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Case No. 52643-3-II

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

**CASCADIA WILDLANDS,
Petitioner - Appellant,**

v.

**FISH AND WILDLIFE,
Respondent.**

**BRIEF OF AMICI CURIAE
TROUT UNLIMITED AND SIERRA CLUB**

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**I. INTRODUCTION AND INTERESTS OF AMICI CURIAE
TROUT UNLIMITED AND SIERRA CLUB**

Amici curiae Trout Unlimited and Sierra Club (Amici) are committed to preserving fish and their habitat. They advocate against Appellee Washington Department of Fish and Wildlife’s (WDFW’s) interpretation of RCW 75.55.091 (Section .091) and its implementing rules, WAC 220-660-300, by arguing WDFW lacks authority to exempt motorized suction dredging and other “large-scale” prospecting and mining techniques from the Hydraulic Code’s permitting, or “hydraulic project approval” (HPA), requirement.

A. Trout Unlimited

Trout Unlimited was founded in 1959 and has grown to be the nation’s largest grassroots coldwater conservation organization with a mission to conserve, protect, and restore North America’s trout and salmon fisheries and their watersheds. In 2018, Trout Unlimited protected over 327,000 acres of land and streams, reconnected 406 miles of waterway and restored over 365 miles of trout and salmon habitat. Trout Unlimited has over 300,000 members and supporters organized into 400 chapters and councils from Maine to Alaska. This dedicated grassroots community is matched by a respected staff of policy experts, scientists, organizers, and aquatic restoration practitioners who work out

of more than 30 offices nationwide. In Washington, Trout Unlimited has close to 4,000 members and 14 full-time professional staff.

Trout Unlimited's advocacy work covers a range of issues, including habitat protection and restoration. One of its primary habitat protection efforts has been reforming motorized suction dredge mining in Washington's rivers and streams. Trout Unlimited has been active in the Legislature and in administrative processes before the WDFW to limit suction dredging. It has, through its staff and volunteers, testified before both the Legislature and the WDFW Commission on the harmful impacts of motorized suction dredging and the need for regulatory and statutory reform. Trout Unlimited also helped to build a large coalition of fishing, conservation, business, and tribal groups to support suction dredging reform, and has established an action center used to generate hundreds of messages to state agencies and legislators.

B. The Sierra Club

The Sierra Club is a national nonprofit organization with 67 chapters and approximately 780,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry

out these objectives. Its Washington Chapter has approximately 31,000 members.

The Sierra Club advocates to stop the significant damage to salmonids, other sensitive aquatic species, and riparian ecosystems caused by suction dredge mining. During WDFW's rulemaking process, it mobilized its members to submit comments describing the importance of protecting water quality and native fish populations and explaining that all motorized mineral prospecting methods, including but not limited to suction dredge mining, should not be covered under the Gold and Fish Pamphlet. The Club and its members also advocated for regulatory provisions that would strengthen compliance with the Endangered Species Act and Clean Water Act, prevent the transportation of invasive species by motorized equipment, and require suction dredges to be registered to deter their improper use.

II. ASSIGNMENTS OF ERROR

An agency may act only as the Legislature has authorized it to act.¹

If an agency enacts a rule that violates constitutional provisions or exceeds its statutory authority, a court must invalidate it.²

Amici adopt and support the Assignments of Error presented by Appellant Cascadia Wildlands: WDFW exceeded its authority under the Hydraulic Code, specifically RCW 77.55.091(3) (“Subsection Three”), when it adopted WAC 220-660-300, exempting the use of motorized equipment, including suction dredges, high bankers, and heavy equipment, from the Code’s permitting requirement.³ The trial court erred by concluding these exemptions are lawful.⁴

III. STATEMENT OF THE CASE

Amici adopt and support the Statement of the Case presented by Cascadia Wildlands, which accurately describes the harms of suction dredge mining, this case’s procedural history, and explains that the

¹ See *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 74, 110 P.3d 812 (2005), citing *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993).

