

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/10/2021 12:12 PM  
BY ERIN L. LENNON  
CLERK

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.

---

**WASHINGTON DEPARTMENT OF FISH AND  
WILDLIFE AND JOE STOHR'S ANSWER TO AMICUS  
CURIAE BRIEFS**

---

ROBERT W. FERGUSON  
Attorney General

JOSEPH V. PANESKO, WSBA No. 25289  
Senior Counsel  
Washington Attorney General's Office  
Public Lands and Conservation Division  
P.O. Box 40100  
Phone: (360) 753-6200  
E-Mail: Joe.Panesko@atg.wa.gov  
OID: 91033  
*Attorneys for Respondents DFW and Joe  
Stohr*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REASONS WHY THE AMICUS BRIEFS DO NOT RAISE ANY COMPELLING ARGUMENTS TO SUPPORT THE PETITION .....	2
	A. The Plain Language of RCW 77.115.010 Controls the Outcome of this Case, and the Court of Appeals’ Straightforward Application of the Statute Does Not Satisfy RAP 13.4(b). .....	2
	B. Amicus Claims of Environmental Harm Rely on Inadmissible Materials.....	5
III.	CONCLUSION .....	6

## TABLE OF AUTHORITIES

### Cases

<i>Protect the Peninsula’s Future v. City of Port Angeles</i> , 175 Wn. App. 201, 304 P.3d 914 (2013) .....	6
<i>Puget Soundkeeper Alliance v. Dep’t of Ecology</i> , 191 Wn.2d 631, 424 P.3d 1173 (2018).....	5

### Statutes

RCW 34.05.558 .....	5
RCW 34.05.570(2) .....	5
RCW 77.115.010.....	1, 2, 3
RCW 77.115.010(2) .....	2, 4

### Rules

ER 201(b) .....	6
RAP 13.4(b).....	2, 7
RAP 13.4(b)(4).....	4
RAP 18.17 .....	7

### Regulations

WAC 220-660-040 .....	4
-----------------------	---

## **I. INTRODUCTION**

The Washington Department of Fish and Wildlife (DFW) submits this consolidated answer to the two amicus briefs filed in support of the pending petition for review. The substantive outcome they seek directly violates the plain language of RCW 77.115.010, which statute is completely ignored by both amicus briefs. Amici offer no legal arguments about how or whether the Court of Appeals erred in its application of RCW 77.115.010; rather, they raise only legislative policy arguments that great environmental harm will occur unless this Court grants review and holds that DFW's hydraulics project approval authority applies to aquatic farmers. These claims rely on inadmissible materials from outside the closed administrative record. The position they advocate requires RCW 77.115.010 to be rewritten, a task that only the legislature can do. The Petition should be denied.

**II. REASONS WHY THE AMICUS BRIEFS DO NOT  
RAISE ANY COMPELLING ARGUMENTS TO  
SUPPORT THE PETITION**

**A. The Plain Language of RCW 77.115.010 Controls the  
Outcome of this Case, and the Court of Appeals’  
Straightforward Application of the Statute Does Not  
Satisfy RAP 13.4(b).**

The simplicity of the legal issue presented by this case is best reflected by the single paragraph ruling by Thurston County Superior Court Judge Lanese:

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.

The amicus briefs neither discuss nor acknowledge RCW 77.115.010, and they offer no legal arguments about how the lower court’s decision is erroneous, implicitly conceding that

they have no legal arguments against the outcome. Their briefs contribute no value to the legal question of how to apply RCW 77.115.010, and they fail to address how the Court of Appeals' plain language application of RCW 77.115.010 meets any of the RAP 13.4(b) standards for granting a petition for review. Instead, they raise only policy arguments about how the effects of the direct application of RCW 77.115.010 allegedly leads to environmental harm.

Setting aside the fallacy of the environmental harm premise, amici's environmental harm arguments have no connection to whether or how the trial court and Court of Appeals erred in reading and applying the plain language in RCW 77.115.010. Claiming that the outcome dictated by the statute will lead to alleged environmental harm raises a policy argument that amicus should advance to the legislature to seek an amendment to the statute. Their disagreement with the legislature's policy choice fails to establish how the Court of Appeals' legal analysis of the statute presents "an issue of

substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). RCW 77.115.010 plainly states that DFW can rely only upon six listed statutes to regulate aquatic farmers and their products. Hydraulic project statutes are not listed. Amici claim that this statutorily mandated outcome results in environmental harm. But this is an argument that only the legislature can redress, because the “fix” they seek requires RCW 77.115.010 to be amended.

