 3.8 percent growth of the aquaculture industry (as calculated by the total continuing active and fallow aquaculture acreage, 36,999) over the entire 20-year period, and less than 0.018 percent annual growth. *Id*.

[1] The Corps prepared the PBA to initiate a programmatic Endangered Species Act and Essential Fish Habitat consultation with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service for shellfish farming activities in the State. Only excerpts of the PBA are contained in the record. The full PBA is publicly available on the Seattle District's website. https://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/Shellfish_PBA_30_Oct_2015.pdf?ver=2016-09-07-185805-287

Commercial aquaculture in Washington State is highly regulated by multiple federal, state, and local agencies. CP 117, 181. Permitting a new farm often takes years to complete and requires extensive time and resources. CP 117-18. Required approvals include multiple permits and reviews that specifically address impacts to fish life and habitat, including: permits issued by local governments and/or the Washington State Department of Ecology ("Ecology") under the SMA, and associated review under the State Environmental Policy Act, chapter 43.21C RCW ("SEPA"); individual permits issued by the Corps under Section 10 of the Rivers and Harbors Appropriation Act of 1899 ("RHA"), 33 U.S.C. § 403 and, in some cases, Section 404 of the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1344; consultations between the Corps and the National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service ("USFWS") under section 7 of the Federal Endangered Species Act ("ESA"), 16 U.S.C. § 1536; and consultations between the Corps and NMFS under the

Essential Fish Habitat ("EFH") protection provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1855. CP 181, 965-1021, 1029-32, 1034-38.

Agencies with expertise over shellfish aquaculture recognize this activity, as regulated, has minimal adverse to beneficial impacts. Ecology's SMA regulations classify commercial shellfish beds as critical saltwater habitats that provide important ecological functions and require a high level of protection. WAC 173-26-221(2)(c)(iii). They further recognize that aquaculture is a preferred use of statewide interest that can result in long-term benefits and protect the ecology of the shoreline when properly managed. WAC 173-26-241(3)(b)(i)(A). Ecology and local governments regulate aquaculture under the SMA and shoreline master programs ("SMPs") to ensure farms are properly managed, and new geoduck farms require conditional use permits. WAC 173-26-241(3)(b).

D. PNA's Farm

PNA's geoduck farm demonstrates both the stringent regulatory process required for establishing a new farm as well as lack of impacts from this activity. In 2014, PNA applied to Thurston County for a SDP under the SMA and the County's SMP, requesting authorization to operate a 1.1-acre geoduck farm on private property owned by PNA's agent, Dr. ChangMook Sohn. CP 962, 974. PNA is partnering with Taylor. *Id*. Taylor is responsible for most planting and harvesting activities, and PNA is assisting in monitoring and communications. *Id*.

The farm's tidelands contain no eelgrass and are not a documented forage fish spawning beach, and the substrate is suitable for geoduck planting with no beach preparation. CP 975, 998, 1000. The uplands of the farm site and adjacent properties on the east side of Zangle Cove contain single family residences and mature forested shoreline buffers, while the west side of Zangle Cove is far from the pristine estuary that

Petitioners represent–it is characterized by residentially developed parcels with bulkheads and minimal vegetative shoreline buffers. CP 974.

Thurston County thoroughly reviewed the farm proposal and issued a mitigated determination of non-significance ("MDNS") under SEPA, CP 966, which imposed 18 mitigating conditions. CP 977-79. A group of neighbors, including the representative of Petitioner Protect Zangle Cove, Patrick Townsend, appealed the MDNS to the Thurston County Hearing Examiner. CP 966. The Examiner conducted an open record hearing on the SDP request and SEPA appeal. *Id*. The parties were represented by counsel and were allowed to cross-examine witnesses. CP 967, 981, 983. The Examiner considered the testimony of numerous lay and expert witnesses on various issues, including potential impacts to fish life and habitat, and concerns regarding eelgrass, sedimentation, plastics, and prey resources. CP 965-1014. The Examiner issued a decision on February 17, 2017, thoroughly rejecting

appellants' claims, affirming the MDNS, and approving the SDP subject to 13 additional conditions. CP 1013-14.

