

NO. 44567-1

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

PUGET SOUND HARVESTERS ASSOCIATION,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Respondent,

and

PURSE SEINE VESSEL OWNERS ASSOCIATION,

Respondent-Intervenor.

**BRIEF OF RESPONDENT WASHINGTON STATE
DEPARTMENT OF FISH AND WILDLIFE**

ROBERT W. FERGUSON
Attorney General

Joseph V. Panesko
Assistant Attorney General
WSBA No. 25289
1125 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0100

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE CASE2

 A. The Department Manages Multiple Species of Salmon
 Within a Much Broader Context Than Just the Two Puget
 Sound Fishing Areas at Issue in the Gillnetters’
 Challenge3

 B. History of the Puget Sound Commercial Chum Fishery4

III. STANDARD OF REVIEW.....6

IV. ARGUMENT8

 A. Differential Fishing Gear Regulations Do Not Trigger
 Equal Protection Considerations.....9

 B. The Department Must Follow Its Statutory Mandate, But
 Is Not Required to Afford Equal Catch Outcomes to
 Every Fisher Group.....12

 C. The Department Carefully Evaluated Available
 Information and Reasonably Determined That the 2012
 Rules Satisfy the Goal of Economic Well-Being and
 Stability of the Fishing Industry17

 D. The Record Supports the Department’s Stated Concern
 Over Bycatch Impacts That Gillnets Pose to Non-Target
 Species26

 1. The Department Reasonably Used Chinook Bycatch
 Mortality Rates Adopted by State and Tribal
 Biologists When Considering Adverse Impacts
 Caused by the Puget Sound Chum Fisheries28

 2. The Department Reasonably Concluded That
 Gillnets Potentially Pose Greater Bycatch Risks to
 Chinook Salmon Than Purse Seines.....34

3.	The Record Shows That Gillnets Pose a Greater Risk of Harm to Other Species	39
V.	CONCLUSION	41

TABLE OF AUTHORITIES

Cases

<i>Ass'n of Wash. Bus. v. Dep't of Revenue</i> , 155 Wn.2d 430, 120 P.3d 46 (2005).....	6, 7
<i>Barker v. State Fish Comm'n</i> , 88 Wash. 73, 152 P. 537 (1915)	9, 10, 11
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	31
<i>Marincovich v. Tarabochia</i> , 114 Wn.2d 271, 787 P.2d 562 (1990).....	16
<i>McMillan v. Sims</i> , 132 Wash. 265, 231 P. 943 (1925)	14, 15, 16
<i>Nw. Gillnetters Ass'n v. Sandison</i> , 95 Wn.2d 638, 628 P.2d 800 (1981).....	passim
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	7
<i>Puget Sound Crab Ass'n v. State</i> , ___ Wn. App. ___, 300 P.3d 448 (2013).....	14, 15, 25
<i>Puget Sound Gillnetters Ass'n v. Moos</i> , 88 Wn.2d 677, 565 P.2d 1151 (1977).....	10, 11
<i>Puget Sound Gillnetters Ass'n v. Moos</i> , 92 Wn.2d 939, 603 P.2d 819 (1979).....	11
<i>Puget Sound Harvesters Ass'n v. Dep't of Fish and Wildlife</i> , 157 Wn. App. 935, 239 P.3d 1140 (2010).....	passim
<i>Purse Seine Vessel Owners Ass'n v. State</i> , 92 Wn. App. 381, 966 P.2d 928 (1998).....	15, 16

<i>Rios v. Dep't of Labor & Indus.</i> , 145 Wn.2d 483, 39 P.3d 961 (2002).....	7, 8
<i>Salmon for All v. Dep't of Fisheries</i> , 118 Wn.2d 270, 821 P.2d 1211 (1992).....	3
<i>State v. Tice</i> , 69 Wash. 403, 125 P. 168 (1912)	15
<i>Wash. Kelpers Ass'n v. State</i> , 81 Wn.2d 410, 502 P.2d 1170 (1972).....	10, 11, 16, 25
<i>Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n</i> , 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823, <i>modified at</i> 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979).....	11

Statutes

RCW 34.05.570	41
RCW 34.05.570(1)(a)	6
RCW 34.05.570(2)(c)	7
RCW 34.05.574(1).....	7
RCW 77.04.012	12, 13, 17, 20
RCW 77.04.020	3
RCW 77.04.030	3
RCW 77.04.055	3
RCW 77.50.120	13, 20

Rules

WAC 220-33-010.....	18
WAC 220-36-023.....	18

WAC 220-40-021.....	18
WAC 220-47-307.....	4, 18
WAC 220-47-311.....	4, 18
WAC 220-47-401.....	4, 18
WAC 220-47-411.....	4, 18
WAC 220-47-427.....	4, 18
WAC 220-47-428.....	4, 18
WAC 220-69-230(1)(v)	17

I. INTRODUCTION

The Washington State Department of Fish and Wildlife (“Department”) annually adopts commercial harvest regulations for salmon in Puget Sound waters. Commercial salmon fishers are licensed based upon the type of gear they use. In the Puget Sound commercial salmon chum fishery, the majority of harvestable chum salmon are caught by fishers using either gillnets (“Gillnetters”), or purse seine nets (“Purse Seiners”). In adopting the 2012 commercial harvest regulations for chum salmon in the Puget Sound region, the Department followed its statutory mandates to conserve natural resources and seek to maintain the economic well-being and stability of the fishing industry.

Puget Sound Harvesters Association, representing a number of Gillnetters fishing chum in Puget Sound, filed a petition challenging the Department’s 2012 Puget Sound commercial salmon rules. The Gillnetters claim the Department’s rules should have increased the amount of harvest time allocated to the Gillnetters in two of the state fish management areas, thereby allowing Gillnetters to catch more chum salmon and reducing the amount caught by Purse Seiners. The Gillnetters allege that, when allocating harvest opportunity between the two competing gear groups, the Department is required to proceed on a presumption that equal catch shares must be provided to each group, and

that the Department may only deviate from equal catch shares if it can articulate a rational justification.

This Court should affirm the trial court's dismissal of the Gillnetters' petition because the argument that they are entitled to equal catch sharing with the Purse Seiners is not supported under either constitutional principles of equal protection or any of the statutes the Washington Legislature has enacted to guide the Department's management of fishery resources. Furthermore, in claiming the Department's rules are arbitrary and capricious, the Gillnetters fail to acknowledge the entire rule-making record. Instead, they focus on, and sometimes distort, isolated pieces of information from the record. The record, when reviewed as a whole, solidly refutes the claim that the Department was arbitrary and capricious when it identified potential adverse impacts that gillnets pose to non-target species.

II. COUNTERSTATEMENT OF THE CASE

The Department disagrees with a number of the Gillnetters' factual assertions regarding prior years of fishing, but agrees with most of the facts regarding the 2012 regulations. Any factual disagreements are either irrelevant to the key issues before the Court, or are dispelled by the additional facts left out of the Gillnetters' narrative and set out below.

A. The Department Manages Multiple Species of Salmon Within a Much Broader Context Than Just the Two Puget Sound Fishing Areas at Issue in the Gillnetters' Challenge

The management of salmon entails a complex process involving international, federal, interstate, state, and tribal coordination. *See Salmon for All v. Dep't of Fisheries*, 118 Wn.2d 270, 273, 821 P.2d 1211 (1992). Before the Department can set recreational and commercial salmon fishing schedules each year, Department staff must first engage with state, federal, and tribal representatives in the "North of Falcon" meeting process. The Washington State Fish and Wildlife Commission establishes policy that guides Department staff in the North of Falcon process.¹ AR 2934. That policy directs that salmon management decisions must be

consistent with the Department's statutory authority, *U.S. v. Washington*, *U.S. v. Oregon*, the Endangered Species Act, the Puget Sound Chinook Harvest Management Plan, the Pacific Salmon Treaty, the Pacific Fishery Management Council's Framework Salmon Management Plan, pertinent state/tribal agreements, and the applicable Fish and Wildlife Commission policies.

