No. 91325-1

IN THE SUPREME COURT FOR STATE OF WASHINGTON

BRUCE M. BEATTY,

Petitioner,

v.

WASHINGTON FISH & WILDLIFE COMMISSION, *et al.*,

Respondents,

Court of Appeals Case No. 31409-0-III
Appeal from the Superior Court of the
State of Washington for Kittitas County

PETITION FOR REVIEW

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Preliminary Statement

Petitioner applied for a hydraulic permit to prospect and mine a federal mining claim on federal land along Fortune Creek, a tributary of the Cle Elum River. Unfortunately, his application was reviewed by a Department of Fish and Wildlife biologist whose boss had been reported by petitioner for misconduct and admonished. Respondents limited petitioner's annual operations to August 1st-15th, ostensibly to protect fish. The biologist provided no such restrictions to the prospectors in the immediately-adjacent stream segment, who had not complained about his boss. The Pollution Control Hearings Board, the Superior Court, and Court of Appeals all held that biologists had utterly arbitrary power to forbid any hydraulic activity based on any level of imagined risk to any single fish or fish nest ("redd"). If the decision stands, there is no rule of law in this context, only the rule of biologists.

A. IDENTITY OF PETITIONER

Petitioner Bruce Beatty is a 73 year-old Washington resident who asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion on January 15, 2015, a copy of which is set forth in the Appendix at pages A1-A41.

C. ISSUES PRESENTED FOR REVIEW

1. May Washington's 1943 hydraulic statute, RCW Chapter 77.55, be interpreted to provide absolute protection against any imagined level of theoretical risk of harm to a single fish, fish egg, or fish nest?

2. If the statute may so be interpreted, should this Court overrule *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894 (1979), and find the statute unconstitutionally vague with respect to the term "protection of fish"?

3. If the statute is not unconstitutional, is a heightened standard of review necessary to protect against arbitrary, capricious, or discriminatory implementation of the statute?

4. Was the restriction to operating two weeks a year commensurate with the impact of the activity, and the least restrictive permit condition, as required by Washington law?

5. May a Washington official deny a permit based on the so-called "cumulative impact" of discretionary decisions to grant future permits?

6. Does the Washington regulatory scheme unconstitutionally frustrate the objectives of federal mining law?

D. STATEMENT OF THE CASE

Washington regulations provide a standard set of rules for the sort of micro-scale suction dredge prospecting proposed by petitioner, set forth in WAC 220-110-200, -201, -202 & -206. Petitioner "intended to dredge 60 linear feet of stream bed each year" (A5), leaving holes in the streambed about the size of a hearing room table (*see* Clerk's Paper's (CP) at 162:1-3), akin to pools in a stream.

Petitioner was "one of the five at-the-table stakeholders" representing mining interests in a long and acrimonious rulemaking process. (CP143:1-16.) During one of the public meetings held in connection with the process, there was a personal conflict between the Department employee directly involved with the Fortune Creek rule development (and the permit application), Mr. Perry Harvester, and Appellant's wife. (CP143:19-25.) Appellant complained to the Director of the Habitat Division, who apologized for Mr. Harvester's behavior. (CP144:1-11; Petitioner's Pollution Control Hearings Board Exhibit (PX) No. 17.)

The general rules provide extensive protective provisions (*see, e.g.*, PX9 at 13-15 (24 numbered rules with subparts)) which petitioner did not challenge. Rather, Appellant sought to expand the two-week work window in the rules by application for an individual permit, a right

afforded by WAC 220-110-200(2). While Mr. Harvester noted during the rulemaking process that most in-water work times for small, headwater streams increased (PX1; CP189-190), the in-water work time for Fortune Creek, where Appellant was known by Mr. Harvester to mine (CP193:22-194:3), decreased dramatically. Mr. Harvester could not explain this at all. (*See* CP195-196 ("verbal testimony during one of the technical work group meetings" might exist); *see also* CP190-192.).

Appellant submitted his permit application to expand the two-week work window on January 25, 2011. (PX31, at 1.) On March 1, 2011, the Department issued what they called a Hydraulic Project Approval, which refused to extend the work window. (PX33.) Mr. Harvester had direct involvement in Appellant's permit process. (CP171:15-173:8), and was identified as one of the two people most knowledgeable about the permitting process in this particular case. (*See* CP172:3-7.) He was the "habitat program manager" overseeing (with an assistant manager) the particular biologist assigned to process the permit, Mr. William Meyer. (CP173:9-18.)

Mr. Meyer issued a permit to another miner to work the Cle Elum River from July 16th to August 31st of each year, immediately downstream from where petitioner sought to work ("to the confluence of Fortune Creek"). (*See* PX78.) This miner and many others received the

full five year permit duration (PX78), while Appellant was limited to two years (PX33, at 1).

Appellant timely appealed Mr. Meyer's decision to the Pollution Control Hearings Board (PCHB). A hearing was held on October 31 and November 1, 2011. The PCHB arbitrarily limited Appellant to merely six hours to make his case (CP83:1), and then arbitrarily excluded sworn testimony from hundreds of witnesses swearing that suction dredging had "never killed a fish, dredged up eggs or found any fish eggs or baby fish in the streambeds". (CP134:8-9; PX41 (sample declaration); CP139:12-13 (evidentiary ruling).)

Petitioner presented a detailed evidentiary case that there was no basis for refusing to expand the two-week work window. There was no dispute that petitioner would generally be operating in areas where fish did not spawn, with the possible exception of gravel pockets that develop behind boulders. (A4.) The Department thus, in other cases, routinely issues permits requiring applicants to stay away from pocket gravels. (*E.g.*, PX26, at 11, 165.)

Appellant engaged an independent consulting biologist, Dr. Robert Crittenden, who received his doctorate at the University of Washington Center for Quantitative Sciences in fisheries and forestry, with special expertise in quantifying biological parameters relating to fish. (CP284:24-

25.) Dr. Crittenden explained to the PCHB in detail why the risks to fish were "so vanishingly small as to not be of any regulatory significance whatsoever". (CP300:13-20.) His conclusions were corroborated by numerous other studies demonstrating that the micro-scale suction dredge mining petitioner proposed could have no appreciable impacts on fishery resources. (*See, e.g.,* PX50, PX52; PX57, at 7-8; PX58, at 9, PX62; PX63.)

The Department's primary response to Dr. Crittenden's conclusions was to speculate that there might be small numbers of "threatened" bull trout in the area (CP472:2-473:16). The fish are found all over Washington (*see generally* 64 Fed. Reg. 58,910 (Nov. 1, 1999)), and anglers may kill and keep them in some areas (*see* PX16, at 5).

Mr. Meyer testified that he had never seen one in the Fortune Creek system (CP222:1-4), despite direct night survey experience (CP432:20-433:5). He did, however, think that he had "read a piece of paper that says someone found one" (CP222:10-11), which appeared to refer to the last page of Respondent's Exhibit 16 (RX) (*see* RX16 & CP457:5). There was also a *draft* report, RX27, which was later updated in PX28 to report "unknown what species of redd, likely bull or brook". (*See also* CP474:4-477:5 (on cross-examination, Mr. Meyer admits that the redds could have been brook trout).) PX28 also had updated RX16 to

show the presence of brook trout, not bull trout. The Court of Appeals overlooked these corrections. (A9, A27.)

Though Mr. Meyer disagreed, all other evidence, including the Department's own surveys, found Fortune Creek to be poor fish habitat, which is "typical of high gradient, high elevation, cold water streams". (CP306:18-307:1 (independent expert Dr. Crittenden summarizes the results of habitat surveys); *see also* CP179:21-24.) (The federal government notes that preferred spawning habitat for bull trout is "low gradient streams". 63 Fed. Reg. at 31,648.)

The Department nevertheless speculated that there might be a "population" of bull trout in the system (one of many thousands); that this population might be entirely isolated from adjacent stream segments (total fiction) (CP218:16-220:1); and that there might be one last redd in the system; and that petitioner could destroy it entirely.

Bull trout spawn in the fall, and common trout in the spring. Petitioner demonstrated that there was no evidence to support restrictions on operations before August 1st because no common trout remained in the streambed at this late date. The Department's own witness ultimately acknowledged that new data available after the permit decision, and presented to the PCHB, showed "earlier emergence" (CP398:25), perhaps

a full thirty days earlier (CP399:4-11 (shifting from 90 day testimony to 60 day testimony)).

Petitioner also demonstrated that there was no evidence to support halting mining after August 15th to protect the non-existent "threatened" bull trout. Repeated surveys never found any bull trout nests in August in Fortune Creek (*see* PX30 (listing survey dates and results); *see* CP187:10-22), but the Court of Appeals upheld speculation that redds observed in September were likely constructed in August. (A5.)

On November 30, 2011, the PCHB issued its Findings of Fact, Conclusions of Law and Order. Petitioner filed a Petition for Review on December 29, 2011, and the Superior Court issued a memorandum decision November 14, 2012 (CP773-778) and judgment on January 7, 2013 (CP779-781). Petitioner appealed to the Court of Appeals, which issued its decision upholding the Superior Court on January 15, 2015.

E. REVIEW SHOULD BE ACCEPTED BECAUSE THIS CASE RAISES VERY SIGNIFICANT QUESTIONS OF LAW AFFLICTED WITH SUBSTANTIAL PUBLIC INTEREST.

1. The Department Desperately Needs Guidance as to Proper Interpretation of RCW 77.55.

RCW Chapter 77.55, which was passed in 1943, provides for regulation of "hydraulic projects," meaning "the construction or performance of any work that will use, divert, obstruct or change the natural flow or bed of any of the salt or freshwaters of the state". RCW

77.55.011(8). Where applicants apply for a permit, "[p]rotection of fish life is the only ground upon which approval of a permit may be denied or conditioned". RCW 77.55.021(7)(a). However, as the Vermont Supreme Court explained in *In re Appeal of JAM Golf, LLC*, 969 A.3d 47, 52 (Vt. 2008), "'[p]rotect' . . . cannot be the equivalent of total preservation, because the same regulations allow for development, which, by necessity, must reduce wildlife habitat . . .".

Repeated abuses of the statute by the Department prompted the Legislature to add that: "The permit conditions must ensure that the project provides proper protection for fish life, *but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.*" RCW 77.55.231 (emphasis added.) To comply with the statute, the Department has developed a formal Mitigation Policy, which provides:

> "WDFW shall determine impacts and mitigation. WDFW shall determine the project impact, significance of impact, amount of mitigation required and amount of mitigation achieved *based on the best available information* . . ."

(PX36, at 4.)

The Court of Appeals nonetheless held that the Department "was not required to find Mr. Beatty's mining operation was likely to harm fish life in order to deny him his permit". (A29.) Rather, said the Court, the question was "whether the potential risk of his proposed operation could

be adequately managed". (*Id.*) This amorphous holding eviscerates the Legislature's clear intent to stop the Department from simply halting activities on the basis of any imagined level of risk to anything.

In fact, there was no risk of any regulatory significance at all. The Court of Appeals found Dr. Crittenden's testimony to this effect to be "too general and not meaningful" and, remarkably, that it "demonstrated the futility of making any kind of quantification or the risk of harm" (A30)—*but this was because it was at all times obvious that the risk was so tiny as to be meaningless.*

Despite undisputed evidence, accepted by the Court of Appeals, that "[g]enerally, areas ideal for suction dredge mining are not ideal for fish redds" (A4), Dr. Crittenden assumed petitioner might dig *anywhere*, and calculated petitioner's chances of striking a single redd, even under this hyper-conservative assumption, at anywhere between one in ten thousand and one in a million (A7).[1] Notwithstanding the absence of any contrary evidence, the Court of Appeals irrationally disparaged Dr. Crittenden's testimony as useless because petitioner would not select his precise prospecting sites randomly. (A30.) At the same time, the Court of

[1] Only in the case of certain "stream material that collects on the basis of large boulders or rocks" might miners and fish prefer the same areas (A4), hence the Department's ordinary permitting practice of forbidding mining in these "pocket gravels". (*See, e.g.,* PX26, at 11, 165 (examples of other permits.) Nothing other than invidious hostility to petitioner could explain the Department's illegal refusal to simply incorporate such a provision in petitioner's permit, and reduce the risk to *zero* (*see also* A7).