² See RCW 34.05.570(3)(a), (b) (“The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law[.]”).

³ See Appellant Cascadia Wildland’s Opening Brief (Opening Br.) at 2.

⁴ See *id.* (citing CP-268–69).

Hydraulic Code’s purpose is protecting fish.⁵ WDFW incorrectly suggests a more moderated purpose, stating the Code balances two statutory mandates: “protecting fish life and working with the prospecting community.”⁶

The statute’s general rules state: “The purpose of the HPA is to ensure that construction or performance of work is done in a manner that protects fish life.”⁷ It does not mention a balancing between the interests of fish and habitat with the interests of developers or prospectors. The administrative history of the rule (“[t]he [H]ydraulic [C]ode rules detail how hydraulic projects must be conducted to protect fish life”⁸), other provisions of the Act that favor fish enhancement projects,⁹ and case law interpreting the Act reinforce the statute’s purpose as described by Cascadia Wildlands.¹⁰

⁵ See *id.* at 6 (citing AR-3046); see also Appellant Cascadia Wildland’s Reply Brief at 1.

⁶ Appellee WDFW’s Response Brief at 2.

⁷ WAC 220-660-010.

⁸ Wash. St. Reg. 15-02-029.

⁹ See *e.g.*, RCW 77.55.181 (allowing streamlined permitting for fish enhancement projects).

¹⁰ See *Beatty v. Fish & Wildlife Comm’n*, 185 Wn. App. 426, 444, 341 P.3d 291 (2015) (“The [H]ydraulic [C]ode provides protection for fish life through the development of a statewide system of rules for hydraulic projects or other work that will use, divert, obstruct, or change the natural flow or bed of state waters. . . . Implementation of the hydraulic code rules is necessary to minimize project specific and cumulative impacts to fish life.”).

IV. ARGUMENT

A. Section .091's Plain Language Defines the Scope of WDFW's Authority to Regulate Small Scale Prospecting and Mining.

Amici incorporate Cascadia Wildlands' argument in section IV.B of its Opening Brief, at pages 11–14, and in its Reply Brief, at pages 1–4.¹¹ The Hydraulic Code, Chapter 77.55 RCW, requires every hydraulic project to be permitted (approved) but for a few exceptions.¹² Section .091 specifically defines and exempts “small scale prospecting and mining”—the use of pans, nonmotorized sluice boxes, concentrators, or minirocker boxes—from this requirement.¹³ It does not exempt other, larger-scale methods, like motorized suction dredging, from this permit requirement.

¹¹ See Opening Br. at 11–14; see also Reply Brief at 1–4.

¹² See RCW 77.55.021(1) (“[I]n the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.”); see also WAC 220-660-010 (“Unless otherwise provided, any person who wants to conduct a hydraulic project must get a construction permit called the hydraulic project approval (HPA) from the department. The purpose of the HPA is to ensure that construction or performance of work is done in a manner that protects fish life.”).

¹³ See RCW 77.55.091 ((1) “Small scale prospecting and mining shall not require a permit under this chapter if the prospecting is conducted in accordance with rules established by the department. (2) ... [T]he department shall adopt rules applicable to small scale prospecting and mining activities subject to the section[.]”); see also RCW 77.55.011(21) (defining “small scale prospecting and mining as “the use of only the following methods: [p]ans; nonmotorized sluice boxes; concentrators; and minirocker boxes for the discovery and recovery of minerals.”).

B. WDFW Misreads Subsection Three as Granting It Authority to Exempt Mining Activities Besides Small Scale Prospecting and Mining from Formal Permitting Requirements.

