

FILED
COURT OF APPEALS
DIVISION II

No. 42364-2-II

12 JAN 23 AM 9:19

Thurston County Cause No.: 10-2-01236-0

STATE OF WASHINGTON

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

BY
DEPUTY

NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION,
ASSOCIATION OF NORTHWEST STEELHEADERS, PACIFIC
COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
INSTITUTE FOR FISHERIES RESOURCES, and IDAHO RIVERS
UNITED,

Appellants,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondents.

REPLY BRIEF OF APPELLANTS

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Fed-Ex 1/20/12

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Petitioner-Appellants, Northwest Sportfishing Industry Association, *et al.*, have challenged the Washington Department of Ecology's refusal to change Washington's water quality standards to protect the dwindling populations of wild salmon and steelhead ("salmon") in the Columbia River Basin. In their opening brief, Petitioners detailed why Ecology's refusal to amend the cap for Total Dissolved Gas ("TDG"), which currently harms young salmon by limiting the number of fish safely passing the federal dams on the Snake and Columbia Rivers, ignored both the extensive scientific record before the agency and violated state law.

In response, Ecology and Intervenor-Appellees Northwest RiverPartners ignore, downplay, and attempt to distract the Court from the overwhelming evidence in the record and argue instead that Ecology's petition denial is subject to a relaxed standard of review that gives nearly unquestioned deference to the agency's determinations. Moreover, while they continue to argue that Washington's current dissolved gas standard is necessary to protect "other aquatic life" in these rivers, appellees have not—and cannot—identify any native species that would allegedly be harmed by changing the standard. Contrary to the unsupported generalities proffered by Ecology and the Intervenors, the record

demonstrates that Petitioners' requested change would protect salmon and all aquatic life in these rivers.

Ecology was for three years presented with comprehensive evidence demonstrating that amending the TDG standard is necessary. Fisheries management agencies uniformly support changing Washington's standard to make the rivers less deadly for young salmon based on this evidence, and the same evidence led Oregon to change its standard. Ecology has had multiple opportunities to reach a rational decision based on that record, but instead has chosen to irrationally ignore the evidence and its duty to protect migrating juvenile salmon. The fact that its ultimate refusal to strengthen its water quality standards is embodied in a denial of a petition for rulemaking does not insulate an irrational decision from a careful and searching review—which it cannot withstand.

I. ECOLOGY ARBITRARILY DISMISSED EVIDENCE THAT STRENGTHENING WASHINGTON'S STANDARD WOULD BENEFIT SALMON AND PROTECT ALL OTHER AQUATIC LIFE IN THE RIVER.

As Petitioners detailed in their opening brief, the record is replete with 15 years of field data and empirical studies from the Snake and Columbia Rivers demonstrating that a uniform total dissolved gas ("TDG") standard of 120% benefits salmon and poses no additional risk to salmon, resident fish, invertebrates, or other aquatic life. Opening Brief of

Appellants (“NSIA Br.”) at 21-22, 25-32. These studies have evaluated at least 200,000 salmon and steelhead, over 40,000 resident fish, and almost 20,000 invertebrates at a range of different in-river TDG levels. This extensive real-world data uniformly shows that TDG levels of 120% do not pose a significant risk to any aquatic life in the Snake and Columbia Rivers. *See* NSIA Br. at 25-32 (summarizing and discussing studies Ecology has not addressed).¹

Ecology failed to consider these critical field studies or inaccurately characterized their results in its petition denial. *See* NSIA Br. at 25-32. Ecology’s failure to consider these studies sets it apart from every other agency to have considered the issue, including its own sister state agency, the Washington Department of Fish and Wildlife, and its counterpart water quality agency in Oregon. *See infra* at 7-8.

Remarkably, both Ecology and Intervenor do not dispute—or even address—the fact that all of the data gathered in the actual rivers at issue demonstrates that changing the TDG standard would be safe for all aquatic life, and beneficial to salmon. Aside from labeling this evidence

¹ Of over 260,000 individual samples, researchers found (often very minor and non-lethal) signs of Gas Bubble Disease/Trauma (“GBD”) at TDG levels at or above 120% (often much higher than 120%) in less than 2% of the salmon and steelhead, AR 276.18, less than 4% of resident fish, AR 2093.5, 2093.10, and in only 12 individual invertebrates, AR 2093.5, .10; AR 2091.67-2091.70; AR 2101.16-.18; AR 2288-2289 (NMFS summarizing studies showing effects to salmon, resident fish, and invertebrates were rare at levels of 120 percent or below).