Appeals also declined to require the Department to conform to law or its own policy and prepare its own impact estimate, apparently based on the erroneous finding petitioner had presented no information explaining why the work window should not be applied. (A23.)

The Court of Appeals decision turns biologists loose to simply manage "risk" with no standards at all, and is especially problematic because the risk perceptions of the Department and biologists are in a different universe than anything the legislature intended. The "overriding purpose" of the statutes entrusted to the administration of the Department of Fish and Wildlife "is to provide for wise use of *the resource*, which is the broadest possible definition of conservation". *Northwest Gillnetters Association v. Sandison*, 95 Wn.2d 638, 643 (1981) (emphasis added). It is not about protecting every single fish or fish egg.

The biologists' testimony, however, was to the contrary:

> "Q: So the department's position is that because there are so many things going on, we cannot have any quantitative evaluation of risk, *and we must protect every single egg*; is that the gist of what you're saying here?"
>
> "A: *Yes*. There's a lot of variety out there."

(CP390:15-20 (Mr. Harvester; emphasis added); *see also* CP245:22-246:1 (Mr. Meyer).) The permit writer, Mr. Meyer, testified that he acted in accordance with the Department's Policy that "[a]voiding the impact altogether by not taking a certain action or parts of an action" was the

required option. (*Compare* PX36, at 1 *and* CP251:20-21 ("My job is to avoid the impact as its [sic—should be "the" or "my"] highest priority . . .").) Mr. Meyer believed he was required to condition the permit to avoid *any* possibility of *any* impact of *any* magnitude. (CP250:7-19; 251:13-254:3.)[2]

In short, the Court of Appeals interpreted this 1943 statute to give the Department power vastly in excess of even the federal Endangered Species Act, where actions may proceed so long as "the taking will not appreciably reduce the likelihood of the survival and recovery *of the species* in the wild". *See* 16 U.S.C. §§ 1536(a)(2); 1539(a)(2)(B)(iv) (emphasis added). At the same time, however, the Department has the power under the statute to issue no such restrictions at all.

2. This Court Should Protect Washington Citizens from Staggeringly Arbitrary and Unconstitutional Limitations on the Use of Private Property.

Hydraulic permits arise in a wide variety of contexts, including highway construction projects that are routinely permitted notwithstanding significant impacts on even federally-listed endangered species.

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[2] The Court of Appeals cited a scrap of contradictory testimony by Mr. Harvester denying an intent to protect every egg, and suggested that the concept of work windows "contemplates some harm to fish eggs and fish life that develop outside the specified dates". (A20-21.) No evidence supports this conclusion—the whole basis of petitioner's detailed scientific evidence dismantling the work windows was that the windows forbid operation when no eggs were in the gravel at all.

"Q: Let's talk about other activities. People do things in streams other than mining, correct?"

"A: Correct."

"Q: Many times these in-water work windows are changed for those type of activities, correct?"

"A: Correct."

"Q: And people in particular, they're given permits that allow them to dry out creeks, to pour tons of gravel into the creek, to cover up bridge abutments, to armor the shoreline or riverbank so their property doesn't wash away. That's the type of thing that's granted under hydraulic permit applications all the time, right?"

"A: Correct."

"Q: And these rivers and streams where this occurs, these are all over Washington, and it's fair to say that rainbow trout are all over Washington, correct?"

"A: Correct."

(CP247:15 -248:7.)

As Mr. Harvester explained, "it's always a judgment call" (CP200:5-6): some citizens can drain 1,000 feet of river and kill everything (*e.g.*, PX12, at 7; *see also* PX13-14), and some like petitioner can't dig a hole that doesn't kill anything (although in other contexts, the same type of activity is declared insignificant (*see, e.g.*, PX12, at 13; PX72; CP264:6-265:15 (permits to dump rip rap)). Washington is supposed to be a state governed by laws, not the arbitrary whims of biologists. It has long been the rule in Washington that "legislative power

may not be delegated to an administrative agency without the prescription of reasonable standards". *Rody v. Hollis*, 81 Wn. 88, 91 (1972). The Department manifestly lacks reasonable hydraulic permitting standards.

This Court has previously upheld the hydraulic permitting provisions against a vagueness attack. In *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894 (1979), the State pursued a criminal prosecution against Crown Zellerbach for failure to comply with conditions in a hydraulic permit. Crown Zellerbach challenged the statute as not "meet[ing] the criteria for lawful delegation" of legislative power. *Id.* at 900.

This Court found that the general statutory standard for "protection of fish life" was adequate to avoid a delegation challenge, "particularly in light of our stated view that environmental factors are not readily subject to standardization or quantification". *Id.* This Court cited the then-recent case of *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59 (1978), for this proposition. *See Polygon*, 90 Wn.2d at 69 ("environmental factors, *especially those involving visual considerations*, are not readily subject to standardization or quantification"; emphasis added).

More recent cases have recognized that the premise of *Crown Zellerbach* and *Polygon*—that no standards can be supplied in the environmental context—was simply erroneous. For example, in *Anderson*

v. City of Issaquah, 70 Wn. App. 64 (1993), the Court of Appeals overturned the denial of building permit on the basis that the design was not "harmonious" or "compatible". *Id.* at 75-76. The court noted that even "aesthetic considerations are not impossible to define in a code or ordinance," citing examples. *Id.* at 78.

Many decades of evolving environmental regulation and science since the *Crown Zellerbach* case have made it eminently possible for the Legislature or Department to provide more precise standards for fish protection, especially in a context where staggering sums are routinely expended to assess the status and health of fish populations. The statutory language barring permit conditions that are "unreasonable" (RCW 77.55.021(7)(a)) or "out of proportion" (RCW 77.55.231) is clearly not working to prevent abuses like the singling out of petitioner.

The *Crown Zellerbach* court had also imagined that adequate procedural safeguards were available through judicial review under the administrative procedures act, *Crown Zellerbach*, 92 Wn.2d at 901, but this case proves that supposition false. As the *Anderson* court explained, "the appellate process is to no avail where the statute at issue contains no ascertainable standards . . . .". *Anderson*, 70 Wn. App. at 81.

The *Crown Zellerbach* holding was also premised on the notion that "appropriate standardized technical provisions, with minor variation,

generally remain the same for hydraulic projects" and "standard provisions were adopted by policy of the directors". 92 Wn.2d at 898. But the presence of general rules cannot save the unbridled discretion that saw the same biologist issue completely different restrictions for two immediately-adjacent mining operations.

This Court should follow modern precedent like *JAM Golf, LLC* and find that a statutory scheme providing "no guidance as to what degree of preservation short of destruction is acceptable . . . violates property owners' due process rights". *JAM Gold, LLC*, 969 A.3d. at 52.

3. At the Least, a Heightened Standard of Review Should Apply in Judicial Review of Hydraulic Permitting Decisions.

If RCW 77.55 is constitutional, this Court should shift the burden of proof to the permit writer to justify the restrictions. *Cf., e.g., Pentagram Corp. v. City of Seattle,* 28 Wn. App. 219 (1981) ("when a city council exercises adjudicatory administrative discretion in denying a permit under a section of a building code that contains general as compared to specific standards, a presumption of reasonableness does not attach to its decision"). This is especially true where, as here, the Department provided no specific findings concerning its refusal to extend the in-water work times, in violation of RCW 77.55.021(8).

The Court of Appeals held that WAC 371-08-485 placed the burden upon petitioner, though that rule obviously cannot control burdens in judicial review, and further that he should have the burden of proof because of superior information as to where he proposed to mine. (A26-27.) Again, the Court ignored the evidence that petitioner had designated the stream segment in his application and explained with expert testimony that prospecting was an "iterative, intuitive process" where more precise stream locations could not be specified in advance. (CP167:25-168:2, CP115-116.) No Washington citizen will dare to participate meaningfully in regulatory processes if they may be singled out and harassed on a record as flimsy as that here; burden shifting could provide at least some protection short of striking the statute down.

4. The Permit Restrictions Were Unduly Restrictive.

In 1997, the Legislature declared that

> "small scale prospecting and mining: (1) Is an important part of the heritage of the state; (2) provides economic benefits to the state; and (3) can be conducted in a manner that is beneficial to fish habitat and fish propagation. Now, therefore, the legislature declares that small scale prospecting and mining *shall be regulated in the least burdensome manner* that is consistent with the state's fish management objectives and the federal endangered species act." (1991 Wash. Laws Chap. 415, § 1; emphasis added.)

Where, as here, the undisputed evidence showed that all risk could be eliminated by simply restricting operations in pocket gravels, it was arbitrary and capricious for the Department to refuse such regulation.

The Court of Appeals simply ignored the Legislative command, stating that "there is no statutory requirement that the WDFW must insert provisions in a permit that minimize impact". (A24.) This holding eviscerates the statutory directive in RCW 77.55.231 to craft permit conditions proportional to impact.

5. The Misuse of "Cumulative Impact" Analysis Is a Growing Problem that Demands Correction.

The biologist took the position that he was lawfully entitled to deny appellant's request for an extension of mining time even if the resulting impact was too small to measure, because if he allowed petitioner a variance, then "every other miner should be allowed to do the same thing" —which might have an impact. (CP254:17-22.) This was irrational because the Department retains the discretion to condition or deny future permits to address future effects. For the Department to restrict an applicant based on speculation concerning future applications imposes restrictions "out of proportion to the impact of the proposed project" in violation of RCW 77.55.231(1). It adds imaginary impacts from imaginary projects that may never occur.

This pernicious misuse of cumulative impact theory is a growing problem in Washington environmental decisionmaking. *See, e.g., Okanogan Wilderness League v. Ecology*, PCHB No. 13-146, Order on Motions for Summary Judgment, at 38 (PCHB July 31, 2014); *see also*

Postema v. PCHB, 142 Wn.2d 68, 131 n.19 (Sanders, J., dissenting; noting issue not addressed by majority). The PCHB and Washington regulatory officials manifestly need guidance to stop denying permits because of the "cumulative impact" of assuming they might grant more permits in the future. The Court of Appeals and Superior Court declined to address this issue.

6. The Department's Two-Week Limit with "Hole by Hole" Review Is Irrational and Unconstitutional.

After petitioner appealed the permit denial, Mr. Meyer wrote a letter in which he stated that if additional information were provided, he "may" be able to extend the work window. (RX6.) Petitioner, however, was entitled to a permit decision lawfully made on the basis of the "best available information" (PX36, at 4), which he did not get.

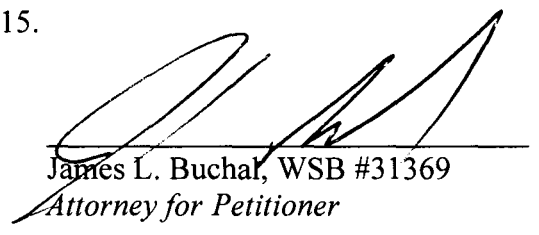
The "prospecting hole-by-prospecting hole" review process is irrational, obviously unnecessary, and unconstitutional. It is irrational because conditions in the stream change constantly, making it impossible to identify any precise hole location as permanently suitable for mining. (CP113-115; CP130:11-13.) It is unnecessary because Mr. Meyer allowed the neighboring miners to excavate *anywhere* "for approximately 1.5 miles to the confluence of Fortune Creek". (PX78.) The Court of Appeals' characterization of this decision as involving a more site-specific determination (A38) is contrary to the record.

The approach is even unconstitutional because it unreasonably bars mineral development on federal mining claims such as those involved here. (*See* PX42-45; CP131.) A two-week limit is a *de facto* ban. (CP119:10-11.) No one can effectively prospect for minerals if each test hole requires site-specific approvals with months of delay between each hole. (*See* CP115-116); *see also* A5 ("like other miners, Mr. Beatty planned to put down sample holes until he reached a satisfactory site")). Unless the Department's staggering abuses of RCW 77.55 are corrected, its regulatory implementation clearly stands as an obstacle to the accomplishment of the full purposes and objectives of Congress". *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 592 (1980); *see also South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998) (striking down county ban on new or amended surface mining permits).

F. CONCLUSION

For the foregoing reasons, the Court of Appeals decision should be reversed and RCW 77.55 declared unconstitutional, or, in the alternative, the case should be remanded for development of lawful permit conditions.