The crux of WDFW’s argument is that the Legislature in Section .091 provided it not only with authority to exempt “small scale prospecting and mining” from the Code’s formal HPA requirement by rule and through publication of a *Gold and Fish Pamphlet*, but it also authorizes WDFW to exempt other methods of prospecting and mining that are not “small scale” through the *Pamphlet*.¹⁴

WDFW notes Section .091’s first subsection limits its authority to require a permit for “small scale prospecting and mining” as that term is defined in RCW 77.55.011(21).¹⁵ It also notes the second subsection directs it to adopt rules applicable to “small scale prospecting and mining.”¹⁶ WDFW grasps onto language in Subsection Three that directs it to prepare a “gold and fish pamphlet that describes *methods of mineral prospecting* that are consistent with the department’s rule[s].”¹⁷ WDFW

¹⁴ See, e.g., Response Br. at 1.

¹⁵ See *id.* at 18.

¹⁶ See *id.*

¹⁷ *Id.* (emphasis added); see also RCW 77.55.091(3) (“[T]he department shall distribute an updated gold and fish pamphlet that describes methods of mineral prospecting that are consistent with the department’s rule[s]. The pamphlet shall be written to clearly indicate the prospecting methods that requires a permit under this chapter and the prospecting methods that require compliance with the pamphlet. To the extent possible, the department shall use the provisions of the gold and fish pamphlet to minimize the number of specific provisions of a written permit issued under this chapter.”).

concludes the absence of the qualifier “small scale” evinces an intent by the Legislature for WDFW to have the discretion to categorically approve prospecting techniques beyond the definition of “small scale prospecting and mining.”¹⁸

WDFW’s reading is incorrect for four reasons: (1) it places Subsection Three’s directive to WDFW outside Substitute House Bill (SHB) 1565’s scope in violation of Article II, Section 19 of the Washington Constitution; (2) it is inconsistent with canons of statutory construction that guide how to determine legislative intent; (3) it contradicts requirements for agency rulemaking under Washington’s Administrative Procedure Act (APA); and (4) it contradicts clear legislative intent, as shown by a comparison of sequential legislative drafts and proceedings before relevant legislative committees. For each reason, Subsection Three does not authorize WDFW to circumvent the Hydraulic Code’s permitting regime.

¹⁸ See Response Br. at 19.

1. Interpreting Subsection Three, as Enacted by SHB 1565, to Allow WDFW to Exempt Techniques Besides Small Scale Prospecting and Mining from Permitting Would Be Inconsistent with Article II, Section 19 of the Washington Constitution.

WDFW asks the Court to read Section .091 with a dual purpose: to describe its obligations regarding small scale prospecting and mining and to grant it authority to exempt any mining technique from the Hydraulic Code's formal permitting requirement that it decides would minimize the number of specific provisions of a written permit.¹⁹ Accepting WDFW's reading would be unconstitutional, and this Court should reject any interpretation that would lead to constitutional difficulties.²⁰

Article II, Section 19 of the Washington Constitution states: "No bill shall embrace more than one subject, and that shall be expressed in the title."²¹ This provision ensures legislators and members of the public have notice of the scope of a piece of legislation.²² Titles can be general or narrow, meaning restrictive.²³ "A restrictive title will not be

¹⁹ See Response Br. at 19 (WDFW's decisions to use the *Gold and Fish Pamphlet* "to regulate small-scale and suction dredge prospecting methods were reasonably consistent with the plain language of RCW 77.55.091.").

²⁰ *State v. Creditford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996); see also *In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993) ("It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute.").

²¹ Const. art. II, § 19.

²² See *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000).

²³ See *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997).

regarded as liberally as a general title, and provisions not fairly within it will not be given force.”²⁴

SHB 1565 was codified in Section .091. The subject and title of SHB 1565, Chapter 415, Laws of 1997, is specific: “AN ACT Relating to *small scale prospecting and mining . . .*”²⁵ This stated subject, using the terms defined in the statute, limits the scope of the statute that follows. The Act’s subject is not vague like a broader and more generic title such as “AN ACT relating to mining” would be.