AR 2934. This policy guidance explains that the Department is responsible for managing numerous species of salmon (chinook, coho, pink, sockeye, and chum) across the state. AR 2934. The policy further

¹ The Fish and Wildlife Commission comprises part of the Department of Fish and Wildlife. RCW 77.04.020. The Commission is made up of nine members appointed by the governor. RCW 77.04.030. The Commission's duties include prescribing basic goals and objectives and establishing policies to preserve, protect, and perpetuate wildlife, fish, and their habitat. RCW 77.04.055.

directs the Department to consider the interests of numerous harvest groups, both recreational and commercial, that employ various types of fishing gear. AR 2934-35. The mix of salmon fisheries is diverse and differs based upon species, location, and type of gear, with further division between commercial and recreational interests within an overall fishing industry. AR 2935.

In 2012, the Department adopted a package of rules addressing commercial salmon harvest in Puget Sound. AR 3645 (amending WAC 220-47-307, -311, -401, -411, -427, and -428). The Gillnetters' rule challenge involves WAC 220-47-411, focusing on only two of the multiple fishing areas addressed in that rule, Areas 10 and 11.² In its Concise Explanatory Statement, the Department refers to Areas 10 and 11 collectively as the "South Sound." *See, e.g.*, AR 3686.

B. History of the Puget Sound Commercial Chum Fishery

From 1973 to 2002, the Department regulated commercial harvest of fall season chum salmon in the South Sound by providing Gillnetters and Purse Seiners an equal number of harvest days each year. *Puget Sound Harvesters Ass'n v. Dep't of Fish and Wildlife*, 157 Wn. App. 935,

² The Gillnetters' rule challenge does not specifically address the text of any of the rules; rather, they simply claim they should be given more harvest time in Areas 10 and 11, which would necessarily require changes to WAC 220-47-411. If the Department were to provide an increase in gillnet harvest time, it would necessarily have to reduce the amount of purse seine harvest time in WAC 220-47-311 to avoid overharvest.

940, 239 P.3d 1140 (2010). The Department's regulations have never guaranteed any percentage of catch outcome between the two groups, and the Department has never allocated harvest opportunity on the basis of actual catch in any commercial Puget Sound salmon fishery. *Id.* Nevertheless, the time that commercial harvesters spend on the water determines a catch outcome. Because purse seines are a more efficient form of harvest than gillnets, the roughly equal harvest time historically provided to both gear groups has produced higher catch levels for the purse seine fleet. AR 3671 (calculating that purse seines averaged 68 percent of the catch across the 30-year period of equal harvest times).

During the years of equal harvest time, the annual catch statistics from Areas 10 and 11 varied widely, with Gillnetters catching as much as 77 percent of the annual catch in 1975, and a low of five percent in 2002. AR 2973. On average, Gillnetters harvested 32 percent of chum in Areas 10 and 11 during that time period. AR 3671. When the Gillnetters caught only five percent of the annual catch in 2002, the Department felt that corrective action needed to be taken to maintain the viability of the Puget Sound gillnet segment of the fishing industry. *Puget Sound Harvesters*, 157 Wn. App. at 940. The Department began providing Gillnetters with additional harvest time with the hope of providing them more economic opportunity. As a result, the Gillnetters' annual catch

shares increased to a range of 13 to 31 percent over the past nine years. AR 2973.

In its 2012 package of rules, the Department increased the number of fishing hours provided to the Gillnetters by 2.5 percent over the hours provided in 2011. The Department determined that the Gillnetters would likely catch about 25 percent of the allowable annual harvest based on the allotted time. AR 3673-74, 3678. The Department determined that this expected harvest outcome would provide a stable level of harvest to the Gillnetters consistent with historic levels when adjusted for changes in fleet size over the years. The Department also concluded that the actual harvest produced by this allocation of harvest time would contribute to the economic well-being and stability of the state fishing industry by providing for a stable gillnet fleet with a reasonable economic return per licensee. AR 3674.

III. STANDARD OF REVIEW

Agency rules are presumed valid, and a party challenging a rule carries the burden to overcome this presumption. RCW 34.05.570(1)(a); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). A court may declare a rule invalid only if it determines that the rule: (1) violates constitutional provisions; (2) exceeds the agency's statutory authority; (3) was adopted in violation of statutory rule-making

procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c); *Ass'n of Wash. Bus.*, 155 Wn.2d at 437.

Under the arbitrary and capricious test, a court will not set aside a discretionary decision of an agency absent a clear showing that the agency's action "is willful and unreasoning and taken without regard to the attending facts or circumstances." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (internal citations omitted). "[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (internal quotations omitted). An agency decision is not arbitrary and capricious even if the record contains contradictory evidence from which one could draw conflicting conclusions. *Id.* at 504.

Moreover, "[i]n reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency." *Id.* at 501-02, n.12 (quoting RCW 34.05.574(1)). Indeed, the court's job is to review the record to determine if the result was reached through a process of reason, "*not whether the result was itself reasonable in the judgment of*

the court.” *Id.* at 501 (emphasis in original) (internal quotations omitted). Reviewing courts accord particular deference to an agency’s determinations when they are based heavily on factual matters, especially those which are complex or involve agency expertise. *Id.* at 501-02, n.12. Courts also afford deference to an agency’s expertise in the interpretation of certain laws. *Puget Sound Harvesters*, 157 Wn. App. at 945 (“Substantial weight is given to the agency’s view of the law if it falls within the agency’s expertise in that special field of law.”) (citation omitted).

IV. ARGUMENT

No constitutional language, no case law, and no statute requires the Department to initiate its fishery regulations from a starting point of equal catch allocation between all gear groups in every fishery area. Rather, the Department’s obligation is to comply with its statutory mandates and abide by departmental management goals when adopting rules allocating harvest opportunity between gear groups. In the 2012 rules, the Department reasonably determined that the expected fishing activity would not violate any conservation concerns, and that the expected catch outcomes continued to serve the economic well-being and stability of the fishing industry. In declining to provide the Gillnetters with a significant increase in harvest opportunity compared to prior years, the Department

cited well-grounded data in the record supporting the Department's stated concerns about gillnet bycatch impacts.

A. Differential Fishing Gear Regulations Do Not Trigger Equal Protection Considerations

The Gillnetters assert the 2012 regulations violate constitutional principles of equal protection. Brief of Appellant (Appellant Br.) at 3. Specifically, they claim that they are in the same class of fishermen as Purse Seiners—commercial harvesters of salmon—and that the Department's failure to allocate Gillnetters and Purse Seiners equal catch shares violates equal protection unless the Department articulates a rational basis for departing from equal shares. This argument fails because controlling case law holds that different fishing gear groups are not in the same class and the Department may regulate them differentially without having to conduct an equal protection analysis.

Nearly 100 years ago, the Washington Supreme Court held that a state fishing statute differentiating between gillnet and purse seine gear users does not trigger constitutional rights. *See Barker v. State Fish Comm'n*, 88 Wash. 73, 76, 152 P. 537 (1915). In rejecting the gillnetters' equal protection challenge in that case, the Court observed that “[i]t seems plain to us that this is not a discrimination between or a classification of persons, but only a discrimination as to appliances which may be used,

and that as to each class of such appliances every person may use them under exactly the same conditions and restrictions.” *Id.* Because the statutory regulation attached to gear type and not to particular individuals, no constitutional violation occurred. *Id.* at 77. *Barker* further indicated that any question about the wisdom of such allocations between gear groups was a matter for the legislature, and the court had no basis for action even if such allocation may be unwise or unjust. *Id.* at 81.