DATED: February 12, 2015.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BRUCE M. BEATTY, Appellant, v. WASHINGTON FISH and WILDLIFE COMMISSION, WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, AND POLLUTION CONTROL HEARINGS BOARD, Respondents.	)	No. 31409-0-III PUBLISHED OPINION

KNODELL, J.* — Bruce Beatty applied for a hydraulic mining permit to operate a suction dredge on Fortune Creek outside of the work window dates established by the Washington Department of Fish and Wildlife (WDFW) Fish and Gold Pamphlet. The WDFW granted the permit, but included a condition that limited suction dredging to the dates within the work window. The WDFW informed Mr. Beatty that his request to operate a suction dredge outside the work window could still be granted if he provided

* Judge John D. Knodell is serving as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

site specific information that allowed the WDFW to assess the impact to fish life. Mr. Beatty refused and appealed the permit decision to the Pollution Control Hearings Board (PCHB). The PCHB upheld the terms of the permit, concluding that WDFW's decision was reasonably designed to protect fish life and not out of proportion to the proposed dredging activity given the lack of information provided by Mr. Beatty. The superior court upheld the PCHB's decision. Mr. Beatty appeals. We find no error with the PCHB's decision to uphold the permit. We affirm the decision of the superior court.

FACTS

The WDFW regulates placer mining statewide.[1] In 2009, the WDFW instituted the current placer mining regulations in the Gold and Fish Pamphlet (Pamphlet). According to the Pamphlet, placer miners are allowed to use certain small handheld tools without restriction. However, miners using motorized equipment, such as suction dredges, are restricted to specific dates established for individual streams throughout the state. Miners wishing to prospect outside the allowed mining methods or dates established in the Pamphlet can apply to the WDFW for an individual hydraulic project approval (HPA) permit.

[1] Placer mining involves searching for gold that has moved away from its original host rock, migrated downstream, and settled into the streambed sediment.

The specific dates, known as work windows, are developed to protect fish spawning activity and egg development through the emergence of juvenile fish called fry. The timing of the work window for each stream is based on the spawning habits of fish species residing in the stream. An important spawning habit is the creation of nests, called redds. A redd is formed when a spawning female fish excavates a hole in small, loose gravel on the stream bed and deposits eggs. After a male fish fertilizes the eggs, the female pushes gravel over the eggs. The eggs develop in the gravel.

Suction dredging mining disturbs gravel in a stream bed, although miners tend to target packed gravel as opposed to the loose gravel used by fish. A suction dredge uses a gas engine and suction hose to remove material from the stream bed. The material is then deposited in a sluice box on a floating platform where the riffle box captures heavier gold. The remaining material is discarded from the unit and returned to the stream. While operating the suction dredge, the miner is in the water lying prone on or near the stream bed with a diving mask, directing the hose to the desired material. Miners pay close attention to the material entering the hose to prevent items from clogging the flow and slowing the process.

Typically, the best gold is found near or on bedrock. Miners using a suction dredge commonly test the productivity of an area by creating a sample hole down to the

bedrock. If there are no viable signs of gold, the miner will move to another location. However, because the dredge equipment is heavy, miners pick a spot that gives them the most opportunities for alternatives.

Generally, areas ideal for suction mining are not ideal for fish redds. Suction dredge miners generally do not consider loose streambed material favorable for gold deposits. However, both placer miners and redd building fish like stream material that collects on the back side of large boulders and rocks.

Mr. Beatty sought an HPA permit to operate a suction dredge on Fortune Creek outside the work window. Fortune Creek is a high elevation, high velocity tributary to the Cle Elum River. While the main stem of the creek is approximately 2.5 miles, the creek also has a north fork, a south fork, and a number of smaller tributaries. The creek passes through federally owned forest land and is open to recreational fishing.

Different portions of the Fortune Creek system exhibit distinct habitat characteristics for fish. Some areas have boulders with limited spawning areas, and other areas have more gravel and less velocity, creating a better spawning environment. Several species are known to reside in the creek, including spring cutthroat trout, rainbow trout, fall brook trout, and whitefish. Additionally, bull trout redds and limited numbers of bull trout have been observed in Fortune Creek.

For Fortune Creek, the work window for suction dredging is August 1 through August 15. WDFW based the start date on rainbow trout and steel head spawning in similar streams in the vicinity of Fortune Creek. The ending date is based on the observation of bull trout redds in the creek. Although discovery of the redds occurred in September, WDFW concluded that the redds were likely constructed in August.

In Mr. Beatty's HPA permit, he sought to use suction dredging and powered highbanking tools on Fortune Creek anywhere within the Fortune Creek watershed at any time within the five year period between May 1, 2011, and September 30, 2016, with suction dredging occurring between the months of May and September.

Mr. Beatty intended to dredge 60 linear feet of stream bed each year. He planned to use either a three- to four-inch suction intake nozzle, or if allowed, a six-inch suction intake nozzle. Like other miners, Mr. Beatty planned to put down sample holes until he reached a satisfactory site. If he found a deposit, he possibly would use a highbanker in conjunction with the suction dredge.[2]

The WDFW issued Mr. Beatty a two year HPA permit and granted his request to use a gasoline-powered highbanker outside of the work window in the Pamphlet. However, the WDFW limited suction dredging to the two-week work window. In a letter

[2] A highbanker processes material at a mining location away from the stream.

to Mr. Beatty, the WDFW explained that it granted the permit for the highbanker but wished to conduct a site visit to evaluate the impact that the prospecting activities had on fish life in the relatively small stream. It also stated that it could not approve the suction dredging request because Fortune Creek had both spring and fall spawning fish, and eggs from these fish could be found in the gravel before and after the approved work window. Nevertheless, the WDFW said that permit approval for suction dredging was still a possibility for Mr. Beatty in Fortune Creek. The letter continued, "'[I]f 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 of the standard work window.'" Clerk's Papers (CP) at 57.

Mr. Beatty chose not to provide site specific information to WDFW after receipt of the letter. He did not believe that identifying particular dredging locations on the stream would be meaningful because conditions change each year. He also declined WDFW's offer to make a site visit and discuss measures that could be added to the permit to protect the fish species spawning in Fortune Creek.

Mr. Beatty appealed the decision to the PCHB. An administrative hearing was held on the matter. Mr. Beatty contended that the condition restricting suction dredging

to the work window was unreasonable because it did not serve the purpose of protecting fish life as required by RCW 77.55.021.

Mr. Beatty presented evidence in an attempt to establish that the restriction was not needed because there was a low likelihood that his operation would harm fish life in Fortune Creek. Dr. Robert Crittenden, a biometrician and fish biologist, testified that the chance of a suction dredge miner encountering a redd on Fortune Creek was miniscule. Dr. Crittenden did not prepare a formal or detailed statistical analysis of potential harm to redds or the likelihood of encountering redds during spawning season. However, he presented a "back of the envelope" calculation of the statistical likelihood of a suction dredge miner encountering a redd on Fortune Creek. CP at 290. Dr. Crittenden's calculation used the size of the entire watershed area, anywhere between 5 and 10 miles, with Mr. Beatty mining 60 feet of stream anywhere in the watershed. By estimating the number of redds and assuming the redds were randomly located, Dr. Crittenden estimated that the probability of encountering a redd was anywhere between one in ten thousand and one in a million. Dr. Crittenden stated that the probability was zero if miners and fish preferred different areas of the creek. Even then, Dr. Crittenden reasoned that harm to fish eggs was of little importance to protecting fish life because the majority of the eggs die under natural causes.

Dr. Crittenden admitted that his personal observation of the creek was very limited. He stated that he observed the top ford of the creek once, but never visited the main stem of the creek. His conclusion that only a small portion of the creek was suitable redd habitat was based on the reports of others.

Mr. Beatty testified that he would not encounter any redds because he avoids the type of areas that they are located. He said that he had never seen or stumbled across a redd. When asked what a redd looks like, Mr. Beatty gave a description of typical color, size, and location, but could not answer more specific questions. Mr. Beatty said that he works underwater close to the suction nozzle, so if he encounters a redd, he could move the nozzle away and take his equipment elsewhere.

Mr. Beatty testified that he felt he was discriminated against in connection with the permit because other miners were getting increased work windows for suction dredging in other waterways in Washington. Mr. Beatty said that he was involved with the Pamphlet rule making process, and that the process was not smooth and harmonious. He stated that in one meeting, Perry Harvester repeatedly interrupted Mr. Beatty's wife while she tried to make a comment. Mr. Harvester's boss apologized for the incident.

WDFW maintained that the decision on Mr. Beatty's permit was based on the information that he provided. WDFW biologists William Meyer and Mr. Harvester

testified that WDFW refused to extend the work window for suction dredging because of the lack of information about where Mr. Beatty would prospect. Mr. Meyer said that he could not determine the risk to the Fortune Creek area because Mr. Beatty failed to give him the information he needed to calculate quantitative impact.

Mr. Harvester testified that the purpose of the restriction on Mr. Beatty's permit was the protection of fish life. Similarly, Mr. Meyer stated that his job was to write a permit that protects fish life, including eggs, fry and adults. He felt that he accomplished this purpose with Mr. Beatty's permit. He limited Mr. Beatty to the standard work window for suction dredging because Mr. Beatty would not discuss other options for the permit. However, he believed that there were areas where Mr. Beatty would have been approved to mine.

As for fish life in Fortune Creek, Mr. Meyer testified that the creek is a good fish habitat and holds a number of different species of fish. Mr. Meyer personally observed the fish in the river during night snorkels. While he never witnessed a bull trout, he read reports that they were in the creek. The WDFW presented fish surveys of Fortune Creek that noted the presence of bull trout and other fish.

Mr. Meyer testified that there were several areas on Fortune Creek that were suitable for redds, depending on the size of the fish. These areas include pools on the

back side of large boulders suitable for placer mining. Mr. Meyer explained that the fish in Fortune Creek spawn primarily in concentrated areas, which if hit, would suffer a catastrophic impact.

Also, Mr. Meyer testified that a trained biologist would have difficulty spotting redds before they are dug into. He described the redds found in high elevation streams as very tiny eggs, approximately the size of BBs. Mr. Harvester used pictures of redds in streams to demonstrate the difficulty in spotting them.

The WDFW presented evidence of the impact of running eggs through a suction dredge. Eggs in their first stage of development that are caught in suction have a mortality rate of nearly 100 percent. The mortality rate decreases significantly for eggs in their second stage. However, when eggs develop into sac fry, the mortality rate jumps up again to approximately 83 percent. In addition, eggs that survive the suction dredge are deposited on the streambed without cover, placing the eggs in extreme danger from predators and in an environment unsuitable for development.

In contrast to Dr. Crittenden's testimony, Mr. Harvester testified that protecting redds is very important in developing fish populations. Furthermore, protecting redds of later emerging fish is important for genetic reasons. Redds from early-producing fish

could be wiped out by a single flood event. However, redds produced after the flood event would still have a chance to survive.

Mr. Harvester did not agree that he had a personal conflict with Mr. Beatty, and that his statements to Mr. Beatty's wife during the meeting were nothing more than a request for her to sit down if she did not have a question regarding the rules. Mr. Harvester said he played a limited role in processing Mr. Beatty's permit.

The PCHB limited review of Mr. Beatty's arguments to those that addressed the WDFW's actions in the permit approval process. The PCHB found the permit review proceeding was not the appropriate vehicle for challenging the administrative rules the WDFW adopted and incorporated into the Pamphlet. For instance, the PCHB determined that Mr. Beatty's argument that fish protection should only be conducted on the resource level, rather than safeguarding all eggs and fish, is an attack on the regulations governing the work window and not a justification for an individual extension of the rules based on site specific information.

The PCHB affirmed the WDFW's permit decision, concluding that the conditions placed on Mr. Beatty's permit were reasonably designed to protect fish life and do not impose restrictions unrelated or out of proportion to the proposed dredging activity.