WDFW’s interpretation of Section .091 results in a construction of the statute outside the scope of the bill’s subject matter. Only interpretations confined by the Act’s title can be properly effectuated. Ignoring the Act’s specificity by construing Subsection Three as including “larger-scale” prospecting and mining techniques would raise substantial constitutional questions. Because the title states, and therefore the Constitution requires, that the subject of SHB 1565 be restricted to acts regarding “small scale mining and prospecting,” the first sentence of Subsection Three must be read as follows: “Within two months of adoption of the rules, the department shall distribute an updated gold and fish pamphlet that describes methods of [small scale] mineral prospecting

²⁴ *Amalgamated Transit*, 142 Wn.2d at 210 (internal punctuation omitted) (citing *Broadaway*, 133 Wn.3d at 127).

²⁵ Laws of 1997, ch. 415, § 2 (emphasis added)

that are consistent with the department’s rule[s].”²⁶ This Court should construe Section .091 accordingly and invalidate WAC 220-660-300 for exceeding WDFW’s authority under the statute.

2. Finding Authority in Subsection Three to Exempt Techniques Besides Small Scale Prospecting and Mining from Permitting Would Contradict Norms of Statutory Construction.

WDFW relies on the absence of two words in Subsection Three (“small scale”) to provide it with rulemaking authority beyond the scope of what is constrained in Section .091’s first and second subsections.²⁷

It rests its case on one judicially-created aid to construction, stating:

“When the Legislature uses two different terms in the same statute, courts presume that it intends the terms to have different meanings.”²⁸ While that is one aid to statutory construction, WDFW’s primary reliance on it here contradicts other canons of construction. This Court must construe Section .091 to follow the statute’s overall structure²⁹ and to avoid absurd results.³⁰

The Court’s fundamental objective when interpreting the Hydraulic Code is to effectuate the Legislature’s intent.³¹ It should

²⁶ RCW 77.55.091(3).

²⁷ See Response Br. at 19.

²⁸ *Id.* at 17 (citing *Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007)).

²⁹ See *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011).

³⁰ See *State v. Weatherwax*, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017).

³¹ See *Dep’t of Ecology v. Campbell & Gwin, L.L.C.*, 146 Wn. 2d 1, 9, 43 P.3d 4 (2002).

interpret any exceptions narrowly to respect the Hydraulic Code’s broader statutory scheme.³² What the United States Supreme Court has said about Congress applies equally to the Washington Legislature: “Congress, we have held, does not alter the fundamental details of a regulatory scheme or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”³³

Here, WDFW would have this Court find an elephant of regulatory authority in the mousehole of a minor difference in language. Had the Legislature wanted WDFW to have authority to exempt motorized or other “larger” mining techniques, it would not have hidden such authority in a provision about small scale prospecting and mining. Reading Subsection Three to grant such authority contradicts the Hydraulic Code’s permitting regime leads to absurd results by allowing motorized methods of mining without HPA review, in direct contravention of the definition of “small scale mining and prospecting,” which does not include motorized mining. And by, as explained below, allowing WDFW to partially evade the rulemaking process.

³² See *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 580–581, 311 P.3d 6 (2013).

³³ *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001), citing *MCI Telecommunications*, 512 U.S. 218, 231, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994).

3. Interpreting Subsection Three, as Enacted by SHB 1565, to Permit WDFW to Exempt Techniques Besides Small Scale Prospecting and Mining from Permitting Would Contradict the APA’s Rulemaking Requirements.

WDFW’s proposed construction also would run afoul of the rule-making provisions in the APA, Chapter 34.05 RCW. In its argument, WDFW concedes the exemption for a permit in Section .091’s first subsection applies only to the defined “small scale prospecting and mining.”³⁴ And it agrees the rule-making authority given it in the second subsection applies only to “small scale prospecting and mining.”³⁵ However, it argues that the mandate in Subsection Three to develop a *Gold and Fish Pamphlet* allows it to exempt additional, non-small scale prospecting and mining activities by including them in the *Pamphlet*.³⁶

That is inconsistent with the APA. A “rule” means:

any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance,

³⁴ See Response Br. at 19.