Barker was quoted at length, and its analysis reaffirmed, over 50 years later. *Wash. Kelpers Ass’n v. State*, 81 Wn.2d 410, 422-23, 502 P.2d 1170 (1972) (finding statute differentiating between commercial and recreational salmon fishing gear did not violate equal protection). *See also Nw. Gillnetters Ass’n v. Sandison*, 95 Wn.2d 638, 641, 628 P.2d 800 (1981) (holding that the Department’s management authority includes the ability “to discriminate among classes of users by gear and purpose”) (internal quotation marks omitted).

Ignoring both *Barker* and *Washington Kelpers Ass’n*, the Gillnetters argue that gillnet and purse seine fishers are similarly situated and must be part of the same class for purposes of equal protection analysis, citing *Puget Sound Gillnetters Ass’n v. Moos*, 88 Wn.2d 677, 684, 565 P.2d 1151 (1977). Appellant Br. at 35. The Gillnetters’ reliance on this 1977 case is misplaced for several reasons. First, the 1977 opinion

was vacated in its entirety and the case remanded for reconsideration. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 660, 99 S. Ct. 3055, 61 L. Ed. 2d 823, *modified at* 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979). Second, the equal protection analysis in the 1977 decision focused on whether the Department could regulate treaty Indian fishers differently than non-Indian fishers, with the court concluding that such regulation was constitutionally invalid as a racial preference. *Puget Sound Gillnetters*, 88 Wn.2d at 684 (finding that “[d]istinctions between fishermen based upon their race or ethnic background are not proper”). The 1977 decision did not overrule the holdings of *Barker* and *Washington Kelpers* that different gear groups are not in the same class for purposes of equal protection. Third and finally, after the United States Supreme Court vacated the 1977 decision and remanded for further consideration, the Washington Supreme Court adopted a new analysis, dropping its equal protection analysis and upholding the differential regulation of fishing groups. *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 946, 603 P.2d 819 (1979). In its 1979 decision, the Court acknowledged that the State has allocated salmon “among fishermen using different types of gear ever since it became necessary to manage the resource.” *Id.*

Because Washington's courts have expressly concluded that fishing gear groups are not similarly situated as a unitary class of fishers, and that differential regulation of fishing gear groups is thus permissible without any equal protection analysis, the Gillnetters' equal protection basis for asserting a right to equal catch shares of chum salmon in Areas 10 and 11 must be rejected.

B. The Department Must Follow Its Statutory Mandate, But Is Not Required to Afford Equal Catch Outcomes to Every Fisher Group

The Gillnetters' claim to an equal share of the chum harvest pervades the rest of their opening brief, but it is no more persuasive than their constitutional claim because no statute mandates that Gillnetters receive one-half of the chum harvest. Indeed, this Court has concluded that blindly proceeding based upon equal catch shares could itself be arbitrary and capricious. *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 950. In setting fishing regulations, the Department exercises broader discretion than acknowledged by the Gillnetters' arguments.

When the Department adopted the 2012 Puget Sound salmon regulations, its discretion was guided by statutory mandates, as interpreted by policy set by the Fish and Wildlife Commission and by management goals set by the Department. By statute, the Department must ensure conservation of the resource. RCW 77.04.012. Consistent with that

overarching objective, the Department must seek to maintain the economic well-being and stability of the fishing industry, and must work to enhance and improve commercial and recreational fishing opportunities statewide. *Id.* The Department must also work to provide a “stable level of harvest” to commercial salmon fishers in the state. RCW 77.50.120.

The Department combined these statutory mandates with Fish and Wildlife Commission policy, and with internal Department goals, to form the following management objectives for the 2012 Puget Sound commercial salmon fisheries. These are set forth in order of priority.

1. Achieve conservation objectives for all species and stocks
 - a. Ensure primary stocks meet escapement goals
 - b. Minimize by-catch of all non-target species
 - c. Monitor fisheries to ensure a & b are met
2. Harvest the non-treaty share of salmon
3. Maintain the economic well-being and stability of the fishing industry (RCW 77.04.012); allow a sustainable level of harvest sufficient to provide opportunity for each gear type (RCW 77.50.120)

AR 3663.³

None of these objectives require the Department to achieve equal catch shares between gear groups on a regional basis or a fish management area basis. Even the third goal, regarding economic well-being and

³ These management objectives differ slightly from the management objectives applied by the Department in some earlier years such as in 2008—the Department no longer requires its fishing seasons to “fairly allocate harvest opportunity between gear groups.” *Contrast* AR 3663 (quoted above) *with Puget Sound Harvesters*, 157 Wn. App. at 940 (mentioning the 2008 goals).

stability, does not dictate any particular allocation of catch shares by species or harvest area for individual gear groups. Instead, these objectives are broad state-wide goals that are designed to foster “wise use” of the state fishery resource. *Nw. Gillnetters Ass’n*, 95 Wn.2d at 643 (“The overriding purpose of the [Department’s] statutes is to provide for wise use of the resource, which is the broadest possible definition of conservation.”); *see also McMillan v. Sims*, 132 Wash. 265, 269, 231 P. 943 (1925) (holding courts have no concern over the reasonableness and wisdom of fishing regulations and restrictions when adopted by an agency pursuant to legislative authority).

In their reply brief, the Gillnetters may cite to this Court’s recent decision in *Puget Sound Crab Ass’n v. State*, ___ Wn. App. ___, 300 P.3d 448 (2013), because that decision referred to a “balance” between recreational and commercial crab harvesting. However, a close reading of that opinion does not support the Gillnetters’ claimed entitlement to equal catch shares.

In *Puget Sound Crab*, commercial crabbers complained that the Department allocated more catch share to recreational crabbers than in prior years and argued that the statutory mandate required the Department to focus on the needs of commercial harvesters rather than considering the needs of recreational harvesters in the context of the state fishing industry.

This court rejected that argument and observed that the Department was statutorily required to consider the interests of both groups. *Puget Sound Crab*, 300 P.3d at 452. Although the opinion uses the terms “balance” and “fairly allocate,” this Court was careful to point out that the Department’s “duty” to the recreational and commercial sectors “should not be interpreted as a limitation on the Department’s ability to allocate the state’s share.” *Id.* No language in *Puget Sound Crab* supports the Gillnetters’ assertion that the Department must presumptively apportion equal catch shares between salmon gear groups. *See also Puget Sound Harvesters Ass’n*, 157 Wn. App. at 950 (“More importantly, however, a 50–50 allocation, made without regard to the attending facts or circumstances, would be arbitrary and capricious as well.”).

Without any constitutional or statutory basis for asserting a right to half the chum harvest in Areas 10 and 11, the Gillnetters essentially invoke claims of “fairness.” But their appeal to fairness necessarily presupposes an underlying entitlement, ignoring the well-established precedent that citizens hold no private right to take fish whatsoever. *McMillan*, 132 Wash. at 269 (quoting *State v. Tice*, 69 Wash. 403, 125 P. 168 (1912)). “The fish in the waters of the State belong to all the people of the state in their collective, sovereign capacity.” *Purse Seine Vessel Owners Ass’n v. State*, 92 Wn. App. 381, 391, 966 P.2d 928 (1998) (citing

Marincovich v. Tarabochia, 114 Wn.2d 271, 276, 787 P.2d 562 (1990)).

The Department has broad police powers to regulate and manage its fish resources, “with ultimate control as to whether any fish whatsoever may be taken.” *Id.* (citations omitted). The fact that some fishers, such as the Gillnetters and Purse Seiners in the present case, are engaged in the *commercial* harvest of fish still “does not give them any property in the fish prior to taking.” *Wash. Kelpers Ass’n*, 81 Wn.2d at 415.

Instead of being governed by an unwritten fairness concept, the Department’s authority is governed by broad statewide mandates that ultimately seek to produce “wise use” of the state’s fishery resources, where wise is defined broadly in terms of overall conservation of resources followed by broad resource utilization objectives that relate to the commercial and recreational fishing industry statewide. *Nw. Gillnetters Ass’n*, 95 Wn.2d at 643; *McMillan*, 132 Wash. at 269. Although the Department does look to segments of the fishing industry when engaging in fishery management, it does so as part of the agency’s duty to manage resources statewide. None of the statutory mandates require the Department to ensure equal catch outcome across every separate gear group.