Citing RCW 77.55.021, the PCHB explained that in order for an applicant to obtain an individual HPA permit extending the duly adopted timing window, the applicant must provide information showing that the requested activity would not harm fish life or habitat based on the conditions specific to the operation or conditions specific to the stream involved. The PCHB concluded that Mr. Beatty, as the applicant, failed to provide the information necessary to fully evaluate the impact of extending a duly adopted work window. He did not identify practices he would employ to avoid redds or describe any conditions on segments of Fortune Creek that might reduce the prospect of harm to redds. He refused to provide any information to the WDFW about his prospecting plans beyond his desire to suction dredge anywhere in the Fortune Creek watershed between May 1 and September 30 each year. Nor did he make an effort to gather information that would justify special exceptions from the established regulations for his prospecting in Fortune Creek. The PCHB explained that Mr. Beatty cannot expect to obtain approval of an HPA to relax a previously adopted regulation for protecting fish without providing any grounds or substantiation for the deviation from the regulation.

The PCHB discredited Dr. Crittenden's testimony. It found Dr. Crittenden's statistical approximations were not based on valid assumptions for Fortune Creek. The approximations did not consider site specific operations or stream conditions when

estimating the harm to fish. The same type of statistics applied to any stream with spawning activity. Furthermore, a statistical calculation based on the entire area within the watershed was again just a further attack on the WDFW policy of establishing a work window to protect fish and eggs.

The PCHB also discredited Mr. Beatty's testimony that he could avoid harm by stopping the dredge immediately if he observed a redd. The PCHB found that it was unlikely that Mr. Beatty could see a redd before sucking it up into a dredge. The PCHB relied on evidence that redds are difficult to identify in a high velocity small stream like Fortune Creek and on evidence of Mr. Beatty's inexperience and lack of training in identifying eggs. The PCHB also found that stopping the dredge after encountering a redd would not avoid harm to eggs already sucked into the dredge and would decrease the number of fish emerging. The PCHB recounted evidence that many of the eggs that are sucked into a dredge are killed directly and the ejected eggs are deposited into a setting that does not allow for further development of fish.

The PCHB also recognized that the Pamphlet already requires miners to stop dredging if they encounter a redd. The PCHB reasoned that if stopping dredging activity when eggs are encountered is adequate protection, then the Pamphlet would not have identified specific work windows at all. The court concluded that Mr. Beatty's argument

was another improper attack on WDFW regulations rather than a justification for relaxed restrictions based upon the specific conditions on Fortune Creek.

In affirming the permit condition, the PCHB concluded that Mr. Beatty failed to show that the condition on his permit was not reasonably designed to protect fish life, citing RCW 77.55.021. The dredging dates Mr. Beatty requested in the permit were the period of time that WDFW had determined through the Pamphlet rulemaking process that fish redds would be present in Fortune Creek. The PCHB concluded that without any other information from Mr. Beatty on specific plans, the WDFW was not unreasonable in refusing to allow unrestricted suction dredging in Fortune Creek during the time periods that encompassed spawning and egg development.

The PCHB also concluded that Mr. Beatty failed to show that the condition placed on the permit to optimize fish life was out of proportion to the impact of the proposed project, citing RCW 77.55.231(1). The court found that limiting work to the work window was a method of avoiding direct harm to fish, rather than a directive to enhance or improve existing fish habitat. Also, the condition was specially designed to address the harm to redds and eggs posed by the suction dredging activity in question and did not extend to enhancing habitat features or repairing damage caused by other persons or prior activity. Because Mr. Beatty did not include information in his application to support a

deviation from the work window, the WDFW acted reasonably in limiting suction dredging to the time frame set forth in the Pamphlet.

Finally, the PCHB concluded that the WDFW's decision on the permit was not the result of personal animosity toward Mr. Beatty. The PCHB determined that Mr. Beatty did not demonstrate that he received unfair treatment when compared to other miners. Other miners obtained extensions based on information specific to their proposed site. The WDFW provided Mr. Beatty the same opportunity to provide additional site specific information and offered to work with him to develop limits that would protect fish. The PCHB found that the WDFW was willing to vary the work window timing standards based on specific facts. Instead, Mr. Beatty chose to stand on his asserted right to mine without limitation.

Mr. Beatty appealed the PCHB's decision to the Kittitas County Superior Court.[3] The court affirmed the PCHB's final order. The court found that substantial evidence supported the factual findings, that the statutory scheme of Washington's regulations on small scale mineral prospecting and mining is neither unconstitutionally vague nor preempted by federal law, and that the final order did not erroneously apply or interpret

[3] Mr. Beatty amended his petition for review to add a challenge to the Pamphlet rules. Later, the parties stipulated to bifurcate the rule challenge. The rule challenge is not a part of the appeal before this court.

the law. The court's decision focused on Mr. Beatty's refusal to provide site specific information despite WDFW's request. The court noted that the most critical fact in the proceedings was Mr. Beatty's refusal to meet and discuss his specific site information.

Mr. Beatty appeals the decision of the PCHB. He contends that (1) the PCHB misinterpreted the state hydraulic mining code when imposing the conditions, (2) the PCHB's order is not supported by substantial evidence, (3) the conditions on the permit conflict with federal mining law, (4) the hydraulic mining code is unconstitutionally vague, (5) WDFW discriminated against him when it imposed the condition, and (6) the WDFW relied on an invalidly adopted rule to impose the condition.

ANALYSIS

The Washington Administrative Procedure Act, chapter 34.05 RCW, provides for judicial review of PCHB's orders. RCW 34.05.570; *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). When reviewing an agency's action, this court sits in the same position as the superior court. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The party challenging the agency action has the burden of demonstrating the invalidity of the action. RCW 34.05.570(1)(a). The challenging party must show that he or she has been substantially prejudiced by the agency action. RCW 34.05.570(1)(d). Additionally, reviewing courts

shall grant relief only if the challenging party shows that the agency's order is invalid for one or more of the grounds enumerated in RCW 34.05.570(3)(a)-(i). We address Mr. Beatty's challenges under RCW 34.05.570(3) individually.

Interpretation of the Hydraulic Code. Mr. Beatty contends that the WDFW misinterpreted and misapplied the hydraulic permitting statute. Relief may be granted if this court finds that the PCHB has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Whether the PCHB has erroneously interpreted or applied the law is reviewed under the error of law standard. *Cascade Court Ltd. P'ship v. Noble*, 105 Wn. App. 563, 566-67, 20 P.3d 997 (2001). When applying the error of law standard, the court may substitute its own judgment for that of the PCHB, although it must give substantial weight to the agency's view of the law it administers. *Id.* at 567. Regulations that are consistent with the legislative scheme will be upheld. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 914 P.2d 750 (1996) (quoting *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wn.2d 314, 321, 771 P.2d 335 (1989)).

Relief can also be granted if the reviewing court finds the agency order is arbitrary and capricious. RCW 34.05.570(3)(i). An agency order is arbitrary or capricious if it is willful and unreasoning and disregards or does not consider the facts and circumstances

underlying the decision. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (2009) (quoting *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000)). A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on honest and due consideration, even if we disagree with it. *Id.* at 421-22 (quoting *Bowers*, 103 Wn. App. at 596).

In 1997, the Washington legislature declared that small scale mineral prospecting and mining

> (1) [i]s an important part of the heritage of the state; (2) provides economic benefits to the state; and (3) can be conducted in a matter that is beneficial to fish habitat and fish propagation. Now, therefore, the legislature declares that small scale prospecting and mining shall be regulated in the least burdensome manner that is consistent with the state's fish management objectives and the federal endangered species act.

LAWS OF 1997, ch. 415, §1.

The legislature tasked the WDFW to adopt rules applicable to small scale prospecting and mining in cooperation with the recreational mining community and other interested parties. RCW 77.55.091(2). The WDFW included these regulations on mineral prospecting as part of the hydraulic code rules, WAC 220-110. *See* WAC 220-110-200 to -206. The hydraulic code provides protection for fish life through the development of a statewide system of rules for hydraulic projects or other work that

will use, divert, obstruct, or change the natural flow or bed of state waters. WAC 220-110-010. Implementation of the hydraulic code rules is necessary to minimize project specific and cumulative impacts to fish life. WAC 220-110-010.

For small scale mining, the legislature required WDFW to distribute a pamphlet describing the methods of mineral prospecting consistent with WDFW's adopted rules. RCW 77.55.091(3). "The pamphlet shall be written to clearly indicate the prospecting methods that require a permit under this chapter and prospecting methods that require compliance with the pamphlet." RCW 77.55.091(3). The Pamphlet contains regulations that a person must follow when mineral prospecting and placer mining. WAC 220-110-200(1).

A person may request an exception to the Pamphlet by applying for an individual HPA permit. WAC 220-110-200(2). To obtain an individual permit, a person must submit a written application containing general plans for the overall project, complete plans and specifications for the proposed construction or work within the ordinary high water line in freshwater, and complete plans and specifications for the proper protection of fish life, among other requirements. WAC 220-110-030; *see also* RCW 77.55.021(2)(a)-(c).

The only ground upon which approval of a permit may be denied or conditioned is the protection of fish life. Former RCW 77.55.021(3)(a) (2010). If the WDFW denies approval of a permit, it shall provide the applicant with a written statement of the specific reasons why and how the proposed project would adversely affect fish life. Former RCW 77.55.021(4). "An HPA shall be denied when, in the judgment of the [WDFW], the project will result in direct or indirect harm to fish life, unless adequate mitigation can be assured by conditioning the HPA or modifying the proposal." WAC 220-110-030(14).

Approval of a permit may not be unreasonably withheld or unreasonably conditioned. Former RCW 77.55.021(3)(a). "Conditions imposed upon a permit must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project." RCW 77.55.231(1).

The WDFW mitigation policy provides, "WDFW shall determine the project impact, significance of impact, amount of mitigation required, and amount of mitigation achieved, based on the best available information, including the applicant's plans and specifications. For large projects with potentially significant impacts, this will be based

on review of studies approved by WDFW." Ex. A-36 at 4. A similar but lengthier definition of "mitigation" can be found in WAC 220-110-020(66).

Mr. Beatty makes several challenges to the WDFW's interpretation of the statutory scheme governing his hydraulic mining permit. First, Mr. Beatty contends that the PCHB misinterpreted the legislative mandate to protect fish life as reflected in RCW 77.55.021. He contends that the WDFW interpreted the mandate to mean that every fish egg must be protected when issuing a permit under the hydraulic code, and used this interpretation as a basis to deny his request to suction dredge outside the work window.

Contrary to Mr. Beatty's assertion, protection of every egg is not the interpretation adopted by the WDFW or the PCHB. The WDFW biologists who testified did not advocate for every egg, but recognized that protection of eggs must be based on the impact the eggs have on the fish population. As stated by Mr. Harvester, "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 at 179.

WDFW's policy to protect fish life in general is reflected in the creation of work windows for mining. Work windows 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. The

establishment of a work window contemplates some harm to fish eggs and fish life that develop outside of the specified dates. The work window provides a baseline measure of protection without any need for further regulatory control and does not contemplate protection of every egg. Thus, limiting Mr. Beatty to the work window did not evidence an interpretation by WDFW or PCHB that every egg must be protected.

Second, Mr. Beatty contends the PCHB wrongly applied RCW 77.55.231, which requires the WDFW to develop permit conditions in proportion to the impact of the proposed project. Mr. Beatty argues that the WDFW was required to determine the specific impact of his project before imposing conditions. Instead of following the statute and policy, Mr. Beatty contends that PCHB allowed the WDFW to forego presenting testimony on the proposed impact and instead concluded that Mr. Beatty was responsible for providing the information.

The PCHB did not err in its interpretation or application of RCW 77.55.231 when deciding that WDFW's permit decision was correct. RCW 77.55.231 states that the WDFW is responsible for assuring that permit conditions that attempt to optimize conditions for fish life are not out of proportion to the impact of the proposed project. The WFDW presented testimony at the hearing justifying the imposition of the condition. The WDFW judged the impact of Mr. Beatty's project by considering the specifications

for the proposed construction and the proper protection of fish life. *See* RCW 77.55.021(2). Mr. Beatty's request was to suction dredge outside of the work window in Fortune Creek with no time or place restrictions. The WDFW determined that dredging outside of the work window was harmful for fish life when it developed the Pamphlet. Thus, without information in Mr. Beatty's application explaining why he would qualify for an exception to the work window, imposing a permit condition in accordance with the Pamphlet is not out of proportion to the impact of the project.