“anemic,” *see* Response Brief of Intervenor-Appellee (“Int. Br.”) at 21, 35, or generally asserting that Ecology somewhere considered these studies, *see* Response Brief of Appellee (“Ecy Br.”) at 24-25, appellees still have failed to address the tremendous volume of real-world data gathered after more than a decade of study on the effects of elevated TDG levels on organisms actually present in the Snake and Columbia Rivers.² Indeed, Ecology remarkably (and incorrectly) asserts that there is “an absence of studies evaluating TDG effects on other indigenous aquatic species” in the record. Ecy Br. at 35. Rather than address this evidence, each party raises a similar litany of arguments to distract the Court from the clear and one-sided record. None of these arguments—alone or in combination—can save Ecology’s irrational decision-making.

A. The Additional Spill Allowed by Changing the Standard Would Significantly Benefit Salmon and Steelhead.

First, though Ecology and Intervenor do not deny that the additional spill allowed by the 120% standard would benefit salmon survival, they attempt to downplay these benefits as “small.” *See* Ecy Br.

² Ecology’s continued assertion that it generally considered these studies in its Literature Review is contradicted by the record. *See* Ecy Br. at 25. Petitioners have explained that the Literature Review either failed to identify or in many cases inaccurately summarized the studies at issue. Indeed, Ecology agreed that its Literature Review could have been more accurate. AR 1754.4; *see also id.* (“We agree that Ecology can clarify some result summaries to include information provided in the petition.”). Regardless, merely listing/cataloguing these studies is a far cry from adequately considering them and drawing a rational conclusion from them. *See* RCW 90.48.580(1) (Ecology “must “use credible information and literature” in reviewing standard) (emphasis added).

at 13-14; Int. Br. at 12-13, 32 (inaccurately stating that salmon survival would “at best” improve by 1%). The estimated increases in spill and salmon survival that would result from changing the TDG standard vary based on the dam operations assumed, snowmelt volume, and other factors. NSIA Br. at 10 & n.5; *see also* AR 1840.25-1840.31.³ Ecology and Intervenors downplay the spill increases and salmon survival benefits by dismissing the mid-to-high end of the range as “unrealistic.” *See, e.g.*, Ecy Br. at 14, n.13; Int. Br. at 8, 10.⁴ The smaller estimates that Ecology and Intervenors favor, however, are based on the even more unrealistic assumptions that (1) spill levels will be dictated by a biological opinion which has since been invalidated, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2011 WL 3322793 at *12 (D. Or. Aug. 2, 2011) (enjoining agencies to increase spill above the level in biological opinion); and (2) that power use in the region will not increase. *But see* AR 1840.9 (AMT Report stating that power use is expected to increase and noting

³ Ecology inaccurately portrays the statement that salmon survival would increase by “less than one percent” as a conclusion of the Joint AMT. Ecy Br. at 13 (citing AR 1840.9, .25, .38, 61). *But the cited pages reveal instead that the AMT did not “conclude” which single spill scenario or survival increase were most likely; rather, the AMT Report simply displayed all results from different studies and scenarios. Indeed, in deciding whether to change their respective standards, Ecology and Oregon DEQ drew different conclusions about which scenario was most likely. See, e.g. AR 1840.64 (Oregon explaining that its decision was based in part on expected spill volume changes and resulting survival benefits).*

⁴ Intervenors rely on incomplete and selected record citations to support their assertions that the benefits of spill are small. Int. Br. at 12-13 (citing AMT Report at AR 1917.10 but highlighting only lowest estimates of increased survival from spill and omitting the more realistic higher estimates contained in the report).

that if biological opinion operations and power use change “removal of the 115% forebay requirement” would allow up to 60% more spill in some years).

Even if Ecology and Intervenor were correct that increases in salmon survival would be “small” (which they are not), this argument ignores the fact that even small improvements are significant against the backdrop of wild salmon populations that are on the brink of extinction. For perspective, the State of Washington will spend a \$40 million dollar federal grant—and the federal government far more than that—on project in the Columbia River estuary to improve the survival of just some of these same salmon runs by up to 6 percent.

More importantly, determining precisely the survival increases that would result from this change is not the real issue: the point is that amending the TDG rule will allow more migrating salmon to survive their passage through the FCRPS dams. As WDFW noted in comments on the AMT Report, while “there are a range of analyses and estimates The primary point is that each method provides a positive expectation that increased spill from changing the gas cap from 115 to 120 will provide increases in salmon survival.” AR 1741.1. Ecology is required to protect designated uses in the Snake and Columbia Rivers; accordingly, Ecology

must amend its TDG rule where doing so will prevent significant mortality of migrating juvenile salmon without harming other aquatic life.