³⁵ See *id.*

³⁶ See *id.*

suspension, or revocation of licenses to pursue any commercial activity, trade, or profession;³⁷

This provision means an agency must go through the rule-making process to effect any such requirement.³⁸

WDFW’s interpretive argument is that the *Gold and Fish Pamphlet* authorized in Subsection Three captures more activities than it must establish rules for under the second subsection. By regulating “larger-scale” activities only through the *Pamphlet* than it has formally established rules for, WDFW runs afoul of the APA’s rule-making mandates. WDFW’s invitation for the Court to sanction its work-around should be rejected as impermissible.

4. SHB 1565’s Legislative History Confirms the Legislature Did Not Intend to Provide WDFW with Authority to Exempt Prospecting or Mining Activities Beyond Those Specifically Defined in RCW 77.55.011(21).

WDFW dismisses Cascadia Wildlands’ argument about the legislative history of SHB 1565 as contained in the Final Bill Report.³⁹

We endorse Cascadia Wildland’s argument regarding the import of the

³⁷ RCW 34.05.010(16).

³⁸ See, e.g., *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 647–48, 835 P.2d 1030 (1992); William R. Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 790 (1989).

³⁹ See Response Br. at 22–23.

Final Bill Report.⁴⁰ However, there are additional sources of legislative history relevant to ascertaining the intent behind SHB 1565. A comparison of sequential drafts as the legislation worked its way through the legislative process⁴¹ and statements made by proponents and opponents of the legislation in committee sessions and on the floor of the House and the Senate are especially elucidating.⁴²

The language at issue evolved throughout the legislative process. Comparing House Bill (HB) 1565 as introduced and various iterations of that language, along with legislative comments on those versions, confirms that the Legislature did not intend to confer authority on WDFW to exempt from permitting prospecting or mining activities besides those meeting the statutory definition of “small scale.”

a. Initial Bills, as Introduced

In late January 1997, HB 1565 and its identical companion bill, Senate Bill (SB) 5351, were introduced.⁴³ Each would have exempted

⁴⁰ See Opening Br. at 25–26; see also Reply Br. at 17.

⁴¹ See, e.g., *Harris v. Groth*, 99 Wn.2d 438, 446, 663 P.2d 113 (1983); *State v. Turner*, 98 Wn.2d 731, 735–36, 658 P.2d 658 (1983); *Howlett v. Cheetham*, 17 Wn. 626, 632–33, 50 P. 522 (1897).

⁴² See, e.g., *Washington Federation of State Employees v. State*, 98 Wn.2d 677, 685, 658 P.2d 634 (1983) (floor debate); *State v. Anderson*, 94 Wn.2d 176, 187–88, 616 P.2d 612 (1980) (transcript of Senate committee meeting). More recently, courts in Washington have turned to recordings of the public affairs network, TVW (<https://www.tvw.org/archives/>) as sources of legislative history. See, e.g., *Headspace International LLC v. Podworks Corp.* 5 Wn. App.2d 883, 897–98, 428 P.3d 1260 (2018).

⁴³ The general history of HB 1565 with links to various versions, reports, and other documents can be found at <https://app.leg.wa.gov/billsummary?BillNumber=1565&Year=1997&Initiative=false>.

“small scale prospecting and mining activities” from the requirement of needing a specific hydraulic project approval.⁴⁴ They included the Venturi method—moving “aggregate through a suction hose” no greater than eight inches (*i.e.*, suction dredging)—within the definition of “small scale prospecting and mining.”⁴⁵ As the committee discussions, summarized below, demonstrates, this language did not sit well with members of the relevant committees in either the House or the Senate.

b. Bills as Passed in the House and Senate

In March 1997, the House passed SHB 1565, by a vote of 97 to 0.⁴⁶ The House revised substantially the initial authorizing language,

Similar information for SB 5351 can be found at

<https://app.leg.wa.gov/billsummary?BillNumber=5351&Year=1997&Initiative=false>.