The Townsends and Anneke Jensen appealed the Examiner's decision to the Board of County Commissioners, and the Board affirmed the Examiner. CP 1025-27. The Townsends and Anneke Jensen then filed an appeal of the SDP with the Shorelines Hearings Board, and that appeal was dismissed. CP 245; *Townsend v. Thurston County*, SHB No. 17-009 (Wash. Shore. Hrgs. Bd. 2017).

The Corps authorized PNA's farm on August 16, 2018. CP 1029-32.[2] The Corps authorization imposes over 30 conditions, many of which protect fish life, including limits on the timing and location of work activities, bed preparation, planting, and harvest. CP 1029-32, 1034-38.

[2] PNA's farm was authorized pursuant to a general permit. As discussed below, as a result of a court decision, the farm will be operated pursuant to an individual Corps permit moving forward. *Infra* at 24-25.

E. Procedural History

Petitioners filed this action against DFW and PNA on April 12, 2018. CP 1. PNA began farm operations shortly after receiving final approval from the Corps. CP 246. Petitioners did not seek a preliminary injunction in this case, but the Townsends sought an injunction in a separate case pending before the Thurston County Superior Court. CP 245-46. That request was denied. *Id*.

The trial court heard argument on Petitioners' action on December 7, 2018. RP 1-51. On December 11, 2018, the court issued an order dismissing Petitioners' claims. CP 1272.

Petitioners appealed to Division II of the Court of Appeals, which affirmed the trial court's decision. Pet. at A-001-31.

V. ARGUMENT

RAP 13.4(b) identifies four potential grounds for accepting review, but Petitioners only rely on two grounds here, contending this case involves a significant question of law and

issues of substantial public interest. Pet. at 3-5. Petitioners' contentions are without merit.

A. No Significant Legal Question Is Presented

Contrary to Petitioners' suggestion, an issue of first impression has not been identified as a sufficient, or even relevant, basis for the Court's review. RAP 13(b)(3) limits the significant legal questions warranting this Court's review to constitutional questions. No constitutional questions are involved in this case—only statutory—and Petitioners do not expressly rely on RAP 13.4(b)(3).

Nor does this case even pose an issue of first impression. It addresses the regulatory authority of an agency, and there is voluminous case law on this topic. While some cases of regulatory authority invoke difficult questions regarding implied agency authority, here, the question is simple. RCW 77.115.010(2) limits DFW's authority to regulate aquatic farmers and their products to a discrete list of statutes that does not include the Hydraulic Code. As illustrated by the trial

court's order, the answer to this question requires no more than examining the plain language of the statute.

> The unambiguous, plain language of RCW 77.115.010(2) dictates that the Washington State Department of Fish and Wildlife does not have authority to regulate the conduct in question. The prohibition against the regulation of "aquatic products" and "aquatic farmers" necessarily, by definition, prohibits the regulation of the farming of those products by those farmers. This unambiguous, plain language renders further statutory construction inappropriate and renders any other pending motions moot. Accordingly, the Petitioners' claims are DISMISSED.

CP 1272.

Petitioners attempt to manufacture a novel question by casting this as a case where DFW retains authority to regulate aquatic farmers pursuant to the Hydraulic Code but lacks enforcement authority. Pet. at 1, 8, 17. Everyone who has examined this issue, including the Attorney General, DFW, the trial court, and the Court of Appeals, has held that DFW lacks the authority to regulate aquatic farmers and their products pursuant to the Hydraulic Code. This is consistent with the statute, which expressly limits DFW's authority "to regulate

private sector cultured aquatic products and aquatic farmers." RCW 77.115.010(2). Nobody has opined or held that DFW has regulatory authority but lacks enforcement authority in this field. As such, Petitioners are disagreeing with a position that nobody is articulating, and requesting this Court to answer a question that nobody other than Petitioners is asking.

Petitioners also mistakenly rely on this Court's decision to accept review in *Spokane County v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 455, 430 P.3d 655 (2018). Pet. at 4 n.2. The Court did not articulate a reason as to why it accepted review in *Spokane County*, and the case involved a starkly different question regarding the geographic scope of DFW's regulatory authority, which is not at issue here. *Id*. Nor did the Court suggest that any question involving the scope of HPA permitting warrants granting discretionary review.