C. The Department Carefully Evaluated Available Information and Reasonably Determined That the 2012 Rules Satisfy the Goal of Economic Well-Being and Stability of the Fishing Industry

Consistent with this Court's ruling in *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 950, the Department forecast the commercial chum salmon catch outcomes likely to occur given the number of allowed harvest hours in the Puget Sound region. AR 3670-73. The Department then conducted an economic analysis using those harvest forecasts. The Department determined that the expected *ex vessel* value per license for both purse seine and gillnet harvesters was likely to be higher than the average value across prior years.⁴ AR 3670-74, 3686. The Department concluded that the economic outcomes provided by its allocation of harvest time would provide stability and reasonable economic returns for both the gillnet and purse seine harvester, consistent with the agency's statutory obligation to promote the economic well-being of the state fishing industry as a whole. RCW 77.04.012.

The Gillnetters distort this broad statutory mandate by myopically focusing on the effects of one portion of a package of Puget Sound fishing regulations involving multiple gear groups, multiple species of salmon,

⁴ "*Ex vessel* value" refers to the amount of money the fisher receives for the first point-of-sale of the fisher's harvest, which harvest was often described as being "landed" at the dock. See WAC 220-69-230(1)(v) (fish ticket reporting form has a box calling for entry of the "total value of landing").

and multiple locations. *See* WAC 220-47-307, -311, -401, -411, -427, and -428. Furthermore, they pay no regard to the economics associated with gillnet harvest opportunities in any of the other fishing areas covered by the same rule, WAC 220-47-411. For example, the Department provided additional harvest time to Gillnetters in Areas 7B and 7C in the 2012 rule, AR 3669, but the Gillnetters never acknowledge those benefits in their brief. Similarly, they fail to acknowledge other gillnet opportunities the Department provides. *See, e.g.*, WAC 220-33-010 (gillnet opportunity for salmon in the lower Columbia River); WAC 220-36-023 (gillnet opportunity for salmon in Grays Harbor); WAC 220-40-021 (gillnet opportunity for salmon in Willapa Bay). The Court should not entertain the Gillnetters' selective focus on just two fishing areas that comprise only a portion of the total salmon fishing opportunity offered to them statewide.

A similar kind of narrow-sighted challenge was rejected by the Supreme Court in *Northwest Gillnetters Ass'n*, 95 Wn.2d at 640. In *Northwest Gillnetters*, commercial gillnetters complained about a single one-day spring season harvest regulation that allowed commercial harvesters to catch only two percent of the spring harvest, with recreational fishers catching the balance of the spring harvest. The Court, however, pointed out that the rule "cannot be viewed in isolated parts"

where separate fall season regulations allowed the same commercial gillnetters to harvest 86 percent of the catch. *Id.* at 640 n.1. The Columbia River gillnetters attacked the rules on various fronts, all of which were denied. *Id.* at 648.

Even if the Court accepts the Gillnetters' narrow view that the Department's regulations are amenable to attack by focusing solely on the outcomes produced in two locations for a single species, their arguments fail to support a claim that the Department was arbitrary and capricious. In meeting its statutory mandates to maintain the economic well-being of the fishing industry and to ensure stable harvests for fishers, the Department properly analyzed the predicted economic benefits of its rule and, to ensure stability, compared those benefits to historical practices.

The Department predicted what percentage of the annual Puget Sound chum harvest share each gear group would likely catch under the 2012 rules and further predicted the economic effects likely to result. AR 3671-72, 3678. The Gillnetters were expected to harvest about 25 percent of the catch in Areas 10 and 11, combined with Hood Canal.⁵ AR 3678. Purse Seiners were expected to harvest the remaining

⁵ Because Hood Canal offers a significant portion of harvest opportunity for the Puget Sound chum fishery, the Department included the Hood Canal Fishing Areas 12, 12B, and 12C in much of its analysis within the record. AR 3671. The Gillnetters, however, have only challenged the allocation in Areas 10 and 11. Some of the documents in the record analyze Areas 10 and 11 separately, but many others set out a combined analysis that includes Hood Canal.

75 percent. *Id.* In order to determine whether these predicted 2012 harvest outcomes satisfied the goals of maintaining the economic well-being and stability of commercial harvesters (RCW 77.04.012) and providing these fishers with a “stable level of harvest” (RCW 77.50.120), the Department compared the expected 2012 catch outcomes with historic trends of catch shares for both gear groups. From 1973 to 2002, the Department allocated equal harvest time for each of the two gear groups. During that period, the Gillnetters averaged 32 percent and the Purse Seiners averaged 68 percent of the annual catch. AR 3671. In more recent years, from 2008 through 2011, the Department observed that the Gillnetters’ share of the annual catch ranged from 24 percent to 28 percent.⁶ The 25 percent predicted harvest for the Gillnetters in 2012 is within the range of outcomes that have sustained that fleet in recent years.

The Gillnetters argue that they should receive a higher share of the catch, and they selectively cite to catch statistics from much earlier years when Gillnetters did have larger catch shares. The Department determined that this older data is not representative of the current situation due to changes in the number of licensed Gillnetters versus Purse Seiners

⁶ The Department excluded years 2003-2007 from its analysis because those were the first years the Department had afforded more harvest time to Gillnetters to address the poor economic results, and the schedules were adjusted each year. AR 3671. Only from 2008 forward did the regulations achieve more stable and consistent schedules across the years. *Id.*

who fish in the Puget Sound area. The number of gillnet licenses has declined significantly over the years. Gillnet licenses went from a high of 1,990 licenses in 1974 to just 195 in 2011.⁷ AR 2973. The number of licensed purse seine harvesters declined from a high of 402 in 1978 to 75 in 2011. AR 2973. These statistics demonstrate that the number of gillnet licenses has declined in a greater proportion than purse seine licenses. As a result, the ratio of purse seine licenses to gillnet licenses annually participating in the Puget Sound salmon fishery has shifted in the direction of purse seine licenses by six percent. AR 3671. The Department determined that this difference in the ratio between purse seine fishers and gillnet fishers would be expected to result in the purse seiners harvesting a six percent increased share of chum salmon compared to the historic years when more gillnets participated *Id.* As a result, the Department concluded that a Gillnet harvest share of 26 percent would be roughly consistent with the historic average adjusted for declines in that fleet. *Id.* Because the 2012 regulations were projected to result in the Gillnetters harvesting 25 percent of the annual catch, which was just one percent

⁷ A portion of this license drop may be attributable to license buy-back programs. AR 3671. The record indicates the existence of one \$26 million salmon license buy-back program that existed in the 1999-2001 biennium. AR 1360. A report submitted by the Gillnetters also suggests license buy-back programs as a reason for the decline in number of gillnet licenses, and thus an economic increase to the remaining fishers. AR 2843.

away from the historic adjusted average, the Department determined that the 2012 rules achieved a stable level of harvest. AR 3673-74, 3678.

After determining that the 2012 rules would provide a stable level of harvest in that the harvest would be consistent with historical harvests, the Department then determined that the expected level of harvest would provide economic returns to both gear groups that would, in turn, contribute to the overall economic well-being and stability of the state's fishing industry. The Department estimated that the harvest opportunity provided by the 2012 rules would produce an *ex vessel* value of \$3,330 per license to the Gillnet fleet.⁸ AR 3674. This estimate was derived by dividing the estimated South Sound and Hood Canal gillnet catch value of \$649,000 by 195 existing gillnet licenses. AR 2973, 3674. This calculation actually underestimates the real amounts earned by participating gillnet licensees because less than half of the license holders actually fish Areas 10 and 11 in any given year. AR 2973; *see also* Appellant Br. at 5 n.1 (pointing out that in 2011, only 76 out of 195 licensed Gillnetters reported harvests from Areas 10 and 11). The Department compared the Gillnetter's expected 2012 economic return per license with the historic *ex vessel* values from prior years, adjusted for inflation. AR 3672-75. From 1973-2002, Gillnetters earned on average

⁸ The Department's economic analysis and calculations combined South Sound (Areas 10 and 11) and Hood Canal (Areas 12, 12B, and 12C). AR 3674.