⁴⁴ See HB 1565, § 3(1); *see also* SB 5351, § 3(1). Section 3 of each of these bills read: NEW SECTION. Sec 3. A new section is added to chapter 75.20 to read as follows:

(1) Small scale prospecting and mining using a method other than the Venturi method, such as pans, sluice boxes, powered concentrators, and mini-rocker boxes, is exempt from the provisions of this chapter.

(2) Small prospecting and mining using the Venturi method is exempt from the provisions of this chapter, provided that such activity is not conducted during periods of known and active fish spawning in the specific area to be prospected or mined.

(3) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) “Small scale prospecting and mining” means the use of the Venturi method and nonVenturi methods for the discovery and recovery of minerals.

(b) “Venturi method” means the mechanical movement of aggregate through a suction hose with a nozzle intake not greater than eight inches in diameter.

⁴⁵ *See id.*

⁴⁶ SHB 1565 § 2. This substitute house bill read:

NEW SECTION. Sec. 2. A new section is added to chapter 75.20 RCW to read as follows:

(1) Small scale mineral prospecting using gold pans, mini-rocker boxes, and nonmotorized sluice boxes shall not require written approval under this chapter if the prospecting is conducted in accordance with provisions established in the department’s most recent gold and fish pamphlet.

...

though it retained some specific authorization for suction dredging by exempting “motorized dredging with a suction nozzle less than four inches in diameter” from the Code’s HPA requirements.⁴⁷ Section 2(6) clarified that suction dredging “with a suction nozzle greater than four inches in diameter are subject to a standard written approval”⁴⁸ It also directed WDFW to adopt rules for small scale prospecting activities and to revise its *Gold and Fish Pamphlet*.⁴⁹

After amendments on the floor, the Senate passed its bill, Engrossed Substitute Senate Bill (ESSB) 5351, by a vote of 43 to 6.⁵⁰ More than the House had, it restricted its exception to the Code’s HPA requirement by redefining “small scale prospecting and mining” to

(5) For the purposes of this section, “small scale prospecting” means prospecting activities to pan, sluice, or dredge for minerals, except that motorized dredging devices with a suction nozzle greater than four inches in diameter are not considered small scale prospecting.

(6) Motorized dredging devices with a suction nozzle greater than four inches in diameter are subject to a standard written approval under RCW 75.20.100.

⁴⁷ See *id.* at § 2(5).

⁴⁸ See *id.* at § 2(6).

⁴⁹ See *id.* at § 2(2)–(4).

⁵⁰ ESSB 5351 § 3. The engrossed substitute senate bill read:

NEW SECTION. Sec. 3. A new section is added to chapter 75.20 RCW 9 to read as follows:

(1) Small scale prospecting and mining is exempt from the provisions of this chapter, provided that such activity does not undercut streambanks or disturb rooted live woody plants such as trees or shrubs.

(2) For the purposes of this chapter, “small scale prospecting and mining” means the use of methods such as pans, sluice boxes, concentrators, and mini-rocker boxes for the discovery and recovery of minerals.

exclude motorized dredging entirely.⁵¹ However, it continued to define “small scale prospecting and mining” by a list of examples.⁵²

c. Consideration of Bills in the Other Houses

The bills then were sent over for consideration by the other body. The House did not take action on the engrossed version of SSB 5351; however, the Senate considered, and debated substantially, SHB 1565. In that consideration, the Senate specifically rejected the type of argument WDFW makes here.

On April 4, the Senate Natural Resources and Parks Committee took up SHB 1565.⁵³ The Committee heard testimony from Mr. Millard Deusen, representing WDFW. Mr. Deusen testified that WDFW predicted “significant impacts to fish life and fish habitat by uncontrolled mineral prospecting,” even under the Senate’s version (that did not include suction dredging within the definition of small scale prospecting and mining) because it “gives certain examples” of techniques exempt from permitting and that list arguably could be expanded to

⁵¹ *See id.* at § 3(1).