B. Other Agencies Do Not Support Ecology's Standard.

Petitioners have shown that every fishery management agency—state, federal, and tribal—in the region supports changing the TDG standard to increase the survival of migrating juvenile salmon. NSIA Br. at 10-12. These agencies and independent scientists have all consistently concluded that additional spill allowed by a 120% standard would benefit salmon and would have no additional impacts to other aquatic life in the rivers. *See, e.g.*, AR 276.18 (comments of fisheries biologists from U.S. Fish and Wildlife Service, four Columbia River Treaty Tribes, IDFG, WDFW, and ODFW concluding that “managing spill to 120% TDG criteria in the tailraces is conservative, and best protects the sensitive fishery existing and designated use of the Columbia River.”). Washington Department of Fish and Wildlife separately supported changing the standard in its comments to Ecology during the AMT process. AR 1741.1-.2 (supporting change and also noting that draft conclusion regarding risk was “too negative”). Oregon’s Department of

Environmental Quality looked at this same data and properly decided to strengthen its standard. AR 1840.10, .62-.4.⁵

Neither Ecology nor Intervenor address the broad support for strengthening Washington's standard among other state, federal, and tribal agencies in the region. Instead, Ecology suggests that other agencies would not support an amendment to the TDG rule. Not so: Ecology is the only agency that refuses to recognize the clear need to amend its standard.

Ecology first highlights that EPA approved its current 115/120 TDG standard in 2008 to imply that EPA would disapprove an amendment to improve that standard now. Ecy. Br. at 10, 24, 27-29. But EPA approved the current standard before the conclusion of the AMT process and so its approval is irrelevant to the issues presented by Ecology's review of *this* record—namely, whether Ecology may ignore the evidence it collected in the AMT Review. Moreover, EPA has not disapproved or indicated any problem with Oregon's more protective—and more recently adopted—120% TDG standard. AR 1840.62-.64 (eliminating Oregon's 115% forebay monitoring requirement in 2009).

⁵ The argument that Oregon's decision is somehow irrelevant because it has a shallow-water TDG standard begs the question why Washington could not similarly adopt that standard as part of the rule change if Ecology believes that it offers some necessary protection. *See also infra* at 13 (explaining that dissolved gas levels are naturally lower in the near-shore show waters covered by Oregon's standard). Intervenor's related attempts to dismiss Oregon's decision as procedurally easier are a distraction. Ultimately, state water quality standards must protect designated uses to comply with the federal Clean Water Act; how that goal is achieved is not relevant.

Ecology similarly assigns unwarranted significance to the fact that EPA entered into formal ESA Section 7 consultation with NMFS after the threshold finding that Washington’s current standard was “likely to adversely affect” listed species. Ecy. Br. at 10, 27-29. Ecology fails to appreciate that EPA based this threshold determination on the fact that the “dams occasionally exceed the 125 percent TDG limits ... during uncontrolled spills” and not on the effects of the 115/120 percent voluntary spill standard. AR 2290.⁶ *But see* Int. Br. at 7 (incorrectly alleging EPA’s/NMFS’s findings were based on the 115% forebay criteria). Moreover, in the resulting biological opinion, NMFS carefully summarized many of the very same studies and evidence discussed in Petitioners’ opening brief, *see* NSIA Br. at 25-32, and expressed the same opinion as the rest of the region’s federal, state, and tribal agencies—harm to salmon and any other resident aquatic life was rare at TDG levels of 120 percent or below. *See, e.g.*, AR 2288-90 (summarizing field studies). Indeed, NMFS’s biologists supported changing the standard during the AMT Process. *See* AR 1705.1; AR 1360.1 (NMFS staff commenting that Oregon’s decision to change the standard is “good news” and that “I wish

⁶ Ecology’s focus on this threshold finding also misses the fact that after fully considering the issue, NMFS determined that the standard would not jeopardize the continued existence of any listed species. AR 2304.

Washington had done the same thing.”). Ecology stands alone in its irrational refusal to amend its TDG standard to adequately protect salmon.

C. Ecology Has A Mandatory Duty To Protect Salmon.

Ecology and Intervenors continue to insist that Ecology may not protect salmon because it has a legal duty to protect against the theoretical possibility of harm to unspecified “other” aquatic life. But these legal arguments are based on a misunderstanding of the governing law, and at bottom simply repackage the unfounded factual argument that aquatic life in the Snake and Columbia Rivers will be harmed at 120% TDG.

As a threshold matter, these arguments fail because they are premised on a mischaracterization of NSIA’s arguments as resting on a mandatory legal duty to protect salmon “above all other aquatic species.” Ecy Br. at 38; *see also* Int. Br. at 27 (“Ecology has no mandatory legal duty to maximize benefits to salmon”). Ecology and Intervenors attempt to manufacture a tension between protecting all aquatic life and protecting salmon and steelhead, but these arguments present a false choice. Ecology’s water quality standards must protect the most sensitive uses of State waters, including the specific “key” aquatic life uses of salmon migration, spawning, and rearing.⁷ WAC 173-201A-200(1)(a)(iii)-(iv).

⁷ To support their argument that generic “other” aquatic life are most sensitive to TDG, Intervenors cite Judge Sutton’s opinion, CP 152-153, in an unconvincing attempt to convert Ecology’s statement that it was “not convinced that salmon are the most sensitive

Ecology also has a general duty to protect all aquatic life (which of course includes endangered salmon and steelhead and the prey species they depend on). WAC 173-210A-200(1).⁸ Ecology is not required—or permitted—to choose between salmon and other aquatic life in the river. It must protect both; and the record demonstrates that it can do so.