\$1,050 per license. AR 3674. The projected 2012 *ex vessel* value of \$3,330 is nearly a three-fold increase from the average historic value.⁹ *Id.*

The graph at AR 3686 illustrates the Department's economic calculations across the past nine years. The graph shows that the *ex vessel* values for gillnets have been slowly and steadily increasing. When the data from the table in AR 3687 is graphed across the entire date range of 1973 through 2011, it demonstrates that the same steady increase in *ex vessel* values has occurred over this broader period of time as well. Appendix 1.

The Gillnetters do not challenge the accuracy of any of the Department's economic calculations. They accept that the expected *ex vessel* value for gillnets in the 2012 season is \$3,300 per license, in contrast to a historic average of just \$1,050. Appellant Br. at 33-34. In the face of these unchallenged findings, the Gillnetters make the unsupported claim that the Department's rules are "slowly extirpating the gillnet fleet" and that "the economics of fishing becomes increasingly difficult on gillnet license-holders." Appellant Br. at 33. They provide no citations to the record to back up these bare assertions.

⁹ This \$3,330 annual *ex vessel* value may appear small in comparison to the annual earnings of even a minimum wage worker, but these fishing incomes are earned from only 20 days of harvest in the South Sound and Hood Canal areas.

The Gillnetters also fail to mention that a report contained in the record, a report that they commissioned themselves from a retired fisheries professor, contradicts their claims of economic woe. In his report, Stephen Matthews observes that “a growing portion of the gill net catch . . . [is] yielding to the fisherman perhaps higher market values . . . ,” AR 2842, and that “Puget Sound chum may be the most valuable non-Indian opportunity remaining.” AR 2843. He states that “[n]ot only is the total value high, but the share by each boat has risen very substantially due to license reduction over the past 20 years.” *Id.* He concludes, “In summary, the Puget Sound chum fishery is healthy and understandably competitive – within and between gear types.” *Id.* The Matthews paper’s observations about the economic health of the fishery across both gear types, confirm the Department’s conclusions that the 2012 rules provide the Gillnetters with a stable and economically significant share of chum salmon.

Having failed to identify any grounds in the record for attacking the Department’s economic analysis, the Gillnetters next claim that the agency has failed to meet its statutory management objectives because the Purse Seiners’ *ex vessel* values per license have increased more rapidly than the per license values obtained by the Gillnetters. *See* Appellant Br.

at 34. The Court should reject this argument because it relies on the unsupported argument that equality of outcomes is somehow mandated.

The Gillnetters claim that they should be allowed more of an economic increase, but no statute and no management goal requires the Department to guarantee any *quantity* or value of harvest to either gear group—no fisher has an entitlement to harvest *any* quantity of fish. *Wash. Kelpers*, 81 Wn.2d at 415. No statute, and no departmental management objective, requires that the direct or indirect benefits of fisheries regulations be balanced equally across all gear groups. Furthermore, the fact that the Department failed to adopt the allocation or economic result that the Gillnetters advocated does not prove arbitrary conduct. *See Puget Sound Crab*, 300 P.3d at 456 (“The Department’s failure to adopt the result that the commercial harvesters advocated does not mean that the Department ignored evidence before it or acted arbitrarily and capriciously.”).

The record in this case demonstrates that the Department used available data to predict the harvest and economic outcomes associated with its proposed allocation of harvest time. The Department then considered and explained its rationale for why those projected outcomes would contribute to the goal of promoting the economic well-being and

stability of the state fishing industry. Accordingly, the rule should be upheld.

D. The Record Supports the Department's Stated Concern Over Bycatch Impacts That Gillnets Pose to Non-Target Species

The Department's conservation mandate justifies consideration of the potential impacts that commercial harvesters may have on non-target species. The Department analyzed the projected bycatch impacts that would result from the proposed harvest schedules and determined the 2012 rules "are reasonably constructed to meet the objective to minimize bycatch overall." AR 3665. The Gillnetters have not expressly attacked this conclusion, nor have the Gillnetters alleged that the adopted 2012 Rules would cause bycatch impacts in violation of the Department's management objectives. Rather, the Gillnetters allege the Department was arbitrary and capricious when it suggested in its Concise Explanatory Statement that gillnets may have more adverse bycatch impacts than purse seines. The record supports the Department's bycatch analysis.

"Bycatch" refers to any non-target species that is inadvertently captured by fishers. "Bycatch mortality" refers to non-target species that are killed by contact with deployed fishing gear. Given the significant differences between how gillnets and purse seines operate, they can have different bycatch rates and bycatch mortality rates.

A gillnet consists of thin filament mesh that ensnares fish that try to swim through it. AR 343-44. Gillnets are considered passive “entanglement” gear. AR 343. Because of the damage caused by the physical entanglement with the mesh, many fish caught in a gillnet die or are injured upon being removed from the mesh, and gillnets stress fish more than other types of passive gear. AR 348, 2844. Gillnets also present significant risks of harm to marine birds that dive for fish and get caught in the hard-to-see nets. *See, e.g.*, AR 147, 264, 1422-23. Gillnets, more than any other fishing gear, regularly get lost after being deployed. AR 2670-73. When lost, they become ghost nets that can indiscriminately snare and kill numerous species for decades. *Id.* Gillnets can also injure or kill fish that fall off the net prior to its being hauled into the boat, a phenomenon called “drop-off” or “drop-out,” an impact that is difficult to quantify. AR 471, 1863.

Purse seine nets differ from gillnets by encircling fish in a more visible net that is deployed and then drawn up to form a bag or “purse.” AR 349. Purse seines are not specifically designed to entangle fish. Purse seines can nevertheless harm fish through abrasion or crushing as the net is drawn in and hauled into the boat. AR 1893. If birds or marine mammals happen to be above a deployed purse seine net, many escape the net as it is being drawn in, and of the few that may be captured, many are

released alive and unharmed. *See, e.g.*, AR 279, 1349, 1420. Purse seine nets are considered to have a near zero risk of drop-out, since all fish gathered into the net are hauled on board and counted. AR 1863, 2221.

Even if a non-target fish is caught alive in either kind of fishing gear and released back to the wild, studies have shown that some of those fish subsequently die from the encounter. Biologists describe these deaths as an indirect form of “bycatch mortality.” A number of studies have attempted to determine the indirect mortality rates for various fisheries. *See, e.g.*, AR 424.

The Gillnetters make several unsupported bycatch arguments. First, they assert the Department used arbitrary bycatch mortality rates for Chinook salmon. Second, they allege that purse seines actually cause greater harm to Chinook salmon than gillnets. Third, the Gillnetters claim the Department arbitrarily concluded that gillnets pose greater risks of harm to non-target, non-salmonid species. These claims are refuted in order.

- 1. The Department Reasonably Used Chinook Bycatch Mortality Rates Adopted by State and Tribal Biologists When Considering Adverse Impacts Caused by the Puget Sound Chum Fisheries**

Chinook salmon in Puget Sound are listed under the Endangered Species Act, so the Department reviews its chum fishing regulations to

ensure harvests do not adversely harm Chinook stocks. AR 3663. The Gillnetters claim the Department was arbitrary and capricious in its adoption of statistical Chinook bycatch mortality rates which the Department used to analyze bycatch impacts in the 2012 rulemaking process, but the facts refute their argument.