This case does not pose a significant constitional, or even statutory, legal issue warranting review under RAP 13.4(b).

B. No Issue of Substantial Public Importance Is Presented

Petitioners advance several arguments in contending this case presents an issue of substantial public importance. None has merit.

a. The AFA's Removal of Hydraulic Code Authority over Shellfish Farming did not Reflect a Major Regulatory Shift

Petitioners argue that WAC 220-660-040(2)(l) resulted in a major shift in the implementation of the Hydraulic Code and undercuts the purpose of the Code. Pet. at 5-7, 12-15. This argument has no basis in law or fact.

WAC 220-660-040(2)(l) merely reflects the plain language of RCW 77.115.010(2), which states DFW lacks authority to regulate aquatic farmers and their products except under a discrete list of statutes that does not include the Hydraulic Code. The AFA's removal of Hydraulic Code authority over aquatic farmers and their products did not reflect a major shift in the regulation of this use, as Fisheries only had express authority to regulate projects in marine waters for two

years prior to passage of the AFA. *Supra* at 3-4. There is no evidence that the Department of Fisheries considered the Hydraulic Code an important, or even relevant, tool to regulate aquatic farming prior to or during this two-year window. Fisheries was instead focused on using the Hydraulic Code to address impacts from shoreline residential development and bulkheads, CP 1202-03, such as those on the west side of Zangle Cove, across from PNA's farm. CP 974. To the extent the legislature saw a need to regulate shellfish activities under the Hydraulic Code, that need was limited to a specific means of mechanically harvesting clams under a section of Title 77 that expressly did not apply to aquatic farmers and their products. Laws of 1985, ch. 457, § 19.

Nor is there evidence that Fisheries (or later, DFW) consistently regulated shellfish farming under the Hydraulic Code after enactment of the AFA. In fact, the record does not contain a single example of Fisheries or DFW requiring or issuing an HPA permit for commercial shellfish cultivation,

either before or after enactment of the AFA.[3] And the "industry guidance" materials that Petitioners have pointed to as acknowledging HPA permits may be required for shellfish farming were not produced by Fisheries, DFW, or shellfish farmers. CP 1217-19, 1226-44. They were prepared by Washington Sea Grant and were addressed to a broader audience that included recreational users who are not aquatic farmers under RCW 77.115.010(2). *Id*.; RCW 15.85.020. They also characterize HPA permits as authorizations that may, but not necessarily would, be applicable. CP 1219, 1240.

In short, the State has never relied on HPA permitting for addressing the environmental interactions of commercial shellfish farming. The trial court and Court of Appeals properly rejected Petitioners' attempt to newly impose HPA permitting

[3] Petitioners could produce only one example in which an HPA permit has ever been issued for an aquaculture facility, and this was a finfish net pen. CP 551-52.

on aquatic farmers and their products, and this Court should do the same by declining to accept review.

b. Petitioners' Argument that HPA Permitting Is Necessary to Protect Fish Life Is Contradicted by Record Evidence

Petitioners argue that shellfish farming has adverse impacts and that hence HPA permits should be required for this activity. Petitioners claims of adverse impacts are largely unsupported by record citations and should be dismissed on this basis. *E.g.*, Pet. at 3-5; *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 459, 266 P.3d 881 (2011).

Petitioners also largely ignore that shellfish farming in Washington is already regulated by various federal, state, and local agencies under several regulatory programs. *Supra* at 8-11. As such, shellfish farmers must comply with numerous measures to ensure that their farms protect fish life and habitat, which is the sole focus of the Hydraulic Code. *Id*. RCW 77.55.021(1), (7)(a). Among other things, aquatic farmers must obtain ESA and EFH consultation coverage for their farms and

comply with any resulting conservation measures. *Supra* at 10-11. In Washington, there is a programmatic ESA/EFH consultation for shellfish farming activities, which was initiated by the 2015 Corps PBA discussed above, that requires farmers to comply with over 30 measures. CP 962-63, 1029-38. To the extent that Petitioners articulate specific issues of concern, such as the placement of gravel or shell material on tidelands, Pet. at 7, these concerns are addressed by programmatic consultation conservation measures, CP 1034 (measure 1, requiring gravel and shell to be clean and applied in minimal amounts using methods which result in less than one inch depth). The programmatic consultation further documents that the very activities Petitioners complain about can have beneficial impacts to fish and habitat. CP 348-49 (artificial structures provide habitat benefits and may increase fish and macro invertebrate species).[4]