Ecology and Intervenor's efforts to dismiss the Supreme Court's holding in *Rios* fail for similar reasons. See Ecy Br. at 38-39; Int. Br. at 26-27 (citing *Rios v. Dept. of Labor & Indus.*, 145 Wash. 2d 483, 39 P.3d 961 (2002)). Ecology and Intervenor attempt to distinguish *Rios* on the grounds that the agency in *Rios* had a legal duty to protect workers, but Ecology has “no mandatory duty . . . to protect salmon above all other aquatic species.” Ecy Br. at 38; see also Int. Br. at 27. But Ecology does have a mandatory duty to protect designated uses of state waters, including

aquatic life in terms of effects from high TDG,” AR 1754.6, into to an unquestionable “verity” on appeal. See Int. Br. at 25. This effort fails for at least three reasons. First, the superior court made no such factual finding on the cited pages—or in any other portion of its decision. Second, while Ecology did not agree that salmon are the most sensitive species, that finding is not supported by the record. See e.g., AR 1943.6-.7 (NMFS finding that salmon are more sensitive to TDG than other aquatic life); AR 2090.1 (study finding that all sampled insects were more tolerant of TDG than fish). Finally, this Court reviews the record de novo and “sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency.” *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 149 Wash.2d 17, 24, 65 P.3d 319, 322 (2003) (citations omitted). Whether this—and all other aspects—of Ecology's petition denial are rational and supported by the record is precisely the determination this Court must make.

⁸ It is irrational to suggest that Petitioners—let alone the federal, state, and tribal, state fisheries agencies that support changing the rule – are indifferent to harming other indigenous aquatic organisms that salmon depend upon. *But see* Ecy Br. at 28.

key salmon uses, and the evidence collected in the AMT Report unequivocally demonstrates that the existing TDG standards do not adequately protect migrating juvenile salmon. The evidence similarly demonstrates that alleviating that harm to salmon can be done without additional risk to other aquatic life. *Rios* is directly on point, and Ecology's petition denial must be set aside.

D. The Record Shows That Aquatic Life Will Not Be Harmed By 120% TDG.

At bottom, Ecology and Intervenor's arguments all rest on the premise that aquatic life will be harmed at 120% TDG, but these fears find no support in the record. Specifically, in its petition denial, Ecology claimed that aquatic life in the top meter of the water column, where TDG levels are highest, would be harmed by TDG levels of 120%. *See* AR 1754.5 (studies in Ecology's "literature review show harmful effects to other indigenous species that, in this case, utilize the upper water column for all or portions of their life stages."); *see also id.* at 1754.7 (asserting that unspecified "[a]quatic organisms in the top meter of water are the most vulnerable" to effects of higher TDG).⁹

⁹ Ecology mischaracterizes the AMT Report in its brief by portraying the finding that "studies clearly demonstrate detrimental effects on aquatic life near the surface when TDG approaches 120 percent" as a "joint" conclusion. *Ecy Br.* at 26-27. As the cited page makes clear, however, this was Ecology's conclusion and its stated basis for refusing to change its standard, not a joint conclusion reached with Oregon. AR 1840.10.

Ecology based its denial solely on concern for aquatic life in the top meter of the water column, but has never identified a single species or study that demonstrates harm. The simple fact is that species that live in shallow water live near the banks of the river, where TDG levels are lower than in the center of the river, while salmon and other species that utilize the main water column in the center (flowing) portion of the river can and do naturally compensate for elevated TDG by swimming in the deeper water in that part of the river. *See* AR 1840.52; AR 276.13-.14 (explaining far lower TDG in shallow shoreline water due to lack of mixing with flow of river and higher surface area dissipation and depth compensation by salmon and other species). Even in its brief on appeal, Ecology has still not and cannot point to a single indigenous species that relies on the top meter of the middle of the river and fails to point to any credible evidence to support a belief that there will be any additional harm to any organisms at 120% TDG. This failure is fatal to Ecology's professed concern.¹⁰

¹⁰ Intervenor mischaracterizes documents or omits relevant facts to suggest that gas levels above 115% are harmful. For example, it cites a summary from an early draft of Ecology's Literature Review, AR 161.10, to allege increased predation from TDG exposure as low as 115%. Int. Br. at 12. *But see* AR 160.1 noting that draft literature review produced before author read and summarized many of the studies). That study was omitted in Ecology's Final Literature Review because Ecology could not locate the study or verify its contents. AR 1856.22. *Compare, e.g.,* Int. Br. at 9 (citing out-of-context statement from draft literature review summary to support steelhead mortality of 5-10%) *with* AR 1856.68 (no statement about low TDG causing steelhead mortality). *See also* Int. Br. at 9, 12 (Intervenors citing its own counsel's brief in federal litigation which in turn cite to documents that are not in the record). Intervenor's selective characterizations of these and other record documents highlight why this Court should

Instead, Ecology continues to highlight two studies conducted in laboratories—studies that other experts uniformly agree do not represent real-world conditions in the rivers.¹¹ NSIA Br. at 37. While Ecology now downplays its reliance on two lab studies involving non-indigenous bullfrogs, it emphasizes that two of the other studies it invoked do cover native steelhead and white sturgeon.¹² Ecy Br. at 35. But that does not cure the problems with its reliance on these two lab studies.