The Department established Chinook bycatch mortality rates for purse seines outside the context of the challenged fishery rules. In 2010, the Department and Treaty Tribes reached agreement on a 2010-2014 Comprehensive Management Plan for Puget Sound Chinook: Harvest Management Component (hereinafter “2010 Management Plan”). AR 2196. As part of the management of the Chinook stocks, tribal and agency biologists analyzed potential adverse impacts to Chinook salmon potentially imposed by Puget Sound fisheries targeting other stocks. AR 2214-22. These adverse impacts were calculated by estimating the bycatch mortality rates that other fisheries could have against non-target Chinook. AR 2221 (Table 9). For purse seine fisheries, state and tribal biologists concluded the indirect mortality rate should be 45 percent for immature fish, and 33 percent for mature fish. *Id.*

The Gillnetters claim that in the context of the 2012 rulemaking process, the Department arbitrarily disregarded different purse seine bycatch mortality rates suggested in a 1997 report by the Chinook

Technical Committee (“CTC” or “Committee”).¹⁰ The 1997 report had suggested differing levels of Chinook mortality in purse seine fisheries depending on the size of the fish, and then it suggested an aggregated mortality rate of 72 percent. AR 432. The Committee placed significant caveats on its recommended numbers:

However, immediate mortality is fishery- and time-specific because of such factors as the type of fishery, frequency of catch sizes (related to handling time and suffocation of the chinook), incidence of chinook in sets by time and area of the fishery, handling of the chinook during boarding, and size distribution of the chinook caught. When fishery specific information becomes available for particular model fisheries, the CTC will apply the more specific estimates.

AR 432. The Department and Tribes believed more specific information justified using different bycatch rates in the 2010 Management Plan and thus the 2010 Management Plan did not adopt the “generic” rates suggested in the 1997 CTC Report. This decision is explained in the Concise Explanatory Statement, which states Department managers had previously reviewed all available studies with tribal co-managers, and in light of all the facts specific to the Puget Sound purse seine fishery, those managers reached agreement on Chinook bycatch mortality rates. AR 3664. This demonstrates that while the Department considered the bycatch mortality rates for purse seines suggested by the 1997 CTC report,

¹⁰ The Chinook Technical Committee is made up of representatives from Canada, the United States, and fish, wildlife, or game employees from the states of Idaho, Oregon, Washington, Alaska, and several tribal organizations. AR 425.

the Department ultimately decided to adhere to the different rate agreed upon with the Tribes in the 2010 Management Plan, which agreement has been approved by the federal government under Endangered Species Act consultation. AR 2707. The Department's reasoned analysis for adhering to this 2010 State-Tribal agreed-upon purse seine bycatch rate in the 2012 rulemaking process defeats the Gillnetters' claim of arbitrary and capricious rulemaking. *See Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997) (when there is room for two opinions, an agency's decision after due consideration is not arbitrary and capricious even though the reviewing court may believe it to be erroneous).

While state and tribal biologists agreed in the 2010 Management Plan upon specific Chinook bycatch mortality rates unique to the Puget Sound purse seine fisheries, they did not adopt specific Chinook bycatch mortality rates unique to the Puget Sound gillnet chum fisheries. Therefore, for purposes of conducting its 2012 rulemaking analysis, the Department relied directly on the gillnet bycatch rates recommended in the 1997 CTC report. AR 3664. That report recommends an assumed mortality rate of 90 percent for Chinook released from gillnets. AR 471. Because the assumed mortality rate of released Chinook is so great, the Department requires gillnet fishers to retain all Chinook retrieved from their nets. The Department's requirement that Gillnetters keep

incidentally caught Chinook is not challenged by the Gillnetters in this case, and the requirement is supported by the record. *See also* AR 432 (the 1997 CTC report acknowledges that Chinook non-retention gillnet fisheries “are unlikely to be implemented due to high expected mortality rate of the fish released”). Because the Gillnetters keep all harvested Chinook, their fishery constitutes a *100 percent mortality* to that non-target species.

The Gillnetters erroneously assert that the Chinook Technical Committee “updated the ‘generic CTC (1997) assumption of 90 percent’ in 2004 to recommend using an overall mortality rate of only 50 percent for gillnets.” Appellant Br. at 21 (citing AR 1895) (emphasis in original). The Gillnetters misrepresent and cite this 2004 report numerous times when they claim the Department arbitrarily and capriciously relied upon the 1997 CTC report for its gillnet bycatch rates. Appellant Br. at 16 n.4, 17 & n.5, 18, 21, 22. The Gillnetters misconstrue both the data and the purpose of the cited 2004 report.

First, the 2004 document issued by the Committee did not replace the generic recommendations set out in the 1997 report. Instead, the 2004 document merely reviewed various studies that had been conducted since issuance of the 1997 report. AR 1897. The 2004 document specifies what process *would have to occur* if the Committee were to update any of its

1997 recommendations. AR 1897.¹¹ Section 4 of the 2004 document is described as a section setting out the results of particular gear- or area-specific mortality studies, AR 1897, and the 50 percent gillnet bycatch mortality rate cited by the Gillnetters comes from one of such studies.¹² AR 1895. The Gillnetters fail to identify any language from the 2004 document that replaces or “updates” the generic 1997 bycatch rate recommendations as a result of one small gear- and area-specific study.

Second, a review of the details of the study in the 2004 report relied upon by the Gillnetters disproves their assertion that the 50 percent bycatch rate observed in that study has any relevance to the Puget Sound chum fishery. The study results reported at AR 1895 involved a Columbia River study conducted in 2002 that used live recovery boxes and short net soak times.¹³ AR 1894. That study suggested a 50 percent mortality rate to adult spring Chinook salmon under those strictly controlled circumstances. AR 1895. The 2004 CTC Report never adopts this area-

¹¹ The 2004 document explains: “The CTC is amenable to the adoption of fishery-specific mortality or drop-off rates in addition to or instead of the rates currently used as per CTC (1997). To adopt such mortality rates, the CTC would require the proposing agency to provide a report documenting the scientific basis of the rate estimates, for review and approval by the bilateral CTC.” AR 1897.

¹² Other studies summarized in Section 4 looked at bycatch impacts associated with commercial trolling gear, AR 1890, recreational hook and line fishing, AR 1891, and gillnets versus tangle nets, AR 1895.

¹³ When a living non-target fish is recovered from a net, it may be lethargic or injured, but allowing that fish to recover in a holding tank (or “recovery box”) for a short time prior to being released back to the wild increases the chance of survival. *See* AR 2460.

and fishery-specific 50 percent mortality rate as being applicable to any commercial gillnet fishery.

Additional facts further disprove the Gillnetters' reliance on the Columbia River study. The record does not show that the tangle nets used in the Columbia River study have any similarity to the commercial gillnets used in Puget Sound, or that the 2002 study's findings about *adult spring* Chinook salmon in a *freshwater* environment have any relevance to the mortality of Chinook released after being ensnared in gillnets in the *salt water* environment of the Puget Sound during the *fall* season. Finally, the Gillnetters do not use recovery boxes or short soak times when they fish in Areas 10 and 11, which handling methods were used in the Columbia River study. The record refutes the Gillnetters' claim that the Department should have credited gillnets with a 50 percent mortality rate for Chinook salmon when analyzing conservation goals and establishing the fall Puget Sound chum fishing season.

2. The Department Reasonably Concluded That Gillnets Potentially Pose Greater Bycatch Risks to Chinook Salmon Than Purse Seines

In its analysis, the Department notes that the bycatch impacts of Puget Sound gillnet harvests have been minimally studied, in contrast to a broader availability of purse seine data, and that it may not be valid to extrapolate the purse seine bycatch data to gillnets because of the

differences in gear types. AR 3665. Given the higher presumed bycatch mortality rates of gillnets, and given the paucity of gillnet monitoring data in the Puget Sound area, the Department expressed reluctance to significantly expand gillnet harvest opportunity without more robust monitoring efforts first being conducted. AR 3664-65. The Department has already started such monitoring efforts, with agency observers recording data from some of the Puget Sound gillnet harvests in the 2011 season, the results of which are discussed further below.