Furthermore, neither RCW 77.55.231, nor the permit application process in RCW 77.55.021, nor the hydraulic mining code in WAC 220-110 require the WDFW to quantify the precise likelihood of impacts to fish life before imposing conditions. Instead, Mr. Harvester testified that risk outside the work window is based on a biologist's observations in conjunction with specific site and operation information provided to the WDFW. Again, Mr. Beatty provided no specific site information to the WDFW, so there was no basis to impose conditions other than those adopted in the Pamphlet. There is no misinterpretation of RCW 77.55.231.

Next, in a related issue, Mr. Beatty contends that the PCHB and WDFW failed to obey the command of the legislature to utilize the least burdensome form of regulation.

Mr. Beatty maintains that the WDFW needed to insert provisions in his permit to minimize impacts rather than denying his request to work outside of the work window.

While legislative policy advocates for the least burdensome regulations, there is no statutory requirement that the WDFW must insert provisions in his permit that minimize impact. Also, there is no reason to conclude that other provisions were available to Mr. Beatty based on the information provided in his permit. Suction dredging in Fortune Creek is harmful to fish life when it occurs outside of the work window. To minimize impact, WDFW prohibited suction dredging during this period. If other less burdensome regulations were available to minimize impacts, they would have been included in the Pamphlet. Therefore, the PCHB did not misinterpret the permitting scheme by failing to require the WDFW to add minimizing impact provisions to Mr. Beatty's permit.

Last, Mr. Beatty contends that the PCHB interpreted an extra obligation into the statutory permit process that requires an applicant to meet with the WDFW and provide more information before a decision can be granted.

The PCHB did not add an extra requirement to the permitting process. Mr. Beatty was required to include site specific information in his permit application according to WAC 220-110-030. The PCHB acknowledged the reason for the denial of Mr. Beatty's permit was his lack of information to substantiate a deviation from the adopted work

window regulations. The WDFW offered to meet with Mr. Beatty to help gather the information needed to assess the application, but did not require the visit. The PCHB's determination that Mr. Beatty needed to provide more information to qualify for an exception to the Pamphlet was not a misinterpretation of the law. The PCHB correctly interpreted the hydraulic code when it affirmed the conditions on Mr. Beatty's permit.

Sufficiency of the Evidence. Mr. Beatty contends that the PCHB's decision to uphold the permit conditions is not supported by the evidence.

The substantial evidence standard in RCW 34.05.570(3)(e) allows this court to grant relief if the agency's decision "is not supported by evidence that is substantial when viewed in light of the whole record before the court." Evidence is substantial if it is in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995) (quoting *Thieu Lenh Nghiem v. State*, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994)). This standard is highly deferential to the agency fact finder. *ARCO Prods. Co. v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). When reviewing the evidence, the court should give substantial deference to the agency's determinations, which are based heavily on factual matters, especially when the factual matters are complex, technical, and close to the heart of the agency's expertise. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373,

396, 932 P.2d 139 (1997). Reviewing courts do not substitute their judgment for that of the decision maker with regard to the credibility of witnesses or the weight granted to conflicting evidence. *William Dickson Co.*, 81 Wn. App. at 411 (quoting *State ex rel. Lige & William B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

The agency's legal conclusions receive de novo review under the error of law standard. *Stuewe v. Dep't of Revenue*, 98 Wn. App. 947, 949, 991 P.2d 634 (2000).

Mr. Beatty asserts that the WDFW failed to present substantial evidence showing impact or risk to fish. And, without any evidence of impact, the PCHB could not uphold the denial of his permit request. Implicit in this argument is the notion the WDFW bears the burden, when denying a permit, of demonstrating some likelihood his proposed mining operation will endanger fish life.

As a preliminary note, it is not appropriate under Washington law to shift the burden of proof under these circumstances to the WDFW as Mr. Beatty suggests. WAC 371-08-485 placed the burden on Mr. Beatty in the administrative hearing and RCW 34.05.570(1)(a) places the burden on Mr. Beatty in this appeal. Furthermore, "[w]hen information necessary to proof 'is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to

make the proof.'" *Cedar River Water & Sewer Dist. v. King County*, 178 Wn.2d 763, 779, 315 P.3d 1065 (2013) (quoting *Jolliffe v. N. Pac. R.R.*, 52 Wash. 433, 436, 100 P. 977 (1909)). Only Mr. Beatty knows the locations of Fortune Creek where he proposes to suction dredge. The burden of proof cannot shift to WDFW. WDFW does not have access to site specific location information of Mr. Beatty's suction dredging as he did not supply it with his initial application or after WDFW requested it.

In his sufficiency of the evidence argument, Mr. Beatty assigns error to several of the PCHB's findings. First, he challenges the findings that bull trout redds and bull trout have been observed in Fortune Creek. This finding is supported by substantial evidence. The WDFW presented records from night snorkeling surveys conducted in July 2000 that documented bull trout in Fortune Creek. Also, the WDFW submitted a draft of a 2000 study by the United States Fish and Wildlife Service that found at least 11 bull trout redds in Fortune Creek. The PCHB relied on these studies in its findings. These studies support the PCHB's finding of bull trout in Fortune Creek.

Second, Mr. Beatty challenges the findings that pertain to his ability to mitigate the damage to fish eggs. He assigns error to the findings that he had no real experience in recognizing redds and that redds were generally difficult to locate. Also, Mr. Beatty

contends that the PCHB should have allowed hearsay declarations from other miners who stated that they never found fish eggs.

These findings are also supported by substantial evidence. Mr. Beatty testified that he had never seen a redd. While he gave a description of a redd, the testimony was based on information Mr. Harvester provided at a stakeholder meeting. Mr. Beatty could not answer when asked specific questions about the color of the eggs and the type of gravel where redds may be found. Mr. Harvester, a WDFW biologist, testified to the difficulties in identifying redds. This testimony of Mr. Beatty and Mr. Harvester sufficiently supports the PCHB's findings. Also, the PCHB did not err by excluding the declarations of the miners. The weight of this evidence would not have had an effect on the PCHB's findings.

Next, Mr. Beatty challenges the PCHB's finding that the WDFW's decision on the application was not the result of personal animosity toward Mr. Beatty. Mr. Beatty contends that the evidence of an altercation between his wife and Mr. Harvester created a bias against Mr. Beatty and led to the denial of his permit.

Substantial evidence supports the finding that the decision on the permit was not based on personal animosity or retaliation. While there is evidence of a brief exchange between Mr. Harvester and Mr. Beatty's wife at a rule development meeting, there is no

evidence that this influenced the permit decision. Mr. Harvester testified that he did not take umbrage against Mr. Beatty. The PCHB found this testimony credible.

Ultimately, Mr. Beatty contends that the evidence as a whole does not show an impact or risk to fish. Mr. Beatty's challenge is based largely on Dr. Crittenden's testimony that there is only a small chance—between one in ten thousand and one in a million—of randomly selecting a spot along the course of the affected river where fish were spawning. Mr. Beatty asserts that on the strength of this testimony there is only an insignificant chance he would mine at the site of a fish habitat. Thus, the WDFW did not demonstrate that his proposed mining operation would likely endanger fish life.

However, the WDFW was not required to find Mr. Beatty's mining operation was likely to harm fish life in order to deny him his permit. It was required to determine, based on the evidence provided, only whether the potential risk of his proposed operation could be adequately managed. The unavailability of sufficient evidence here resulted from Mr. Beatty's failure to submit a complete written application specifying each location of his proposed operation as he was required to do. Mr. Beatty was not going to select mining sites at random, as Dr. Crittenden's testimony suggested. In order to determine the probability that Mr. Beatty would mine at the site of a fish habitat, the WDFW had to know where those sites would be.

The PCHB correctly found that Dr. Crittenden's testimony was too general and not meaningful. Dr. Crittenden's testimony was really nothing more than a demonstration of the futility of making any kind of quantification of the risk of harm posed by Mr. Beatty's proposed operation. In evaluating the kind of evidence presented by Dr. Crittenden, one must ask whether (1) the study was properly designed and (2) whether it was based on sufficient data. The study, a "back of the envelope" calculation on its face did not answer a relevant question. It addressed only the likelihood of randomly selecting a spot on the river where fish were spawning. The relevant question was whether a mining site designated by the applicant (not randomly selected) would coincide with a fish habitat site. Additionally, Dr. Crittenden failed to employ any generally accepted hypothesis testing required to evaluate the significance of his conclusions. *See* D.H. Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH. L. REV. 1333 (1986).

Apparently the only datum available to Dr. Crittenden was the length of the river. Dr. Crittenden was unable to supply any reliable data establishing even the proportion of the river covered by fish habitat. This, coupled with Mr. Beatty's failure to disclose the location of his operations made it impossible to make any meaningful prediction about the likelihood of harm occurring. There was no basis to estimate the degree of possible harm. This lack of data disfavored any kind of statistical proof. Under these circumstances, the

PCHB was entitled both to reject Dr. Crittenden's attempt to quantify the risk of Mr. Beatty's proposed operation and to conclude there was no adequate means of managing that risk. Thus, the PCHB's finding that Dr. Crittenden's testimony was too general and not meaningful is supported by evidence.

Mr. Beatty's challenge to the sufficiency of the evidence fails. Mr. Beatty's application did not include site or operation specific information that would have allowed the WDFW to determine the risks of Mr. Beatty's operation and whether an exception was warranted from the work window. The PCHB correctly concluded that "the conditions WDFW placed on [Mr. Beatty's permit] are reasonably designed to protect fish life and do not impose restrictions unrelated to or out of proportion to the proposed dredging activity." CP at 73-74. The PCHB order affirming the suction dredging condition is supported by substantial evidence.

Conflict with Federal Mining Laws. Mr. Beatty contends that WDFW's regulations are preempted by federal law because they materially interfere with mining on his federal mining claim. Mr. Beatty maintains that the condition on his permit essentially prohibits him from exercising his mining rights.

We may declare an agency rule invalid as applied if it violates constitutional provisions or if it exceeds statutory authority of the agency. RCW 34.05.570(3)(a), (b);

Ass'n of Wash. Bus. v. Dep't of Revenue, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). The validity of an agency rule is reviewed de novo. *Ass'n of Wash. Bus.*, 155 Wn.2d at 437. Similarly, de novo review applies to questions of federal preemption. *Robertson v. Wash. State Liquor Control Bd.*, 102 Wn. App. 848, 853, 10 P.3d 1079 (2000).

The Supremacy Clause in the United States Constitution gives the federal government the power to preempt state law. *Arizona v. United States*, __ U.S. __, 132 S. Ct. 2492, 2500-01, 183 L. Ed. 2d 351 (2012). Preemption can occur in three ways: express preemption, field preemption, and conflict preemption. *Id.* Express preemption occurs when Congress expressly withdraws specified powers from a state through a statutory provision. *Id.* Field preemption occurs when Congress determines that a field of conduct must be regulated by its exclusive governance. *Id.* Conflict preemption occurs when federal and state laws conflict making compliance with both a physical impossibility, or when the challenged state law stands "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 2495 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). Conflict preemption is at issue here, specifically, whether the permit conditions imposed by the WDFW and upheld by the PCHB stand as an obstacle to the purpose of the federal mining laws.

To determine whether the permit condition is preempted, "we must first determine the purposes and objectives of Congress that are embodied in the [Federal Mining Act of 1872, 30 U.S.C. §§ 21-26]. Second, we must determine whether the [condition] stands as an obstacle to the accomplishment of these Congressional purposes." *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1009 (8th Cir. 1998).

The Federal Mining Act provides for the free and open exploration of public lands for valuable mineral deposits. 30 U.S.C. § 22. Generally, the purpose of federal mining regulations is for "the encouragement of exploration for 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." *South Dakota Mining*, 155 F.3d at 1010.

Federal forest service regulations, including the Federal Mining Act and the Multiple Use Mining Act, 30 U.S.C. § 601, do not preempt a general state environmental regulation requiring a permit for operating a mining claim on federal land. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 582-95, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987).