For example, the 1976 steelhead study, AR 2088, addresses only steelhead eggs and hatchlings. But steelhead eggs and hatchlings are found only in smaller tributary streams that are unaffected by TDG from mainstem dam operations. Indeed, young steelhead do not migrate downstream in the Snake and Columbia Rivers until after they have spent

conduct a thorough, in-depth review of the record. See *Northwest Coalition for Alternatives to Pesticides v. U.S. E.P.A.*, 544 F.3d 1043, 1052, & n.7 (9th Cir. 2008) (court must review the record in sufficient detail to “determin[e] whether the agency’s conclusions are rationally supported.”) (internal citations and quotation marks omitted).

¹¹ Ecology unconvincingly downplays the evidence in the record questioning the reliability of lab studies by ascribing it to the “opinion of one scientist,” Ecy Br. at 34. To the contrary, the record reflects the consistent opinion of researchers that where, as here, available field studies monitoring real-world conditions consistently provide the most credible data. See AR 1856.18 (Ecology Literature Review discussing *Backman, et al.* (2002) and noting finding that “[l]ab predictions overestimate the GBD incidence”). See also NSIA Br. at 37 (discussing numerous federal, tribal, and independent scientists’ findings that lab studies are not representative of field conditions).

¹² Intervenor struggles to equate those studies with the of lab rats as proxies for effects on other species. Int. Br. at 38-39 (asserting use of frogs to assess impacts to salmon is acceptable because “lethal laboratory experiments are not routinely performed on endangered Columbia River salmon”). See also Ecy Br. at 35 (incorrectly asserting that the record contains “an absence of studies evaluating TDG effects on other indigenous aquatic species”). Here, Ecology had before it an abundance of information regarding TDG effects on salmon, resident fish, and invertebrates *in these very rivers* from which to draw its conclusions. See *supra* at 1-3. It had no need to rely on proxy species.

one to two years in those tributaries.¹³ Ecology's concerns about steelhead life stages that will never be impacted by a change in TDG standards is irrational.

Moreover, Ecology's assertion that there are "no subsequent studies refuting the conclusions reached in" the 1976 steelhead study, Ecy. Br. at 35, is wrong. *See, e.g.*, AR 2288 (NMFS concluding that "[t]he accumulated data on GBT in juvenile Chinook salmon and steelhead [from over a decade of in-river study] revealed few GBT signs below 120 percent TDG."). Indeed, steelhead smolts were routinely sampled as part of the 200,000 salmonids sampled in monitoring over the past 15 years, and are among the species that would benefit from increased spill. *See* AR 276.10-276.15 (summarizing studies); AR 1840.38 (U.S. Fish and Wildlife Service predicting 1-9% survival increase for steelhead depending on spill scenario); AR 1742.1 (WDFW emphasizing "large benefits" from improving adult steelhead migration with increased spill).¹⁴

Ecology also argues that use of lab studies is proper or allowable in other contexts. Ecy Br. at 36; *see also* Int. Br. at 37-40. But the question

¹³ *See* 42 Fed. Reg. 43937, 43938 (Aug. 18, 1997) (NMFS Endangered Species Act listing notice for two species of steelhead in Columbia River basin).

¹⁴ While white sturgeon are also native species, the study that Ecology relies on specifically notes that it is not known whether the studied larval life stage uses the top portion of the water column, *see* AR 2193.6, let alone whether larvae specifically utilize the top portion of the water column in the middle portion of the river where TDG levels are highest. *See* NSIA Br. at 34 & n.21.