The Gillnetters claim the Department's stated concern over alleged gillnet impacts is arbitrary and capricious because they claim purse seines cause greater harm to Chinook salmon. The materials the Gillnetters rely on do not prove the Department's analysis to be arbitrary and capricious. One document the Gillnetters cite is a report by Mr. Stephen Matthews, who was hired by the Gillnetters. The Matthews paper asserts that purse seines catch "many times" more Chinook salmon than gillnetters, AR 2841, and estimates that the bycatch mortality of purse seines could be higher than the Department presumes. AR 2852. The Department reviewed and rejected these unscientific conclusions for four reasons: First, the Matthews paper did not analyze or discuss all data available to the Department, including the recent 2011 monitoring reports. AR 3679. Second, the paper did not analyze bycatch impacts to any species other

than salmon, while the Department weighs impacts to all species of concern, including Puget Sound rockfish, dogfish, common murre, and others. *Id.* Third, the paper assumed that fish tickets accurately represented the full scope of gillnet bycatch, which assumption has been disproved in numerous studies.¹⁴ AR 3680. Fourth, the paper did not address other sources of fishing-induced mortality such as illegal, misreported, or unreported landings, discard mortality, escape mortality, drop-out mortality, avoidance mortality, ghost fishing mortality, and habitat degradation mortality. *Id.* The Department explained each of those four concerns in detail. AR 3679-80. A fifth reason for rejecting the Matthews paper's bycatch conclusions also exists: The paper has never been peer reviewed or published in a scientific journal. The Department thoughtfully explained its reasoning when declining to give significant weight to the Matthews paper. AR 3679-80.

The Gillnetters distort other evidence in the record to bolster their assertion that purse seines harm more Chinook salmon than gillnets. The Department had started having monitors observe some Puget Sound gillnet

¹⁴ Fish ticket data is unreliable. AR 3666. The 2011 monitoring data suggests higher bycatch rates than had been self-reported on fish tickets. AR 3680. Another study observed fishers oftentimes do not report marine mammal bycatch even when required by federal law and that “[i]t is widely accepted that accurate estimation of bycatch rates in any fishery requires an independent observer scheme.” AR 1994. Other studies conclude that self-reporting by fishers underestimates fishery impacts on non-targeted species. *See* AR 264, 468.

harvests during the 2011 season to begin building a better scientific understanding of the bycatch impacts that gillnets pose in the Puget Sound area. The raw 2011 observer forms are included in the record at AR 3001-3346, and the Department had compiled some of the observer reports in the tables at AR 3612-13, but the data had not been scientifically reviewed at the time the 2012 rules were adopted.

Undeterred by the lack of scientific review of the 2011 observer data, the Gillnetters rely upon it to assert in their opening brief that Purse Seiners had higher Chinook bycatch “of *stunning* proportions.” Appellant Br. at 20 (emphasis in original). However, this conclusion is only reached after they mischaracterize the 2011 observer data. Almost all of the purse seine Chinook bycatch occurred during the summer pink salmon fishery, a separate fishery in which *no gillnet boats participated*. AR 3676. In fact, only one single Chinook salmon was caught by monitored purse seines participating in the fall chum fishery during the months of October and November. AR 3612. By including bycatch data from the summer pink fishery where gillnets did not participate, the Gillnetters’ analysis manipulates the statistics to reach the false conclusion that gillnets have less bycatch risks to Chinook than purse seines when engaged in the fall chum fishery.

In contrast, when the relevant observation data from Areas 10 and 11 from the months of October and November is compared side-by-side, as shown in Appendix 2, the numbers show the significantly higher bycatch impacts that gillnets appear to have not only on Chinook salmon, but also on dogfish and birds, compared to purse seines. Several simple calculations derived from the data assembled in Appendix 2 demonstrate these higher bycatch rates associated with gillnets in Areas 10 and 11:

Bycatch Species	Gillnets	Purse seines
Number of Chinook per net set: ¹⁵	0.11	0.01
Number of Chinook per 1000 chum: ¹⁶	3.00	0.15
Number of Coho per net set:	0.02	0.37
Number of Coho per 1000 chum:	0.60	4.39
Number of dogfish per net set:	3.98	0.00
Number of dogfish per 1000 chum:	107.51	0.00
Number of birds per net set:	0.44	0.09
Number of birds per 1000 chum:	12.01	1.02

The Gillnetters argue that because purse seines catch a higher share of the fall chum fishery, the Department should weigh purse seine bycatch impacts more heavily than the impacts of the gillnet fishery. Appellant Br. at 22-23. But their logic is specious: If the Department provides more harvest opportunity to Gillnetters, effectively transferring more of the annual catch to that gear, and if Gillnetters have higher bycatch rates on

¹⁵ To determine the bycatch rate per net set, divide the bycatch total for each particular species by the total number of net sets.

¹⁶ To determine the bycatch rate of each species per 1,000 chum caught, divide the bycatch total by the total number of chum harvested, then multiply by 1,000.

the species of greatest concern, then the bycatch impacts on Chinook salmon would *increase*, not decrease.

3. The Record Shows That Gillnets Pose a Greater Risk of Harm to Other Species

The Gillnetters state that no record exists of a gillnet harming a marbled murrelet in Puget Sound, Appellant Br. at 24-25, and they allege that all of the Department's stated cautions about gillnet impacts are misplaced. Their argument selectively mines discrete portions of the record and ignores numerous other studies and reports. The record establishes the particular risk that gillnets pose to all kinds of sea birds, not just marbled murrelets. *See* AR 147 (stating gillnets are "one of the most pressing conservation problems affecting marine birds"), AR 264 ("Mortality in gill nets may be one of the greatest conservation problems facing the Marbled Murrelet."), AR 1422-23 (indicating that the "chronic mortality [to marbled murrelet] which occurs from gillnet mortality would have an increasingly significant effect on the population should it continue to decline"). The fact that no marbled murrelet fatality has been documented by Gillnetters in the Puget Sound chum fishery is not surprising, given how little independent observer data exists for the gillnet

fishery in that area, coupled with the fact that a strong incentive exists for fishers not to report such encounters.¹⁷

The United States Fish and Wildlife Service conducted a five-year evaluation on the status of the marbled murrelet in 2004, and that evaluation acknowledges that gillnet threats to the murrelets have been reduced, *but that they still continue to pose a risk.* AR 1705. The evaluation recommends further study to determine current bycatch levels and estimates of past mortality. *Id.* Of particular concern to the Department is the fact that the 2004 federal evaluation relied on low fishing effort levels observed in the years of 1996-2000, AR 1406, and the evaluators presumed that fishing efforts would continue to decline. AR 1425 (“Fishing effort in gillnet fisheries is likely to decline, as licenses are bought out as part of the effort to reduce fleet size.”). Gillnet fishing efforts in Areas 10 and 11, however, have increased by a factor of 2.5 percent since 2000. *See* AR 3611 (average of 172 gillnet landings from 1996-2000, compared to 473 landings in 2011). The Gillnetters’ efforts to portray their fishery as posing no risk to marbled murrelets simply ignore the evidence in the record that the Department collected and reviewed.

Marbled murrelets are not the Department’s only concern. The 2011 observer data, discussed extensively above, shows that gillnets

¹⁷ *See* footnote 14, *supra*, documenting that fishers’ self-reports of adverse impacts on non-target species, especially protected species, are inherently unreliable.

encountered 12 sea birds for every 1,000 chum harvested in Areas 10 and 11, in contrast to the one bird per 1,000 chum harvested by purse seines. AR 3612-13. Out of the 37 dead birds observed in 2011 from all fishing areas, 36 of them were found in gillnets, representing 100 percent fatality for gillnet encounters.¹⁸ AR 3611. Other references in the record confirm that most birds entangled in gillnets are killed. *See* AR 236 (of 195 seabirds tangled by gillnets, 188 were dead, and only seven were released alive), AR 398 (of 23 seabirds caught out of 230 net sets, 20 were killed). In stark contrast, studies suggest most birds reported caught in purse seines are released unharmed. *See* AR 286 (of 106 birds caught, out of 1,439 purse seine net sets, only five birds were killed), AR 3611-12 (2011 observer data showing one bird death out of nine encounters).