In *Granite Rock*, the California Coastal Act, California Public Resources § 30000, required any person undertaking development in the state's coastal zone to obtain a permit from the coastal commission, including those wishing to exercise federal mining rights. *Id.* at 576. Granite Rock refused to obtain a permit for its limestone mining operation on federal land within the coastal zone. *Id.* at 576-77. Instead, Granite Rock challenged the permit requirement in federal court, contending that the state law permit requirement was preempted by federal law. *Id.* at 577. The United States Supreme Court concluded that the state law permit requirement, as a means of imposing reasonable environmental regulations on mining operations, was not in conflict with federal law and was not preempted on its face. *Id.* at 594.

However, the Court limited the scope of its decision to the facial challenge presented. *Id.* It pointed out that Granite Rock did not argue that the coastal commission placed any particular conditions on the permit that conflicted with federal statutes or regulations. *Id.* at 579-80. Thus, the Court did not approve any future application of the state permit requirement that conflicted with federal law. *Id.* at 594.

This case presents the issue left open in *Granite Rock*. Specifically, whether the condition on Mr. Beatty's permit conflicts with federal law. As the court noted in

Granite Rock, "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impractical." *Id.* at 587.

The condition on Mr. Beatty's permit and the state regulations supporting the condition do not stand as an obstacle to the accomplishment of the federal mining laws. The general environmental mining regulations imposed in the Pamphlet still allow Mr. Beatty to exercise his federal mining rights, albeit with restrictions. The mining restrictions and permit conditions are designed to protect the physical environment for the development of fish life, which is consistent with the Federal Mining Act.

The restrictions in the Pamphlet do not act as a de facto ban on mining. If the allowable mining methods in the Pamphlet are not suitable or economically viable, a miner may request relaxed mining regulations by completing an application with site specific information and specifications for the proper protection of fish life. *See* WAC 220-110-030. As another layer of protection, any condition placed on the permit to optimize fish life cannot be out of proportion to the proposed project. RCW 77.55.231(1). This provision limits the burden that the WDFW can place on exploration for mining valuable minerals. As applied to Mr. Beatty, he may provide the information needed to obtain an exception from the Pamphlet regulations and modify the

conditions imposed on his permit. The mining regulations and the modifiable condition on his permit do not stand as an obstacle to Mr. Beatty's right to mine.

In sum, the condition on Mr. Beatty's permit does not conflict with federal regulations on mineral prospecting. The condition allows for the exploration of public lands for valuable mineral deposits while protecting the physical environment. Furthermore, the efficient and economical extraction of minerals is not obstructed. Mr. Beatty may apply for an exception to the permit conditions and propose a site specific plan that increases his mineral production while protecting fish life.

Constitutional Challenges. Mr. Beatty makes two constitutional challenges to the PCHB's approval of the permit. Mr. Beatty contends that the hydraulic mining permit statute, RCW 77.55.021, is unconstitutionally vague because the statute fails to give the WDFW any guidance on the proper scope of review for a permit application. He also contends that he was subject to unconstitutional discrimination.

Mr. Beatty is incorrect. The hydraulic mining permit statute is not unconstitutionally vague. The statute provides an identifiable standard for denying a permit. Former RCW 77.55.021(3)(a) directs the WDFW that protection of fish life is the only grounds upon which approval of a permit may be denied. The WDFW defined fish as all fish species, including food fish and game fish, at all stages of development of those

species. Former RCW 77.08.010(17) (2009). "Protection of fish life" is defined 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). The statute and definitions provide suitable guidance for the WDFW to deny a permit on the grounds that it endangers the fish population.

Furthermore, the court in *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 900-01, 602 P.2d 1172 (1979) held that the statute delegating authority to WDFW was constitutionally enforceable under the delegation of powers principle. The court found the general standards given in the statute were adequate, "particularly in light of our stated view that environmental factors are not readily subject to standardization or quantification." *Id.* at 900. There is no evidence in the record that would support a conclusion that RCW 77.55.021 was unconstitutional as applied to Mr. Beatty.

Mr. Beatty's relies on *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993) as authority that a precise standard is needed in the environmental context. Mr. Beatty's reliance is misplaced. *Anderson* is not persuasive. The building code regulations in *Anderson* are not comparable to the hydraulic mining code in WAC 220-110. The words used in Issaquah's building code were not technical words

commonly understood within the industry. *Anderson*, 70 Wn. App. at 77. Nor did the regulations involve environmental factors not subject to standardization.

Mr. Beatty contends that the WDFW unconstitutionally discriminated against him because he was not treated the same as other miners downstream who received permits. Mr. Beatty fails to cite legal authority for his argument. Citations to legal authority and reference to relevant portions of the record must be included in support of issues raised on appeal. RAP 10.3(a)(5). "Without adequate, cogent argument and briefing, this court should not consider an issue on appeal." *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). In any case, there is no evidence of disparate treatment. The miners downstream are not similarly situated to Mr. Beatty because they provided site specific information to WDFW to obtain work window extensions. The WDFW offered Mr. Beatty the same opportunity to explore a site specific solution to obtain a permit extension, but Mr. Beatty refused. Mr. Beatty's discrimination claim fails.

The hydraulic mining permit statute is not unconstitutionally vague. Nor did the WDFW discriminate against Mr. Beatty.

Adoption of WDFW's Mitigation Policy. Mr. Beatty contends that the mitigation policy adopted by the WDFW is a "rule" as defined by RCW 34.05.010(16) in

Washington's Administrative Procedure Act, and that the WDFW did not follow prescribed rule-making procedures in adopting a rule.

An agency action constitutes a rule only if it meets the requisite elements in RCW 34.05.010(16). The action must be an agency order, directive, or regulation of general applicability and meet one of the five expressed qualifiers in the definition. RCW 34.05.010(16).

As stated earlier, the WDFW mitigation policy provides, "WDFW shall determine the project impact, significance of impact, amount of mitigation required, and amount of mitigation achieved, based on the best available information, including the applicant's plans and specifications. For large projects with potentially significant impacts, this will be based on review of studies approved by WDFW." Ex. A-36 at 4.

Similarly, "mitigation" in hydraulic permits is defined by rule in WAC 220-110-020(66) and means "actions that shall be required as provisions of the HPA to avoid or compensate for impacts to fish life resulting from the proposed project activity." The definition lists the types of mitigation to be considered and implemented, where feasible, in the following sequential order of preference:

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

WAC 220-110-020(66).

Mr. Beatty neglected to address which of the qualifiers in RCW 34.05.010(16) apply to the WDFW's action in order to classify the internal mitigation policy as a rule. Still, it is clear that the internal mitigation policy is not a new directive to the agency to consider mitigation. The internal policy is a simplified restatement of WAC 220-110-020(66). The much shorter internal mitigation policy simply reiterates the mitigation rule and reminds persons in the WDFW to follow the rule.

In any case, the mitigation policy did not affect Mr. Beatty. The WDFW did not consider mitigation because Mr. Beatty did not submit a mitigation plan to the WDFW or work with them to develop a mitigation plan. Without an influence on the decision, there is no violation.

In conclusion, we find no error with the PCHB's decision on Mr. Beatty's permit. We affirm the decision of the superior court.

Knodell, J.P.T.

WE CONCUR:

Korsmo, J.

Siddoway, C.J.

Washington Constitutional Provisions

ARTICLE I

DECLARATION OF RIGHTS

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

ARTICLE II

LEGISLATIVE DEPARTMENT

SECTION 1 LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington . . .

16 U.S. Code § 1536 - Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S. Code § 1539 - Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538 (a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)

(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met; and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

RCW 77.12.047

Scope of commission's authority to adopt rules — Application to private tideland owners or lessees of the state.

(1) The commission may adopt, amend, or repeal rules as follows:

(a) Specifying the times when the taking of wildlife, fish, or shellfish is lawful or unlawful.

(b) Specifying the areas and waters in which the taking and possession of wildlife, fish, or shellfish is lawful or unlawful.

(c) Specifying and defining the gear, appliances, or other equipment and methods that may be used to take wildlife, fish, or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed.

(d) Regulating the importation, transportation, possession, disposal, landing, and sale of wildlife, fish, shellfish, or seaweed within the state, whether acquired within or without the state.

(e) Regulating the prevention and suppression of diseases and pests affecting wildlife, fish, or shellfish.

(f) Regulating the size, sex, species, and quantities of wildlife, fish, or shellfish that may be taken, possessed, sold, or disposed of.

(g) Specifying the statistical and biological reports required from fishers, dealers, boathouses, or processors of wildlife, fish, or shellfish.

(h) Classifying species of marine and freshwater life as food fish or shellfish.

(i) Classifying the species of wildlife, fish, and shellfish that may be used for purposes other than human consumption.

(j) Regulating the taking, sale, possession, and distribution of wildlife, fish, shellfish, or deleterious exotic wildlife.

(k) Establishing game reserves and closed areas where hunting for wild animals or wild birds may be prohibited.

(l) Regulating the harvesting of fish, shellfish, and wildlife in the federal exclusive economic zone by vessels or individuals registered or licensed under the laws of this state.

(m) Authorizing issuance of permits to release, plant, or place fish or shellfish in state waters.

(n) Governing the possession of fish, shellfish, or wildlife so that the size, species, or sex can be determined visually in the field or while being transported.

(o) Other rules necessary to carry out this title and the purposes and duties of the department.

RCW 77.55.011
Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Bed" means the land below the ordinary high water lines of state waters. This definition does not include irrigation ditches, canals, storm water runoff devices, or other artificial watercourses except where they exist in a natural watercourse that has been altered artificially.

(2) "Board" means the pollution control hearings board created in chapter 43.21B RCW.

(3) "Commission" means the state fish and wildlife commission.

(4) "Date of receipt" has the same meaning as defined in RCW 43.21B.001.

(5) "Department" means the department of fish and wildlife.

(6) "Director" means the director of the department of fish and wildlife.

(7) "Emergency" means an immediate threat to life, the public, property, or of environmental degradation.

(8) "Emergency permit" means a verbal hydraulic project approval or the written follow-up to the verbal approval issued to a person under RCW 77.55.021(12).

(9) "Expedited permit" means a hydraulic project approval issued to a person under RCW 77.55.021 (14) and (16).

(10) "Forest practices hydraulic project" means a hydraulic project that requires a forest practices application or notification under chapter 76.09 RCW.

(11) "Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.

(12) "Imminent danger" means a threat by weather, water flow, or other natural conditions that is likely to occur within sixty days of a request for a permit application.

(13) "Marina" means a public or private facility providing boat moorage space, fuel, or commercial services. Commercial services include but are not limited to overnight or live-aboard boating accommodations.

(14) "Marine terminal" means a public or private commercial wharf located in the navigable water of the state and used, or intended to be used, as a port or facility for the storing, handling, transferring, or transporting of goods to and from vessels.

(15) "Multiple site permit" means a hydraulic project approval issued to a person under RCW 77.55.021 for hydraulic projects occurring at more than one specific location and which includes site-specific requirements.

(16) "Ordinary high water line" means the mark on the shores of all water that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in ordinary years as to mark upon the soil or vegetation a character distinct from the abutting upland. Provided, that in any area where the ordinary high water line cannot be found, the ordinary high water line adjoining saltwater is the line of mean higher high water and the ordinary high water line adjoining freshwater is the elevation of the mean annual flood.

(17) "Pamphlet hydraulic project" means a hydraulic project for the removal or control of aquatic noxious weeds conducted under the aquatic plants and fish pamphlet authorized by RCW 77.55.081, or for mineral prospecting and mining conducted under the gold and fish pamphlet authorized by RCW 77.55.091.

(18) "Permit" means a hydraulic project approval permit issued under this chapter.

(19) "Permit modification" means a hydraulic project approval issued to a person under RCW 77.55.021 that extends, renews, or changes the conditions of a previously issued hydraulic project approval.

(20) "Sandbars" includes, but is not limited to, sand, gravel, rock, silt, and sediments.

(21) "Small scale prospecting and mining" means the use of only the following methods: Pans; nonmotorized sluice boxes; concentrators; and minirocker boxes for the discovery and recovery of minerals.

(22) "Spartina," "purple loosestrife," and "aquatic noxious weeds" have the same meanings as defined in RCW 17.26.020.

(23) "Stream bank stabilization" means those projects that prevent or limit erosion, slippage, and mass wasting. These projects include, but are not limited to, bank resloping, log and debris relocation or removal, planting of woody vegetation, bank protection using rock or woody material or placement of jetties or groins, gravel removal, or erosion control.