is not whether resort to lab studies is *ever* proper, or even whether Ecology could consider them along with all the other evidence here; it is instead whether Ecology's exclusive and unexplained reliance on *these* specific few laboratory studies, in the face of overwhelming contrary evidence gathered in the very rivers at issue, was rational. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (even where an agency with "technical expertise" acts "within its area of competence," courts do not defer when agency's "decision is without substantial basis in fact, and there must be a rational connection between the facts found and the determinations made."). The APA requires Ecology to "support and explain [its] conclusions with evidence and reasoned analysis." *Ctr. for Biological Diversity v. U.S. Dep't. of Interior*, 623 F.3d 633, 648 (9th Cir. 2010). Here, the record before Ecology overflowed with credible, peer-reviewed studies of TDG in the Columbia and Snake Rivers, but Ecology inexplicably ignored that evidence in favor of a handful of unrepresentative lab studies. *Puget Sound Harvesters Ass'n v. Dept. of Fish & Wildlife*, 239 P.3d 1140, 1147 (2010) ("[I]t is not rational for [Ecology] to ignore the considerable information that it does have."). Ecology cannot rationally base a decision on its belief—contradicted by extensive, more specific evidence—that unidentified "aquatic life" might be harmed if it changes the TDG standard. A decision based on conjecture

about possible harm to unidentified species in the face of a record replete with evidence to the contrary is quintessentially arbitrary and capricious and is not based on credible data. *See* RCW 90.48.580(1).¹⁵

II. ECOLOGY AND INTERVENOR'S OTHER LEGAL ARGUMENTS LACK MERIT.

Rather than confront the substantial evidence showing that Ecology must amend its TDG rule to protect salmon, Ecology and Intervenor raise a host of procedural arguments to shift focus from the lack of legal or factual support for Ecology's petition denial. All lack merit.

As a threshold matter, Ecology asks for heightened deference to a decision it characterizes as "factually complex and technical," Ecy Br. at 21.¹⁶ But it is well-settled that "[t]he deference accorded an agency's scientific or technical expertise is not unlimited. The presumption of agency expertise can be rebutted when its decisions, while relying on

¹⁵ Ecology's attempt to limit its duty to use credible data to only the establishment of a water quality standard in a full-blown rulemaking, Ecy Br. at 31-32, contradicts the plain language of RCW 90.48.580(1). Ecology "shall use credible information and literature for developing and reviewing a surface water quality standard," RCW not just when it adopts the standard. *Id.* (emphasis added). *See also* NSIA Br. at 20 & n.14. Similarly, Ecology's argument that this duty is limited to only to the formal triennial review process, Ecy Br. at 32, if accepted, would produce an absurd result: Ecology could rely on or disregard information when reviewing a petition to change a standard that it would not be permitted to consider when establishing that standard.

¹⁶ Although Ecology portrays its decision as purely scientific, it does not address or explain why officials and political appointees outside Ecology were involved in the decision-making process and why Ecology considered policy issues and economic concerns in its decision. *See* NSIA Br. at 12 n.7 (citing political appointees' involvement and Ecology's consideration of "decreased power generation," "increase[d] power costs," and opposition from business groups as "cons" in changing standard).

scientific expertise, are not reasoned.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (citations omitted). Ecology cannot escape in-depth review of its decision by repeatedly falling back on “‘reminders that its scientific determinations are entitled to deference’ in the absence of reasoned analysis. . . .” *NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000). As explained above, that reasoned analysis is missing here, and Ecology may not rely on a deferential standard of review to save its irrational decision.

A. Intervenor May Not Graft New Requirements Into The APA.

In a novel procedural argument not raised before the superior court, Intervenor asks this Court to disregard the plain language of the APA and clear Supreme Court precedent, solely on the basis of Intervenor’s strained interpretation of *Alpine Lakes Protection Soc’y v. Dep’t of Ecology*, 135 Wash. App. 376 (2007). *See* Int. Br. at 21-28 (arguing for imposition of new “prerequisites” to APA review). But this attempt to rewrite Washington law cannot withstand even modest scrutiny.

The Washington APA sets out standards of review for three categories of agency actions. RCW 34.05.570. Interested parties may seek judicial review of rules under RCW 34.05.570(2), or orders issued in agency adjudications under RCW 34.05.570(3). The final section is a

catch-all provision, authorizing review of “[a]ll agency action not reviewable under subsection (2) or (3) of this section.” RCW

34.05.570(4)(a). This catch-all provision authorizes relief on four specified grounds:

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

- (i) Unconstitutional;
- (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
- (iii) Arbitrary or capricious; or
- (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

RCW 34.05.570(4)(c) (emphasis added). This provision also includes a separate process under which “a person whose rights are violated by an agency’s failure to perform a duty that is required by law to be performed *may* file a petition for review . . . seeking an order pursuant to this subsection requiring performance” RCW 34.05.570(4)(b) (emphasis added). That specific process requires the agency to respond to petitions for review within 20 days and allows the court to hear evidence on material issues of fact. *Id.*

Ignoring its plain language, Intervenor argues that judicial review is authorized under RCW 34.05.570(4) *only* where an agency fails to perform a duty that is required by law. Int. Br. at 22. But this catch-all

provision broadly and explicitly authorizes review for *all* agency action not covered by the provisions specific to rules and adjudicative orders, RCW 34.05.570(4)(a), and specifies that relief is available for agency action *including* the exercise of discretion *or* an action under subsection (b), RCW 34.05.570(4)(c). Intervenor does not even attempt to reconcile this clear language with its novel theory that only the failure to perform a required duty is actionable. Where the language of a statute is plain on its face, as it is here, the Court must carry out the clearly expressed intent of the legislature. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002).