Conservation Angler’s brief ignores RCW 77.115.010 and focuses only on the challenged rule, WAC 220-660-040. They incorrectly assert that if the rule was invalidated, then hydraulic project permits could be applied to marine net pen aquaculture. Conservation Angler Amicus Br. at 3, 8. This ignores the direct language in RCW 77.115.010(2), which uncontrovertibly omits all hydraulics project statutes from the short list of statutes DFW can apply to aquatic farmers. Even if DFW’s rule exempting aquatic farmers were invalidated, DFW would still lack statutory authority to require aquatic farmers to apply for or obtain

hydraulics project permits for their aquatic farming activities. The challenged rule does not create the permit exemption; the challenged rule merely acknowledges the statutory language that precludes DFW's hydraulics authority over aquatic farmers. The only authorities DFW has over aquatic farmers are disease control rules and six particular statutes, not including any of the hydraulics statutes in Chapter 77.55 RCW.

**B. Amicus Claims of Environmental Harm Rely on Inadmissible Materials.**

Both amicus briefs rely solely on inadmissible materials from outside the closed record—neither brief provides a single citation to evidence contained in the closed record before the Court. This case was filed as an Administrative Procedures Act review of an agency rule under RCW 34.05.570(2). CP 2. Judicial review of the matter is restricted to the administrative record before the agency below. RCW 34.05.558; *Puget Soundkeeper Alliance v. Dep't of Ecology*, 191 Wn.2d 631, 637, 424 P.3d 1173 (2018). Neither amicus brief offers any legal argument or analysis to justify consideration of their extra-record



materials under the narrow standards for judicial notice, nor would their materials qualify under those standards. *See, e.g., Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 216, 304 P.3d 914 (2013) (refusing to consider amicus materials under ER 201(b)). At this stage in appellate proceedings, DFW has no opportunity to review and dispute the materials upon which the amicus briefs base their environmental harm claims. Their extra-record materials should be stricken and not considered as part of the Court's review of the Petition.

### **III. CONCLUSION**

The Court of Appeals ruled that RCW 77.115.010 plainly omits hydraulic project permit statutes from the short list of statutes DFW can apply to aquatic farmers and their products. Disliking the legislature's policy choice, both amici argue about the alleged harm this holding will cause. But their briefs completely ignore the single legal question in the case, and thus they fail to show how the Court of Appeals' legal analysis meets

the standards for review under RAP 13.4(b). The Petition should be denied.

This document contains 979 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of November, 2021.

ROBERT W. FERGUSON  
Attorney General

*s/ Joseph V. Panesko*  
\_\_\_\_\_  
JOSEPH V. PANESKO,  
WSBA No. 25289  
Senior Counsel  
*Attorneys for Respondents DFW and  
Joe Stohr*

## CERTIFICATE 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:

Electronic Mail per Agreement

JIS/ECF

For Protect Zangle Cove; Coalition to Protect Puget Sound; and Wild Fish Conservancy:

Claire Loeb Davis  
Animal and Earth Advocates PLLC  
2226 Eastlake Ave E, Suite 101, Seattle, WA 98102  
claire@animalearthadvocates.com

Jonathon Bashford  
Bashford Law PLLC  
600 1st Ave., Suite 405  
Seattle WA 98104  
jon@bashfordlaw.com

For Pacific Aquaculture, LLC and Taylor Shellfish Company, Inc.:

Samuel W. Plauché  
Jesse G. DeNike  
Plauche & Carr LLP  
1218 3rd Avenue, Suite 2000, Seattle, WA 98101  
Jesse@plauchecarr.com  
Billy@plauchecarr.com  
Sarah@plauchecarr.com

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

DATED this 10th day of November, 2021 at Lacey, Washington.

s/Diane Stercks  
DIANE STERCKS  
Legal Assistant

**FISH, WILDLIFE, & PARKS SECTION - ATTORNEY GENERAL'S OFFICE**

**November 10, 2021 - 12:12 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 100,112-6  
**Appellate Court Case Title:** Protect Zangle Cove, et al. v. Washington Department of Fish and Wildlife, et al.  
**Superior Court Case Number:** 18-2-01972-6

**The following documents have been uploaded:**

- 1001126\_Answer\_Reply\_20211110120949SC648572\_3298.pdf  
This File Contains:  
Answer/Reply - Other  
*The Original File Name was AnswerAmicusBr.pdf*

**A copy of the uploaded files will be sent to:**

- Diane.newman@atg.wa.gov
- RESOlyEF@atg.wa.gov
- admin@bashfordlaw.com
- billy@plauchecarr.com
- claire@animalearthadvocates.com
- claire@animalearthlaw.com
- fwdef@atg.wa.gov
- gkimbrell@centerforfoodsafety.org
- jesse@plauchecarr.com
- jon@bashfordlaw.com
- mryanboise@msn.com
- rhowze@centerforfoodsafety.org
- rob@theconservationangler.org
- tammy@plauchecarr.com

**Comments:**

WDFW and Joe Stohr's Answer to Amicus Curiae Briefs

---

Sender Name: John Nygren - Email: John.Nygren@atg.wa.gov

**Filing on Behalf of:** Joseph Vincent Panesko - Email: joe.panesko@atg.wa.gov (Alternate Email: )

Address:  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA, 98504  
Phone: (360) 570-3415

**Note: The Filing Id is 20211110120949SC648572**