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

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CASCADIA WILDLANDS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Respondent,

and

RESOURCE COALITION, INC.,

Intervenor

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**DEPARTMENT'S RESPONSE TO BRIEF OF AMICUS CURIAE  
TROUT UNLIMITED AND SIERRA CLUB**

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## I. INTRODUCTION

In this Administrative Procedure Act (APA) rulemaking challenge, Trout Unlimited and Sierra Club (collectively, “Amici”) assert the unconstitutionality of a statute that Appellant Cascadia has not challenged. Amici raise at least one additional issue that Cascadia has not argued. Even if Amici’s arguments were properly before this Court, they lack merit.

Amici, like Cascadia, assert that WDFW exceeded its statutory authority when it decided to regulate hand-held *and* small motorized mineral prospecting methods—which are not “small scale prospecting and mining” methods as statutorily defined—via WDFW’s *Gold and Fish* pamphlet. This includes suction dredge prospecting, upon which Amici, like Cascadia, focus.

But Amici’s arguments ignore the plain language of RCW 77.55.091, which unambiguously restricts regulation of “small scale prospecting and mining” methods while allowing WDFW discretion to regulate other methods through its pamphlet. Amici’s heavy reliance on legislative history here is misplaced in light of the plain language of RCW 77.55.091. Further, the Legislature has acquiesced in WDFW’s interpretation for over 20 years. Amici’s arguments must fail.

This Court should therefore uphold WDFW's longstanding interpretation of RCW 77.55.091 and affirm the superior court's order dismissing Cascadia's Petition for Judicial Review.

## II. ARGUMENT

This Court should decline to consider claims, issues, and legal theories advanced only by Amici. The record does not evidence an attempt by WDFW to circumvent rulemaking requirements under the APA, nor has Amici met their heavy burden of showing the unconstitutionality of Substitute House Bill (SHB) 1565 beyond a reasonable doubt. The plain language of RCW 77.55.091 supports WDFW's decision to regulate mineral prospecting methods using "hand-held mineral prospecting tools and small motorized equipment", including some suction dredges, through its *Gold and Fish* pamphlet. WAC 220-660-300(1). WDFW's decades-long interpretation and lack of substantive amendment to WDFW's regulatory authority by the Legislature all support WDFW's reasonable interpretation of RCW 77.55.091.

### A. **This Court Should Decline to Consider New Constitutional Claims Raised Only By Amici; Alternatively, SHB 1565 Is Constitutional**

Cascadia does not challenge the constitutionality of SHB 1565, and Amici's procedural constitutional challenge is therefore not properly before this Court. *E.g. Protect the Peninsula's Future v. City of Port Angeles*, 175

Wn. App. 201, 217, 304 P.3d 914 (2013). Amici assert that WDFW's interpretation of RCW 77.55.091 renders the original 1997 enactment of the law, SHB 1565, unconstitutional under Article II, Section 19 of the Washington State Constitution. Amici Br. at 10. They further claim this Court must read additional language—"small scale"—into to the third subsection of SHB 1565 to avoid the alleged constitutional infirmity. Amici Br. at 10. This Court should decline to reach the merits of Amici's claim.

If the Court decides to reach the merits, however, it should decline to invalidate SHB 1565 as unconstitutional. In Washington, "it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010); *Washington State Grange v. Locke*, 153 Wn.2d 475, 486, 105 P.3d 9 (2005).

Here, Amici have failed to meet their burden of proving, beyond a reasonable doubt, that the provisions of SHB 1565 went beyond the scope of that bill's general title beginning with "AN ACT Relating to small scale prospecting and mining," and they also fail to show that the bill's title contained more than one subject. *See generally* Laws of 1997, c. 415 (SHB 1565). Article II, Section 19's provisions are "liberally construed in favor

of upholding the challenged legislation.” *City of Fircrest v. Jensen*, 158 Wn.2d 384, 390, 143 P.3d 776 (2006); *Washington Federation of State Employees v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995). Because Amici have failed to meet their heavy burden, their procedural constitutional challenge to SHB 1565 must fail.