Not only does Intervenor ignore the plain language of the APA in its attempt to impose new “prerequisites” to judicial review, it also ignores the plain language of directly controlling Supreme Court precedent. In *Rios*, the Court held that “we conclude that the pesticide handlers will be entitled to relief only if they demonstrate that the Department’s failure to initiate rulemaking in 1997 violated a duty under WISHA *or was otherwise arbitrary and capricious.*” 145 Wash.2d at 493 (emphasis added); *see also id.* at 505 & n.15. Intervenor is not free to modify that holding any more than it may modify the plain language of the APA.¹⁷

¹⁷ Intervenor argues that the initial TDG rule was not arbitrary at the time it was enacted, and that therefore any subsequent decision not to amend that rule is also inherently not arbitrary. Int. Br. at 25-26. But this argument cannot be squared with *Rios*. In *Rios*, the

A substantial body of federal case law likewise confirms that an agency exercise of discretion, including denials of petitions for rulemaking, may be set aside where such denial is arbitrary and capricious. *See, e.g., WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (denial must articulate “a ‘rational connection between the facts found and the choice made,’ and follow[] upon a ‘hard look’ by the agency at the relevant issues”); *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987); *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008).

Alpine Lakes does nothing to change the plain language of the APA or the substantial body of federal and state case law making clear that an agency’s denial of a rulemaking petition must be set aside where that denial is arbitrary and capricious, as it is here. Rather, *Alpine Lakes* illustrates the simple proposition that plaintiffs may choose which causes of action to pursue. In *Alpine Lakes*, the petitioners alleged that they were entitled to relief because the agency had failed to perform a duty required by law. 135 Wash. App. at 382-83. The court rejected plaintiffs’

Court found that a 1993 worker protection rule was not arbitrary and capricious at the time it was enacted, 145 Wash.2d at 504, but went on to hold that the Department’s failure in 1997 to grant the petition to amend that same rule was arbitrary because the evidence the Department had since collected demonstrated the need for such an amendment. 145 Wash.2d at 505-06. Similarly, while Petitioners are no longer challenging the TDG rule at the time it was enacted, Ecology’s failure to amend the TDG rule was arbitrary because the evidence Ecology has since collected in the AMT Review demonstrates the need for the amendment.

allegations that the agency had failed to perform a required duty, and for that reason found that relief was not warranted. 135 Wash. App. at 399. In contrast, Petitioners in this case explicitly pled two causes of action challenging the petition denial: one alleging that Ecology acted arbitrarily and abused its discretion in the performance of a discretionary act by denying the petition, CP 22-23, and another alleging that Ecology failed to perform a duty required by law, CP 23-25.¹⁸ NSIA is in no way bound by the pleading choices of the *Alpine Lakes* plaintiffs where the APA explicitly provides another avenue for relief. RCW 34.05.570(4).

B. Ecology's Arguments Eviscerate the APA's Judicial Review Provision.

Ecology's procedural arguments fare no better. Ecology alleges that the standards governing the denial of a rulemaking petition differ dramatically from the standards governing a rulemaking, and that Ecology's petition denial must be upheld because it complied with the minimal procedural requirements specific to such denials. *See Ecy Br.* at 41-47; *but see Rios*, 145 Wash.2d at 492 (standard of review for denial of

¹⁸ Intervenor attempts to muddy the waters by citing to Ecology's petition denial, rather than NSIA's complaint, to characterize the claims at issue in this litigation. *See, e.g., Int. Br.* at 20 (arguing that Ecology has no duty to "maximize" benefits to salmon). NSIA's complaint clearly alleges that Ecology has a duty to protect designated uses of state waters, including salmon uses, CP 8-10, and that Ecology failed to perform that duty as required by law, CP 23-25. The evidence collected in the AMT Report unequivocally demonstrates that the existing TDG standards do not adequately protect migrating juvenile salmon. *See supra* at 4-6. Because amending the TDG rule would benefit salmon without harming any other aquatic life, Ecology's failure to amend the rule was arbitrary and capricious, and must be set aside.

rulemaking petitions is “very similar to the standard of review governing the challenge to the 1993 rule”). Ecology argues that the Washington legislature created a narrow and virtually meaningless review process: while the APA provides for judicial review of an agency’s petition denial, that denial could never be set aside as arbitrary so long as Ecology produces any written answer within 60 days. But whether Ecology’s explanation is rational and based on the record does not turn on the fact that some explanation was offered; rather, the Court must examine the record and the agency’s explanation in sufficient detail “to be able to comprehend the agency’s handling of the evidence cited or relied upon. . . . [and to] determin[e] whether the agency’s conclusions are rationally supported.” *Nw. Coal. for Alternatives to Pesticides*, 544 F.3d at 1052 n.7 (internal citations and quotation marks omitted). The argument that an agency’s petition denial must be upheld so long as the agency gave reasons in writing for the denial within 60 days—no matter how arbitrary those reasons may be—simply cannot be squared with the APA. *Rios*, 145 Wash.2d at 492; *see also WWHT, Inc.*, 656 F.2d at 817; *Am. Horse Prot. Ass’n, Inc.*, 812 F.2d at 5; *Defenders of Wildlife*, 532 F.3d at 919.¹⁹