[4] These pages are from NMFS's programmatic biological opinion for the programmatic consultation, which responded to

Petitioners mischaracterize *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 417 F. Supp. 3d 1354 (W.D. Wash. 2019), *aff'd*, 843 Fed. Appx. 77 (9th Cir. 2021) as evidence that shellfish farming has significant impacts, claiming the court in that case overturned a Corps permit for shellfish farming "because such activities have more than minimal environmental impact and the permit failed to comply with Clean Water Act and NEPA." Pet. at 9-10. The court in this decision actually held that the Corps' analysis supporting a general permit (Nationwide Permit, or "NWP," 48) for shellfish farming was inadequate, not that shellfish farms as conditioned have more than minimal impacts; among other things, the court did not address ESA and EFH conservation measures imposed on farm authorizations through the programmatic consultation. 417 F. Supp. 3d at 1367. In fact this decision demonstrates the extensive level of regulatory review shellfish farms are

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the Corps' 2015 PBA and represented NMFS's formal opinion and recommendations on the programmatic consultation.

currently subject to; as a result of this decision, shellfish farms are now permitted through the more rigorous individual Corps permits.

PNA's geoduck farm demonstrates both the stringent regulatory process required for establishing a new farm as well as lack of impacts from this activity. As discussed above, PNA's farm underwent several years of review by Thurston County and the Corps. *Supra* at 12-14. Petitioner Protect Zangle Cove's representative challenged the permits at every turn, but his claims that the farm would harm fish life and habitat were thoroughly rejected, and conditions were imposed on the permits to protect fish life. *Id*. To this date, Petitioners have failed to articulate a credible basis for a finding that PNA's farm, as approved, would harm fish life, nor have they identified a single additional condition that would be imposed under an HPA permit to protect fish life.

Petitioners' claims that HPA permitting is needed to protect fish life and habitat is undermined by the record and cannot form a basis for accepting review. RAP 13.4(b)(4).

c. Petitioners' Claims of Rapid Shellfish Farming Expansion Are Inaccurate

Petitioners contend shellfish farming is a rapidly expanding use that "will occupy one-third of the state's tidelands" within a short period of time. Pet. at 4. Petitioners are incorrect.

As of 2015, active shellfish culture occupied 10 percent of the State's tidelands, with most of this activity concentrated in Willapa Bay. CP 353. Moderate amounts of acreage were fallow (seven percent of State tidelands), and the Corps projected very minor growth would occur over the following 20-year period (1,401 acres total, or 0.06 percent of State tidelands). CP 353-54. There is no record evidence that shellfish farming has in fact exceeded this expansion estimate.

Petitioners ignore these estimates and instead fixate on a 72,000-acre figure that appears in a different analysis that

addressed the 2017 version of NWP 48. Pet. at 9. This figure does not represent actual, expected, growth but is an estimate of the total acreage that potentially "could be authorized over a five year period from 2017-2022," and assumed that all land transferred to private individuals under the Bush and Callow Acts would be put into production during this period. CP 1222-23. The Corps developed this figure as part of an analytical exercise, and took a highly conservative approach that it recognized "may ultimately be an overestimation of the acreage that is actually verified and/or put in to active use under NWP 48 2017." CP 1223. Notably, this five-year period (2017-2022) is now almost over, and there is no evidence that shellfish farming has expanded anywhere near at the scale that the Corps assumed could potentially occur. CP 1222.

Even if shellfish farming was growing at a faster pace than the Corps projected in its 2015 PBA, that would not raise an issue of substantial public interest unless adverse impacts were associated with that growth. Given new shellfish farms are

highly regulated by a complex set of other authorities and agencies, no such adverse impacts would result. *Supra* at 22-25.

Petitioners' claim of rapid shellfish farming expansion is unsupported by the record and provides no basis for this Court to grant review.

d. DFW's Authority over Aquatic Farmers Is Clear and There Is No Outstanding Confusion

Petitioners contend that review by this Court is necessary to resolve confusion with respect to DFW's authority over aquatic farmers in light of the AFA, emphasizing that there is a lack of case law construing the AFA. Pet. at 8, 15.