⁵² *See id.* at § 3(2).

⁵³ *Hearing on SHB 1565 Before the S. Comm. on Natural Resources and Parks, 55th Leg., Reg. Sess., starting at 39:34 (April 4, 1997), video recording by TVW, Washington State Public Affairs Network, <https://www.tvw.org/watch/?eventID=1997041173> “Senate Hearing”). Senator Oke, the Chair of the Senate Committee indicated that he understood that SB 5351 “got into a little bit of difficulty with some miners,” so he did not think the Senate bill would move in the House. *Id.* at 40:21.*

include some suction dredging.⁵⁴ He urged adoption of the House version because it would protect fish and fish habitat by directing WDFW to engage in a rulemaking process and to revise the *Gold and Fish Pamphlet*.⁵⁵ Senator Hargrove disagreed with Mr. Deusen’s contention that the illustrative list of examples in the Senate’s version opened the door to an interpretation that suction dredging would be allowed.⁵⁶ The Senate Committee then marked up the bill by replacing the House language with the language of the Senate bill previously passed.⁵⁷

Upon returning from Executive Session, Senator Hargrove commented that the bill still contained the language “such as.” Regarding the argument advanced by Mr. Deusen, Senator Hargrove opined that WDFW should be able to restrict suction dredging because it is not described within the definition of “small scale.”⁵⁸ “I don’t think anyone could make an argument or prevail in court that anything but what is on that list would be allowed or totally exempt” from the HPA requirement.⁵⁹ Senator Rossi supported Senator Hargrove. Senator Rossi recounted the history of the legislation and acknowledged that the Senate wanted to

⁵⁴ *Id.* at 42:52–43:45.

⁵⁵ *See id.* at 44:42.

⁵⁶ *See id.* at 45:18.

⁵⁷ *See id.* at 1:08:23.

⁵⁸ *Id.* at 1:10:05.

⁵⁹ *Id.* at 1:10:08.

remove suction dredging from the exemption.⁶⁰ Accordingly, the Committee Chair invited an amendment “to exclude suction dredging devices,” at least without individual hydraulics permits.⁶¹ The Committee then clarified its intent by deleting the “such as” language and replacing it with the statute’s current language defining small scale prospecting and mining to “include only” the listed methods of pans, nonmotorized sluice boxes, concentrators, or minirocker boxes.⁶² The bill with that amendment passed out of Committee; the provision authorizing suction dredging was rejected. The full Senate passed the Committee version 26 to 22.⁶³

d. Conference Committee and Final Floor Action

The House refused to concur in the Senate amendments.⁶⁴ The Conference Committee reported the version that eventually was enacted, and both houses approved it.⁶⁵ The Senate language limiting the definition of “small scale mining and prospecting” to “only” a defined list of methods was adopted.⁶⁶ This is confirmed by the record before the superior court, which contained a copy of a summary of the Legislature’s

⁶⁰ *See id.* at 1:13:25.

⁶¹ *Id.* at 1:14:20.

⁶² *See id.* at 1:16:02.

⁶³ 1997 Sen. J. at 1131–32 (April 14, 1997).

⁶⁴ 1997 House J. at 3582–83 (April 24, 1997).

⁶⁵ 1997 Senate J. at 2101 (April 26, 1977) (vote of 42-1); 1997 House J. at 4098 (April 26, 1977) (vote of 98-0).

⁶⁶ SHB 1565 § 2(4); *see also* Laws of 1997, ch. 415, § 2.

conference report, which stated: “All dredging requires HPA, no change in current law.”⁶⁷

e. Conclusion: The Legislative History Is Clear that Suction Dredging Is Not Exempt from Permitting.