WDFW’s interpretation of RCW 77.55.091 does not invite constitutional error, especially in light of post-1997 Legislative re-enactments and amendment. Amici claim that interpreting RCW 77.55.091(3) to apply to prospecting methods beyond those that are “small-scale prospecting and mining” results in a single-subject bill violation because the title of SHB 1565 referenced *only* small scale prospecting and mining. Amici Br. at 10. However, the Legislature twice re-enacted this 1997 law as part of larger pieces of legislation. *See* Laws of 2000, ch. 107, § 129 (moving the former version of Laws of 1997, c. 415 from RCW 75 to RCW 77); *see also* Laws of 2005, c. 146, § 402 (amending RCW 77.55.270, the prior codified version of Laws of 1997, c. 415, § 2). During the 2005 re-enactment, the Legislature also amended the text of the 1997 law without changing the scope of WDFW’s statutory regulatory authority. Laws of 2005, c. 146, § 402. The 2005 bill amended former RCW 77.55.270, now 77.55.091, among many other hydraulics statutes, under the general title that began with “AN ACT Relating to regulatory reform of the hydraulic

project approval program.” *Id.* The contents of RCW 77.55.091 fit within the general 2005 bill title.

At the very least, the Legislature’s 2005 amendment defeats Amici’s constitutional attack. A claimed violation of the single subject rule or subject-in-title rule “is precluded when the allegedly constitutionally infirm legislation has been subsequently reenacted or amended pursuant to properly titled legislation. Such amendment or reenactment cures the article II, section 19 defect.” *Morin v. Harrell*, 161 Wn.2d 226, 227, 164 P.3d 495 (2007) (citation omitted). Because RCW 77.55.091 was amended (under its former codification at RCW 77.55.270) in 2005 Legislation with a general title related to hydraulic projects, WDFW’s plain language reading of RCW 77.55.091(3) does not encounter any alleged constitutional infirmity.

This Court should decline to consider Amici’s constitutional challenges to SHB 1565, as Cascadia has not raised this claim. However, if this Court does consider Amici’s procedural constitutional challenge, it should uphold the constitutionality of the statute and affirm the superior court’s order.

**B. WDFW's Interpretation of RCW 77.55.091 Adheres to Its Plain Language**

RCW 77.55.091's plain language supports WDFW's decision to regulate small motorized methods of mineral prospecting, including suction dredge prospecting, through its *Gold and Fish* pamphlet. If a statute's plain language is unambiguous, subject only to one reasonable interpretation, then the court's inquiry ends. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). A statute is not ambiguous merely because two or more interpretations are conceivable. *Id.* A statute is not ambiguous simply because it is silent on an issue or because one or more of its words are associated with multiple meanings. *See Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 859, 347 P.3d 503 (2015); *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). "If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says." *Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.*, 186 Wn.2d 336, 346, 376 P.3d 372 (2016) (citing *State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001)).

WDFW's longstanding interpretation of RCW 77.55.091 is in accordance with that statute's plain and unambiguous language. RCW 77.55.091(1) prohibits WDFW from requiring an individual permit for "small-scale prospecting and mining" if the activity complies with WDFW

rules. RCW 77.55.091(1); Resp. Br. at 16-20. The phrase “small-scale prospecting and mining” is expressly defined in statute. RCW 77.55.011(21). While this definition currently resides in a separate statute containing all definitions relevant to RCW 77.55, it was originally part of the substantive statute at issue here, under that statute’s former codification at RCW 77.55.270(4). Laws of 1997, ch. 415, § 2. In 2005, the Legislature moved the definition, a separate statute now at RCW 77.55.011 containing all hydraulics-related definitions. *See* Laws of 2005, c. 146, §§ 101(14) & 402.

Given the stark contrast between the Legislature’s use of the narrower and statutorily defined phrase “small scale prospecting and mining” in RCW 77.55.091(1) and (2) with multiple references to the more general phrases “mineral prospecting” and “prospecting methods” in RCW 77.55.091(3), WDFW’s interpretation is the only reasonable one. RCW 77.55.091(1) and (2) specifically include the phrase “small scale prospecting and mining,” while the plain language of RCW 77.55.091(3) allows WDFW to utilize its *Gold and Fish* pamphlet to regulate those “methods of mineral prospecting that are consistent with the department’s rule.” RCW 77.55.091(3) (emphasis added). That subsection further directs that “[t]he pamphlet shall be written to clearly indicate the prospecting methods that require a permit under this chapter and the prospecting

methods that require compliance with the pamphlet.” (emphasis added). This means that WDFW has authority to determine which prospecting methods, including small motorized methods like suction dredging, it will regulate via the pamphlet. None of the “norms of statutory construction” invoked by Amici can overcome this plain reading of the statute and nullify the different language intentionally used by the Legislature in RCW 77.55.091(3). *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

If the Legislature had intended to limit WDFW’s pamphlet regulations solely to small scale prospecting and mining, it could have done so in RCW 77.55.091(3) by repeating the defined and restrictive phrase “small scale mining and prospecting” and plainly stating that only those statutorily defined methods would be the methods covered by the pamphlet. Instead, by directing WDFW to specify in its pamphlet which “prospecting methods” require an individual permit versus which “prospecting methods” are covered by the pamphlet, the Legislature acknowledged WDFW’s discretion to regulate mineral prospecting methods beyond just “small scale prospecting and mining” via its *Gold and Fish* pamphlet while also protecting fish life. The broader phrase “prospecting methods” cannot reasonably be interpreted to have the same meaning as the expressly defined phrase “small scale prospecting and mining,” which definition had been included within the statute as originally enacted. Laws of 1997, ch. 415, § 2.