The record does not demonstrate that there is confusion with respect to the scope of DFW's authority over aquatic farmers and their products as articulated in WAC 220-660-040(2)(l). At most, there was an open question after issuance of the 2007 Attorney General Opinion as to whether aquatic farmers could be required to obtain HPA permits for constructing accessory structures such as boat ramps that are used in association with their farming activities. CP 543. WAC

220-660-040(2)(l) resolved this question by more broadly construing DFW's authority, stating HPA permits are required for such projects. Petitioners don't take issue with how this question was answered but rather over whether routine shellfish farming activities, such as geoduck cultivation at PNA's farm, require HPA permits.

There is no evidence that anyone, including aquatic farmers, DFW staff, or the broader public is confused as to the scope of the agency's authority in light of WAC 220-660-040(2)(l). Hence, there is no need for this Court to provide clarification on this issue, and the Court should decline to accept review. RAP 13.4(b).

The fact that this Court has never interpreted the AFA cuts against Petitioners' request for discretionary review. The lack of prior disputes over the meaning or application of the AFA reinforces that this Act, including the limit of authority in RCW 77.115.010(2), does not raise issues of substantial public interest. RAP 13.4(b)(4).

It is understandable that nobody to date has felt compelled to litigate the meaning of RCW 77.115.010(2), as it is unambiguous and does not require detailed construction or interpretation. CP 1282; *Davis v. State ex rel. Dep't of Licensing*, 137 Wn. 2d 957, 963–64, 977 P.2d 554 (1999). The Court of Appeals, like the trial court and the Attorney General, correctly gave effect to the plain language of RCW 77.115.010(2), which limits DFW's authority to regulate aquatic farmers and their products to a discrete list of statutes that does not include the Hydraulic Code.

Petitioners' contention to the contrary—that the Court of Appeals violated principles of statutory interpretation and failed to give effect to the different terms "aquaculture," "aquatic farmer," and "private sector cultured aquatic product"—is incorrect. Pet. at 15-17; RAP 13.4(b)(1). The Court of Appeals gave effect to these terms in its detailed, well-reasoned opinion. Pet. at A-019-22. The Court properly read the limit of authority in RCW 77.115.010(2) as applying conjunctively to activities

that aquatic farmers engage in with respect to aquatic products, stating: "In some instances, these activities involve cultivation of aquatic products, such as insertion of PVC pipes and installation of netting on tidelands used in geoduck cultivation. In other instances, the activities do not relate directly to cultivation but may involve marketing, transporting, or labeling aquatic products." *Id*. at A-021.

Petitioners, on the other hand, would construe the limit of authority as applying to only non-cultivation activities that aquatic farmer engage in with their products. This reading is inconsistent with the plain language of the statute and has been appropriately and consistently rejected by everyone who has considered this issue. *State v. J.P.*, 149 Wn. 2d 444, 450, 69 P.3d 318 (2003). This Court should decline to accept review simply to once again reiterate the plain language of RCW 77.115.010(2).

VI. CONCLUSION

Petitioners have failed to demonstrate that this case warrants review under the limited criteria established in RAP 13.4(b). This case presents a simple case of giving effect to the plain, unambiguous language of RCW 77.115.010(2), which prevents DFW from regulating aquatic farmers and their products pursuant to HPA permitting. The trial court and Court of Appeals appropriately refused to ignore the plain language of this statute, and Petitioners' request to have this Court render a contrary decision should be denied. The appropriate audience for Petitioners' arguments is the legislature, not the courts.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), I certify that this document contains 4,920 words, excluding the items exempted by RAP 18.17(b). This certification is made in reliance on the word count calculation of the word processing software used to prepare this document.

Respectfully submitted this 20th day of September, 2021.

PLAUCHÉ & CARR LLP

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I caused to be served a copy of the forgoing document to be delivered in the manner indicated below to the following persons at the following addresses:

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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.

EXECUTED at Seattle, Washington on September 20, 2021.

/s/ Tammy Weisser
Tammy Weisser, Legal Assistant

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September 20, 2021 - 4:18 PM

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