(24) "Tide gate" means a one-way check valve that prevents the backflow of tidal water.

(25) "Waters of the state" and "state waters" means all salt and freshwaters waterward of the ordinary high water line and within the territorial boundary of the state.

RCW 77.55.021
Permit.

(1) Except as provided in RCW 77.55.031, 77.55.051, 77.55.041, and 77.55.361, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

(2) A complete written application for a permit may be submitted in person or by registered mail and must contain the following:

(a) General plans for the overall project;

(b) Complete plans and specifications of the proposed construction or work within the mean higher high water line in saltwater or within the ordinary high water line in freshwater;

(c) Complete plans and specifications for the proper protection of fish life;

(d) Notice of compliance with any applicable requirements of the state environmental policy act, unless otherwise provided for in this chapter; and

(e) Payment of all applicable application fees charged by the department under RCW 77.55.321.

(3) The department may establish direct billing accounts or other funds transfer methods with permit applicants to satisfy the fee payment requirements of RCW77.55.321.

(4) The department may accept complete, written applications as provided in this section for multiple site permits and may issue these permits. For multiple site permits, each specific location must be identified.

(5) With the exception of emergency permits as provided in subsection (12) of this section, applications for permits must be submitted to the department's headquarters office in Olympia. Requests for emergency permits as provided in subsection (12) of this section may be made to the permitting biologist assigned to the location in which the emergency occurs, to the department's regional office in which the emergency occurs, or to the department's headquarters office.

(6) Except as provided for emergency permits in subsection (12) of this section, the department may not proceed with permit review until all fees are paid in full as required in RCW 77.55.321.

(7)(a) Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned. Approval of a permit may not be unreasonably withheld or unreasonably conditioned.

(b) Except as provided in this subsection and subsections (12) through (14) and (16) of this section, the department has forty-five calendar days upon receipt of a complete application to grant or deny approval of a permit. The forty-five day requirement is suspended if:

(i) After ten working days of receipt of the application, the applicant remains unavailable or unable to arrange for a timely field evaluation of the proposed project;

(ii) The site is physically inaccessible for inspection;

(iii) The applicant requests a delay; or

(iv) The department is issuing a permit for a storm water discharge and is complying with the requirements of RCW 77.55.161(3)(b).

(c) Immediately upon determination that the forty-five day period is suspended under (b) of this subsection, the department shall notify the applicant in writing of the reasons for the delay.

(d) The period of forty-five calendar days may be extended if the permit is part of a multiagency permit streamlining effort and all participating permitting agencies and the permit applicant agree to an extended timeline longer than forty-five calendar days.

(8) If the department denies approval of a permit, the department shall provide the applicant a written statement of the specific reasons why and how the proposed project would adversely affect fish life.

(a) Except as provided in (b) of this subsection, issuance, denial, conditioning, or modification of a permit shall be appealable to the board within thirty days from the date of receipt of the decision as provided in RCW 43.21B.230.

(b) Issuance, denial, conditioning, or modification of a permit may be informally appealed to the department within thirty days from the date of receipt of the decision. Requests for informal appeals must be filed in the form and manner prescribed by the department by rule. A permit decision that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(9)(a) The permittee must demonstrate substantial progress on construction of that portion of the project relating to the permit within two years of the date of issuance.

(b) Approval of a permit is valid for up to five years from the date of issuance, except as provided in (c) of this subsection and in RCW 77.55.151.

(c) A permit remains in effect without need for periodic renewal for hydraulic projects that divert water for agricultural irrigation or stock watering purposes and that involve seasonal construction or other work. A permit for stream bank stabilization projects to protect farm and agricultural land as defined in RCW 84.34.020 remains in effect without need for periodic renewal if the problem causing the need for the stream bank stabilization occurs on an annual or more frequent basis. The permittee must notify the appropriate agency before commencing the construction or other work within the area covered by the permit.

(10) The department may, after consultation with the permittee, modify a permit due to changed conditions. A modification under this subsection is not subject to the fees provided under RCW 77.55.321. The modification is appealable as provided in subsection (8) of this section. For a hydraulic project that diverts water for agricultural irrigation or stock watering purposes, when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the burden is on the department to show that changed conditions warrant the modification in order to protect fish life.

(11) A permittee may request modification of a permit due to changed conditions. The request must be processed within forty-five calendar days of receipt of the written request and payment of applicable fees under RCW 77.55.321. A decision by the department is appealable as provided in subsection (8) of this section. For a hydraulic project that diverts water for agricultural irrigation or stock watering purposes, when the hydraulic project or other work is associated with stream bank stabilization to protect farm and agricultural land as defined in RCW 84.34.020, the burden is on the permittee to show that changed conditions warrant the requested modification and that such a modification will not impair fish life.

(12)(a) The department, the county legislative authority, or the governor may declare and continue an emergency. If the county legislative authority declares an emergency under this subsection, it shall immediately notify the department. A declared state of emergency by the governor under RCW 43.06.010 shall constitute a declaration under this subsection.

(b) The department, through its authorized representatives, shall issue immediately, upon request, verbal approval for a stream crossing, or work to remove any obstructions, repair existing structures, restore stream banks, protect fish life, or protect property threatened by the stream or a change in the streamflow without the necessity of obtaining a written permit prior to commencing work. Conditions of the emergency verbal permit must be reduced to writing within thirty days and complied with as provided for in this chapter.

(c) The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

(d) The department may not charge a person requesting an emergency permit any of the fees authorized by RCW 77.55.321 until after the emergency permit is issued and reduced to writing.

(13) All state and local agencies with authority under this chapter to issue permits or other authorizations in connection with emergency water withdrawals and facilities authorized under RCW 43.83B.410 shall expedite the processing of such permits or authorizations in keeping with the emergency nature of such requests and shall provide a decision to the applicant within fifteen calendar days of the date of application.

(14) The department or the county legislative authority may determine an imminent danger exists. The county legislative authority shall notify the department, in writing, if it determines that an imminent danger exists. In cases of imminent danger, the department shall issue an expedited written permit, upon request, for work to remove any obstructions, repair existing structures, restore banks, protect fish resources, or protect property. Expedited permit requests require a complete written application as provided in subsection (2) of this section and must be issued within fifteen calendar days of the receipt of a complete written application. Approval of an expedited permit is valid for up to sixty days from the date of issuance. The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

(15)(a) For any property, except for property located on a marine shoreline, that has experienced at least two consecutive years of flooding or erosion that has damaged or has threatened to damage a major structure, water supply system, septic system, or access to any road or highway, the county legislative authority may determine that a chronic danger exists. The county legislative authority shall notify the department, in writing, when it determines that a chronic danger exists. In cases of chronic danger, the department shall issue a permit, upon request, for work necessary to abate the chronic danger by removing any obstructions, repairing existing structures, restoring banks, restoring road or highway access, protecting fish resources, or protecting property. Permit requests must be made and processed in accordance with subsections (2) and (7) of this section.

(b) Any projects proposed to address a chronic danger identified under (a) of this subsection that satisfies the project description identified in RCW 77.55.181(1)(a)(ii) are not subject to the provisions of the state environmental policy act, chapter 43.21C RCW. However, the project is subject to the review process established in RCW77.55.181(3) as if it were a fish habitat improvement project.

(16) The department may issue an expedited written permit in those instances where normal permit processing would result in significant hardship for the applicant

or unacceptable damage to the environment. Expedited permit requests require a complete written application as provided in subsection (2) of this section and must be issued within fifteen calendar days of the receipt of a complete written application. Approval of an expedited permit is valid for up to sixty days from the date of issuance. The department may not require the provisions of the state environmental policy act, chapter 43.21C RCW, to be met as a condition of issuing a permit under this subsection.

RCW 77.55.231

Conditions imposed upon a permit — Reasonably related to project — Minor modifications to plans/work timing.

(1) Conditions imposed upon a permit must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.

(2) The permit must contain provisions allowing for minor modifications to the plans and specifications without requiring reissuance of the permit.

(3) The permit must contain provisions that allow for minor modifications to the required work timing without requiring the reissuance of the permit. "Minor modifications to the required work timing" means a minor deviation from the timing window set forth in the permit when there are no spawning or incubating fish present within the vicinity of the project.

WAC 220-110-200
Mineral prospecting

(1) WAC 220-110-201 through 220-110-206 set forth the rules necessary to protect fish life that apply to mineral prospecting and placer mining projects. A copy of the current *Gold and Fish* pamphlet is available from the department, and it contains the rules which you must follow when mineral prospecting under its authority.

(2) Alternatively, you may request exceptions to the *Gold and Fish* pamphlet by applying for an individual written HPA as indicated in WAC 220-110-031. An HPA shall be denied when, in the judgment of the department, the project will result in direct or indirect harm to fish life, unless adequate mitigation can be

assured by conditioning the HPA or modifying the proposal. The department may apply saltwater provisions to written HPAs for tidally influenced areas upstream of river mouths and the mainstem Columbia River downstream of Bonneville Dam where applicable.

(3) Nothing in these rules relieves a person of the duty to obtain landowner permission and any other necessary permits before conducting any mineral prospecting activity

WAC 220-110-201
Mineral prospecting without timing restrictions.

You may mineral prospect year-round in all waters of the state, except lakes or salt waters. You must follow the rules listed below, but you do not need to have the rules with you or on the job site.

(1) You may use only hand-held mineral prospecting tools and the following mineral prospecting equipment when mineral prospecting without timing restrictions:

(a) Pans;

(b) Spiral wheels;

(c) Sluices, concentrators, mini rocker boxes, and mini high-bankers with riffle areas totaling three square feet or less, including ganged equipment.

(2) You may not use vehicle-mounted winches. You may use one hand-operated winch to move boulders, or large woody material that is not embedded. You may use additional cables, chains, or ropes to stabilize boulders, or large woody material that is not embedded.

(3) You may work within the wetted perimeter only from one-half hour before official sunrise to one-half hour after official sunset.

(4) You may not disturb fish life or redds within the bed. If you observe or encounter fish life or redds within the bed, or actively spawning fish when collecting or processing aggregate, you must relocate your operations. You must avoid areas containing live freshwater mussels. If you encounter live mussels during excavation, you must relocate your operations.

(5) Rules for excavating:

(a) You may excavate only by hand or with hand-held mineral prospecting tools.

(b) You may not excavate, collect, or remove aggregate from within the wetted perimeter. See Figures 1 and 2.

(c) Only one excavation site per individual is allowed. However, you may use a second excavation site as a settling pond. Multiple individuals may work within a single excavation site.

(d) You may not stand within, or allow aggregate to enter, the wetted perimeter when collecting or excavating aggregate.

(e) You must fill all excavation sites and level all tailing piles prior to moving to a new excavation site or abandoning an excavation site. If you move boulders, you must return them, as best as you can, to their approximate, original location.

(f) You may not undermine, move, or disturb large woody material embedded in the slopes or located wholly or partially within the wetted perimeter. You may move large woody material and boulders located entirely within the frequent scour zone, but you must keep them within the frequent scour zone. You may not cut large woody material. See Figure 2.

(g) You may not undermine, cut, or disturb live, rooted woody vegetation of any kind.

(h) You may not excavate, collect, or remove aggregate from the toe of the slope. You also may not excavate, collect, or remove aggregate from an unstable slope or any slope that delivers, or has the potential to deliver, sediment to the wetted perimeter or frequent scour zone. See Figures 3 and 4.

(6) Rules for processing aggregate:

(a) You may stand within the wetted perimeter when processing aggregate with pans; spiral wheels; and sluices.

(b) You may not stand on or process directly on redds or disturb incubating fish life. You may not allow tailings, or visible sediment plumes (visibly muddy water), to enter redds or areas where fish life are located within the bed.

(c) You may not level or disturb tailing piles that remain within the wetted perimeter after processing aggregate.

(d) You must classify aggregate at the collection or excavation site prior to processing, if you collected or excavated it outside the frequent scour zone.

(e) You may process only classified aggregate within the wetted perimeter when using a sluice.

(f) The maximum width of a sluice, measured at its widest point, including attachments, shall not exceed twenty-five percent of the width of the wetted perimeter at the point of placement.

(g) You may process with a sluice only in areas within the wetted perimeter that are composed primarily of boulders and bedrock. You must separate sluice locations by at least fifty feet. You may not place structures within the wetted perimeter to check or divert the water flow.