The intent of the Legislation is clear: SHB 1565 as enacted excludes motorized suction dredging from the definition of “small scale prospecting and mining,” therefore making it subject to the individual HPA requirement rather than the *Gold and Fish Pamphlet*. The argument that WDFW makes here—that Subsection Three’s language gives it discretion to draft a *Gold and Fish Pamphlet* that exempts categories of suction dredging from permitting—was specifically rejected by the amendment offered in the Senate, when it defined suction dredging as “*only* the use of the following methods: [p]ans, nonmotorized sluice boxes, concentrators, and minirocker boxes for the discovery and recovery of minerals.”⁶⁸ Not only is the statutory definition in Section .091 clear on this point, but its legislative history shows an intent to exclude suction

⁶⁷ See CP 96 (attachment to Declaration of Bill Clarke). Also in the record at CP 95 is the comparison of the two versions, which shows that the Senate version prohibited dredging without an individual permit, and that version was adopted by the Conference Committee.

⁶⁸ SHB 1565 § 2(4).

dredging devices from the small scale prospecting and mining exemption.⁶⁹

In summary, WDFW's position that it has statutory authority under the Hydraulic Code to exempt motorized suction dredge mining from permit requirements is infirm for four independent reasons, as explained above. We contend all four reasons apply to the present case, but it bears emphasis that any of the reasons advanced is sufficient for the Court to reject WDFW's position. We therefore urge this Court to reject WDFW's argument, just as the Senate Committee rejected essentially the same argument made in testimony before it.

C. WDFW Is Not Entitled to Deference in Its Interpretation of the Scope of Its Authority.

WDFW argues the Court should defer to its interpretation of Section .091 because it has expertise in hydraulic project regulation.⁷⁰ While that might be so, WDFW lacks expertise in statutory interpretation and determining legislative intent. Courts "do not defer to an agency the power to determine the scope of its own authority."⁷¹ WDFW is not entitled to deference here.

⁶⁹ See Senate Hearing at 1:14:20; 1:15:39.

⁷⁰ Response Br. at 24, 27 (citing *Puget Sound Harvesters Ass'n v. Dep't of Fish and Wildlife*, 182 Wn. App. 857, 867, 332 P.3d 1046 (2014) and *Spokane Cnty. v. Dep't of Fish and Wildlife*, 192 Wn.2d 453, 430 P.3d 655 (2018)).

⁷¹ *In re Registration of Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

V. CONCLUSION

WDFW has exceeded its authority under Section .091 by exempting non-small scale prospecting and mining techniques from the Hydraulic Code's HPA requirement. Based on the above arguments, we urge the Court:

1. Pursuant to RCW 34.05.570(2)(c), to hold the provisions in the WDFW small scale mining and prospecting rule authorizing suction dredging or any method beyond the strict definition of "small scale prospecting and mining" in RCW 77.55.011(21) are invalid;
2. Under RCW 34.05.574(1), to remand the matter to WDFW to commence proceedings on an emergency basis under RCW 34.05.350 to amend its rules in accordance with the limitations in Section .091 and RCW 77.55.011(21) and to publish a revised *Gold and Fish Pamphlet* consistent with the Court's opinion;
3. Pursuant to RCW 34.05.574(4), to provide notice to all persons known to WDFW to be engaging in prospecting and mining that the authorization to engage in suction dredging other prospecting or mining activity not specifically included within the definition of "small scale prospecting and mining" without

a regular hydraulics permit is unlawful and subject to an enforcement action; and

4. Also pursuant to RCW 34.05.574(4) and the inherent power of the Court, to take any other action appropriate to protect the public interest as expressed by the Legislature in RCW 77.55.091 and RCW 77.55.011(21).

Alternatively, we ask the Court to remand this matter to the Superior Court for it to develop and implement appropriate remedies until WDFW amends its rules consistent with this Court's opinion.

Respectfully submitted this 3rd day of June, 2019.

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

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