¹⁹ There is no merit to Ecology’s related suggestion that the arbitrary and capricious standard of review shifts based on the timeframe in which the agency’s decision was made. *See* Ecy Br. at 43-45 (arguing that Ecology is not required to consider issues in detail because petition denials must be issued in 60 days); Int. Br. at 19-20 (same). To the contrary, courts routinely examine and apply the same arbitrary and capricious

Ecology's argument also runs directly counter to Supreme Court precedent. In *Rios*, the Supreme Court noted that "[o]rdinarily, an agency is accorded wide discretion in deciding to forgo rulemaking in an area." 145 Wash.2d at 507. The Court, however, recognized that the agency already had compelling information demonstrating the need for the requested rule:

At the time of their request in 1997, the pesticide handlers were not asking the Department to embark on a new enterprise—they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds.
...

Because the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department's 1997 denial of the pesticide handlers' request was 'unreasoning and taken without regard to the attending facts or circumstances.' *Hillis*, 131 Wash.2d at 383, 932 P.2d 139. Consequently, in failing to act on the request for rulemaking, the Department violated RCW 49.17.050(4)

Id. at 507-08. Here, as in *Rios*, Petitioners are not asking Ecology to embark on a new enterprise: Ecology has already invested significant

standard of review to actions with timelines similar to those applicable here. *See, e.g., Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 415 F.3d 1121, 1124, 1126 (10th Cir. 2005) (regulations under the Clean Water Act require EPA to review and approve state water quality standard within 60 days and courts "review the EPA's decision to approve state water quality standards under the arbitrary and capricious standard"); *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004) (applying APA's arbitrary and capricious standard to agency's 90-day finding on a petition to list a species under the ESA, and finding that agency's "failure to consider all of the relevant information in the Petition ... was inappropriate").

resources in studying the effects of changing its TDG standard to protect migrating salmon. And here, as in *Rios*, the evidence marshaled by the AMT Review can lead to only one conclusion. *See supra* at 1-3,7. NSIA does not argue that every agency is required to conduct a multi-year, comprehensive study in response to every petition for rulemaking it receives—but *Rios* teaches that where an agency has already chosen to undertake such a comprehensive effort, it may not then ignore the evidence it collected.²⁰ 145 Wash.2d at 507-08. In this extraordinary circumstance—where the agency has invested its resources in a comprehensive study and then ignored the very evidence it so painstakingly gathered—Ecology’s petition denial is arbitrary and must be set aside. *Id.*²¹

CONCLUSION

For the foregoing reasons, this Court should hold that Ecology’s denial of NSIA’s petition to amend the TDG standard was arbitrary and capricious and order Ecology to initiate rulemaking.

²⁰ Under these circumstances, the Court should reject Intervenor’s request for a remand to Ecology, rather than ordering it to initiate rulemaking. Int. Br. at 42-43. At this stage in the process, the agency has considered the issue and provided its sole reason (protection of aquatic life other than salmon) for denying the petition. If this Court determines, as it should, that Ecology’s decision is not rational or founded on the record, there is nothing more for the agency to do except to initiate rulemaking. *Rios*, 145 Wash.2d at 508.

²¹ Apart from their merits arguments, appellees do not contest Petitioners’ entitlement to attorneys’ fees and costs. If the court finds Ecology’s decision arbitrary and capricious, it should also find that Petitioners are prevailing parties entitled to those fees and costs. RCW 4.84.340-.360.

Respectfully submitted this 20th day of January, 2012.

A handwritten signature in black ink, appearing to read "Stephen D. Mashuda". The signature is written in a cursive style with a horizontal line underneath it.

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DIVISION II

12 JAN 23 AM 9:19

No. 42364-2-II

Thurston County Cause No.: 10-2-01236-0 STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION,
ASSOCIATION OF NORTHWEST STEELHEADERS, PACIFIC
COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
INSTITUTE FOR FISHERIES RESOURCES, and IDAHO RIVERS
UNITED,

Appellants,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondents.

CERTIFICATE OF SERVICE

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I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington.

On January 20th, 2012, I served a true and correct copy of the following documents on the parties listed below:

1. Reply Brief of Appellants, and
3. Certificate of Service.

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I, Cheryl McEvoy, declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of January, 2012, at Seattle, Washington.


Cheryl McEvoy