The 2011 observer data further justifies the Department's concern over gillnet impacts to dogfish, with gillnets catching an average of 107 dogfish per 1,000 chum, whereas the purse seiners caught *no* dogfish. AR 3612-13, 3664. The record also justifies the Department's concern over ghost gillnets harming ESA-listed rockfish. AR 2671-73, 3680.

V. CONCLUSION

The Gillnetters are unable to carry their heavy burden of proof to show that the Department's 2012 rules violate RCW 34.05.570.

¹⁸ This statistic comes from observer data across all fishing areas and for all fisheries, not just fall season chum in Areas 10 and 11.

Nonetheless, the Gillnetters invite the Court to second-guess the Department's regulations governing the wise use of a fishery resource. The relief the Gillnetters seek is beyond the scope of the legislative mandate to the Department, and their efforts to force the Department to allocate more fish to them belong in the legislative arena, not the courtroom. Their rulemaking challenge should be denied.

RESPECTFULLY SUBMITTED this 5th day of June, 2013.

ROBERT W. FERGUSON
Attorney General

/s/Joseph V. Panesko
Joseph V. Panesko
Assistant Attorney General
WSBA No. 25289
Attorneys for Respondent
Washington State Department of
Fish and Wildlife

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent Washington State Department of Fish and Wildlife on all parties or their counsel of record on the date below as follows:

U.S. Mail Postage Prepaid via Consolidated Mail Service

David S. Mann
Brendan W. Donckers
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 715
Seattle, Washington 98101

Robert F. Kehoe
Attorney at Law
1900 West Nickerson Street, Suite 320
Seattle, Washington 98119-1650

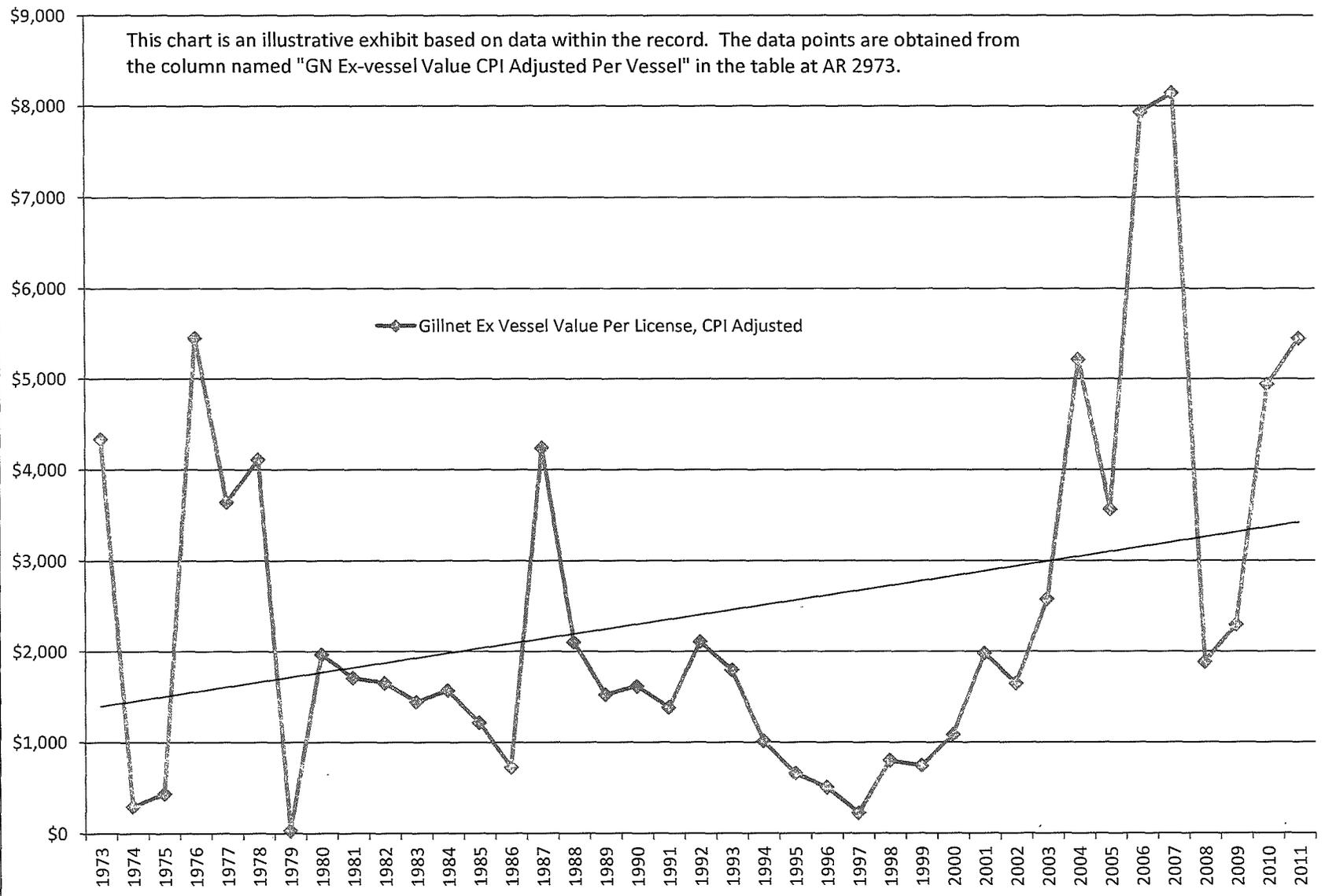
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of June, 2013, at Olympia, Washington.

/s/ Dominique P. Starnes

Dominique P. Starnes
Legal Assistant

Gillnet Ex Vessel Value Per License, CPI Adjusted, Areas 10 & 11



APPENDIX 2

2011 Purse Seine fall Chum observation data, Areas 10 & 11 (extracted from AR 3612)

Area	Date	Chinook	Coho	Chum	Dogfish	Birds	Observed sets
10	10/18/2011	0	5	609	0	0	10
10	10/24/2011	0	7	2,203	0	1	14
10	11/1/2011	0	3	888	0	1	11
10	11/7/2011	0	0	25	0	0	4
11	10/18/2011	0	8	568	0	0	10
11	10/24/2011	1	2	358	0	0	6
11	11/1/2011	0	3	1,082	0	3	10
11	11/7/2011	0	2	1,103	0	2	16
Total	8 days	1	30	6,836	0	7	81

2011 Gillnet fall Chum observation data, Areas 10 & 11 (extracted from AR 3613)

Area	Date	Chinook	Coho	Chum	Dogfish	Birds	Observed sets
10	10/19/2011	0	0	131	1	1	5
10	10/25/2011	0	0	63	0	0	7
10	10/26/2011	0	0	185	0	0	6
10	11/2/2011	0	0	225	0	4	4
10	11/8/2011	0	1	213	1	1	4
10	11/9/2011	1	0	61	1	0	3
10	11/13/2011	2	0	453	29	10	9
10	11/20/2011	2	0	201	125	1	3
11	10/19/2011	0	0	10	0	0	2
11	11/20/2011	0	0	73	15	1	1
11	11/21/2011	0	0	50	7	2	1
Total	11 days	5	1	1665	179	20	45

WASHINGTON STATE ATTORNEY GENERAL

June 05, 2013 - 3:20 PM

Transmittal Letter

Document Uploaded: 445671-Respondent's Brief.pdf

Case Name: Puget Sound Harvesters Ass'n v. State Department of Fish and Wildlife

Court of Appeals Case Number: 44567-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Joe V Panesko - Email: joep@atg.wa.gov