(h) You may operate mini high-bankers or other concentrators only outside the wetted perimeter. You may only supply water to this equipment by hand or by a battery-operated pump with a screened intake. You may not allow visible sediment or muddy water to enter the wetted perimeter. A second excavation site may be used as a settling pond.

(i) Under RCW 77.57.010 and 77.57.070, any device you use for pumping water from fish-bearing waters must be equipped with a fish guard to prevent passage of fish into the pump intake. You must screen the pump intake with material that has openings no larger than five sixty-fourths inch for square openings, measured side to side, or three thirty-seconds inch diameter for round openings, and the screen must have at least one square inch of functional screen area for every gallon per minute (gpm) of water drawn through it. For example, a one hundred gpm rated pump would require at least a one hundred square inch screen.

(j) You may not excavate, collect, remove, or process aggregate within four hundred feet of any fishway, dam, or hatchery water intake.

(k) You may not disturb existing habitat improvement structures or stream channel improvements.

(l) If at any time, as a result of project activities, you observe a fish kill or fish life in distress, you must immediately cease operations and notify the Washington department of fish and wildlife, and the Washington military department emergency management division, of the problem. You may not resume work until the Washington department of fish and wildlife gives approval. The Washington department of fish and wildlife may require additional measures to mitigate the prospecting impacts.

WAC 220-110-202

Mineral prospecting with timing restrictions.

You may mineral prospect only in the waters, during the times, and with the mineral prospecting equipment limitations identified in WAC 220-110-206. You must follow the rules listed below, and you must have the rules with you or on the job site.

(1) You may use only hand-held mineral prospecting tools and the following mineral prospecting equipment when mineral prospecting with timing restrictions:

(a) Pans;

(b) Spiral wheels;

(c) Sluices, concentrators, rocker boxes, and high-bankers with riffle areas totaling ten square feet or less, including ganged equipment;

(d) Suction dredges should have suction intake nozzles with inside diameters of five inches or less, but shall be no greater than five and one-quarter inches to account for manufacturing tolerances and possible deformation of the nozzle. The inside diameter of the dredge hose attached to the nozzle may be no greater than one inch larger than the suction intake nozzle size. See Figure 1.

(e) Power sluice/suction dredge combinations that have riffle areas totaling ten square feet or less, including ganged equipment, suction intake nozzles with inside diameters that should be five inches or less, but shall be no greater than five and one-quarter inches to account for manufacturing tolerances and possible deformation of the nozzle, and pump intake hoses with inside diameters of four inches or less. The inside diameter of the dredge hose attached to the suction intake nozzle may be no greater than one inch larger than the suction intake nozzle size. See Figure 1.

(f) High-bankers and power sluices that have riffle areas totaling ten square feet or less, including ganged equipment, and pump intake hoses with inside diameters of four inches or less.

(2) The widest point of a sluice, including attachments, shall not exceed twenty-five percent of the wetted perimeter at the point of placement.

(3) The suction intake nozzle and hose of suction dredges and power sluice/suction dredge combinations must not exceed the diameters allowed in the listing for the stream or stream reach where you are operating, as identified in WAC 220-110-206.

(4) You may not use vehicle-mounted winches. You may use one motorized winch and one hand-operated winch to move boulders and large woody material that is not embedded, and additional cables, chains, or ropes to stabilize them.

(5) Equipment separation:

(a) You may use hand-held mineral prospecting tools; pans; spiral wheels; or sluices, mini rocker boxes, or mini high-bankers with riffle areas totaling three square feet or less, including ganged equipment, as close to other mineral prospecting equipment as desired.

(b) When operating any sluice or rocker box with a riffle area exceeding three square feet (including ganged equipment), suction dredge, power sluice/suction dredge combination, high-banker, or power sluice within the wetted perimeter, you must be at least two hundred feet from all others also operating this type of equipment. This separation is measured as a radius from the equipment you are operating. You may locate this equipment closer than two hundred feet if only one piece of equipment is operating within that two hundred foot radius. See Figure 2.

(c) When operating any sluice or rocker box with a riffle area exceeding three square feet (including ganged equipment), suction dredge, power sluice/suction dredge combinations, high-banker, or power sluice outside of the wetted perimeter that discharges tailings or wastewater to the wetted perimeter you must be at least two hundred feet from all others also operating this type of equipment. This separation is measured as a radius from the equipment you are operating. You may locate this equipment closer than two hundred feet if only one piece of equipment is operating within that two hundred foot radius. See Figure 2.

(6) Under RCW 77.57.010 and 77.57.070, any device you use for pumping water from fish-bearing waters must be equipped with a fish guard to prevent passage of fish into the pump intake. You must screen the pump intake with material that has openings no larger than five sixty-fourths inch for square openings, measured side to side, or three thirty-seconds inch diameter for round openings, and the screen must have at least one square inch of functional screen area for every gallon per minute (gpm) of water drawn through it. For example, a one hundred gpm rated pump would require at least a one hundred square inch screen.

(7) All equipment fueling and servicing must be done so that petroleum products do not get into the body of water or frequent scour zone. If a petroleum sheen or spill is observed, you must contact the Washington military department emergency management division. You must immediately stop your activities, remove your equipment from the body of water, and correct the source of the petroleum leak. You may not return your equipment to the water until the problem is corrected. You must store fuel and lubricants outside the frequent scour zone, and in the shade when possible.

(8) You may work within the wetted perimeter or frequent scour zone only from one-half hour before official sunrise to one-half hour after official sunset. If your mineral prospecting equipment exceeds one-half the width of the wetted perimeter of the stream, you must remove the equipment from the wetted perimeter or move it so that a minimum of fifty percent of the wetted perimeter is free of equipment between one-half hour after official sunset to one-half hour prior to official sunrise.

(9) You may not excavate, collect, remove, or process aggregate within four hundred feet of any fishway, dam, or hatchery water intake.

(10) You must not disturb existing habitat improvement structures or stream channel improvements.

(11) You may not undermine, move, or disturb large woody material embedded in the slopes or located wholly or partially within the wetted perimeter. You may move large woody material and boulders located entirely within the frequent scour zone, but you must keep them within the frequent scour zone. You may not cut large woody material.

(12) You may not undermine, cut, or disturb live, rooted woody vegetation of any kind.

(13) Only one excavation site per individual is permitted. However, you may use a second excavation site as a settling pond. Multiple individuals may work within a single excavation site.

(14) You must fill all excavation sites and level all tailing piles prior to working another excavation site or abandoning the excavation site.

(15) You may not excavate, collect, or remove aggregate from the toe of the slope. You also may not excavate, collect, or remove aggregate from an unstable slope or any slope that delivers, or has the potential to deliver, sediment to the wetted perimeter or frequent scour zone. See Figures 3 and 4.

(16) You may partially divert a body of water into mineral prospecting equipment. However, at no time may the diversion structure be greater than fifty percent of the width of the wetted perimeter, including the width of the equipment. You may not divert the body of water outside of the wetted perimeter.

(17) You may use materials only from within the wetted perimeter, or artificial materials from outside the wetted perimeter, to construct the diversion structure by hand. You must remove artificial materials used in the construction of a diversion structure and restore the site to its approximate original condition prior to abandoning the site.

(18) You may process aggregate collected from the frequent scour zone:

(a) At any location if you use pans; spiral wheels; mini rocker boxes; mini high-bankers; or sluices or other concentrators with riffle areas totaling three square feet or less, including ganged equipment.

(b) Only in the frequent scour zone or upland areas landward of the frequent scour zone if you use power sluice/suction dredge combinations, high-bankers, or power sluices with riffle areas totaling ten square feet or less, including ganged equipment; or sluices or rocker boxes that have riffle areas totaling more than three, but less than ten square feet, including ganged equipment. You may not discharge tailings to the wetted perimeter when using this equipment. However, you may discharge wastewater to the wetted perimeter provided its entry point into the wetted perimeter is at least two hundred feet from any other wastewater discharge entry point.

(19) You may process aggregate collected from upland areas landward of the frequent scour zone:

(a) At any location if you use pans; spiral wheels; or sluices, concentrators, mini rocker boxes, and mini high-bankers with riffle areas totaling three square feet or less, including ganged equipment. You must classify the aggregate at the excavation site prior to processing with this equipment within the wetted perimeter or frequent scour zone.

(b) Only at an upland location landward of the frequent scour zone if you use power sluice/suction dredge combinations; high-bankers; power sluices; or rocker boxes. You may not allow tailings or wastewater to enter the wetted perimeter or frequent scour zone.

(c) Within the wetted perimeter or frequent scour zone with a sluice with a riffle area greater than three square feet. You must classify the aggregate at the excavation site prior to processing with a sluice with a riffle area exceeding three square feet.

(20) You may use pressurized water only for crevicing or for redistributing dredge tailings within the wetted perimeter. No other pressurized water use is permitted.

(21) You may conduct crevicing in the wetted perimeter, in the frequent scour zone, or landward of the frequent scour zone. The hose connecting fittings of pressurized water tools used for crevicing may not have an inside diameter larger than three-quarters of an inch. If you crevice landward of the frequent scour zone, you may not discharge sediment or wastewater to the wetted perimeter or the frequent scour zone.

(22) You must avoid areas containing live freshwater mussels. If you encounter live mussels during excavation, you must relocate your operations.

(23) You may not disturb redds. If you observe or encounter redds, or actively spawning fish when collecting or processing aggregate, you must relocate your operations.

(24) If at any time, as a result of project activities, you observe a fish kill or fish life in distress, you must immediately cease operations and notify the Washington department of fish and wildlife, and the Washington military department emergency management division of the problem. You may not resume work until the Washington department of fish and wildlife gives approval. The Washington department of fish and wildlife may require additional measures to mitigate the prospecting impacts.

WAC 220-110-206

Authorized work times and mineral prospecting equipment restrictions by specific state waters for mineral prospecting and placer mining projects.

Mineral prospecting and placer mining under WAC 220-110-202 shall only occur in the state waters, with the equipment restrictions, and during the times specified in the following table.

(1) The general work time for a county applies to all state waters within that county, unless otherwise indicated in the table.

(2) The work time for a listed state water applies to all its tributaries, unless otherwise indicated. Some state waters occur in multiple counties. Check the listing for the county in which mineral prospecting or placer mining is to be conducted to determine the work time for that state water.

(3) Where a tributary is listed as a boundary, that boundary shall be the line perpendicular to the receiving stream that is projected from the most upstream point of the tributary mouth to the opposite bank of the receiving stream. See Figure 1.

(4) Mineral prospecting and placer mining within state waters listed as "submit application" are not authorized under the Gold and Fish pamphlet. A written HPA is required for these state waters.

(5) Mineral prospecting using mineral prospecting equipment that has suction intake nozzles with inside diameters that should be four inches or less, but shall be no greater than four and one-quarter inches to account for manufacturing tolerances and possible deformation of the nozzle is authorized only in the listed state waters, and any tributaries to them, unless otherwise indicated in the table. The inside diameter of the dredge hose attached to the nozzle may be no greater than one inch larger than the nozzle size.

(6) Mineral prospecting using mineral prospecting equipment that has suction intake nozzles with inside diameters that should be five inches or less, but shall be no greater than five and one-quarter inches to account for manufacturing tolerances and possible deformation of the nozzle is authorized only in the listed state waters in the following table. The inside diameter of the dredge hose attached to the nozzle may be no greater than one inch larger than the nozzle size. You may use only mineral prospecting equipment with suction intake nozzle inside diameters of four and one-quarter inches or less in tributaries of these state waters. The inside diameter of the

dredge hose attached to the nozzle may be no greater than one inch larger than the nozzle size.

(TABLE OMITTED)

WAC 371-08-485

Standard and scope of review and burden of proof at hearings.

(1) Hearings shall be formal and quasi-judicial in nature. The scope and standard of review shall be de novo unless otherwise provided by law.

(2) The board shall make findings of fact based on the preponderance of the evidence unless otherwise required by law.

(3) The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders. In other cases, the appealing party shall have the initial burden of proof.

DECLARATION OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On February 12, 2015, I served the foregoing Petition for Review on the parties below addressed as follows:

(X) (First Class US Mail) by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

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