Further, the Legislature’s allowing WDFW to include other forms of mineral prospecting in the pamphlet serves the expressly stated goal “to minimize the number of specific provisions of a written permit issued under this chapter.” RCW 77.55.091(3). Amici offer no reasonable explanation for why the Legislature used the broad phrase “mineral prospecting” in RCW 77.55.091(3) if it had intended that subsection to apply only to small scale prospecting and mining.

WAC 220-660-300 thus complies with the plain language of RCW 77.55.091. Amici argues that WDFW asks this Court to “find an elephant of regulatory authority in the mousehole of a minor difference in language.” Amici Br. at 12. This unreasonable characterization of WDFW’s regulation ignores the plain language used by the Legislature across the three subsections of RCW 77.55.091 as discussed above.

Further, Amici’s claim that WDFW’s interpretation allows “large-scale” prospecting to evade hydraulic project permitting and rule requirements is incorrect. WAC 220-660-300 limits application of the pamphlet only to small mining methods. *See, e.g.*, WAC 220-660-300(1) (referencing “small motorized equipment”); -300(4)(b)(iii) (limiting application of this subsection to designated equipment with riffle areas totaling three square feet or less); -300(5)(b)(iii) (limiting application of this subsection to designated equipment with riffle areas totaling ten square feet

or less); -300(5)(b)(iv) (limiting application of this subsection to suction dredges with intake nozzles with inside diameters no greater than five and one-quarter inches). Mining methods exceeding the size restrictions in the rule cannot rely upon the *Gold and Fish* pamphlet, and prospectors attempting to use such methods are required to obtain individual permits before doing so. *Beatty v. Wash. Fish and Wildlife Comm'n*, 185 Wn. App. 426, 432, 341 P.3d 291 (2015).

This Court should not stray from the plain language of RCW 77.55.091, as adhering to the plain language will not lead to absurd results. *Compare* Amici Br. at 11-12. “Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language [...]” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011). As such, the “absurd results” canon implicates separation of powers issues, and courts have relied upon it only in rare circumstances where adhering to a statute’s plain meaning would yield inconceivable results. *Id.* Here, WDFW has applied the plain meaning of RCW 77.55.091(3) for over 20 years. Thus, its implementation is conceivable and does not lead to absurd results. WDFW has carefully exercised its discretion authorized in RCW 77.55.091(3) by adopting a detailed rule that expressly restricts the sizes of qualifying

mining methods, including methods that use small engines, and by adopting location-specific work windows that dictate when application of the *Gold and Fish* pamphlet is permissible.

WDFW's decision to apply WAC 220-600-300 to small motorized prospecting methods is therefore consistent with the plain language of RCW 77.55.091. WDFW's interpretation of that statute is the only logical interpretation that gives full meaning to all the language used across its three subsections. RCW 77.55.091(1) and (2) require WDFW to regulate small scale prospecting and mining through its *Gold and Fish* pamphlet instead of individual permits, and RCW 77.55.091(3) allows WDFW to regulate other mineral prospecting methods through the pamphlet, too.

This Court should decline to add words to the plain language of RCW 77.55.091. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (“We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.”) Amici concede that their attack on the validity of WAC 220-660-300 requires a court to read the restrictive phrase “small scale” into RCW 77.55.091(3). Amici Br. at 10-11. This Court would need to add it three times:

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 that are consistent with the department's rule. The pamphlet shall be written to clearly indicate the [small scale] prospecting

methods that require a permit under this chapter and the [small scale] 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.

Thus, this Court should uphold WAC 220-660-300 and WDFW's decades-old decision to use its *Gold and Fish* pamphlet to regulate small motorized mineral prospecting methods, and it should affirm the superior court's order dismissing Cascadia's Petition for Judicial Review.

**C. WDFW Adopted WAC 220-660-300 in Compliance With APA Rulemaking Requirements.**

Contrary to Amici's argument, WDFW has not circumvented APA rulemaking requirements by regulating small motorized prospecting methods, including suction dredge prospecting methods, through its *Gold and Fish* pamphlet. Amici Br. at 13-14. As a preliminary matter, this Court should decline to address Amici's claim to the contrary, as Cascadia has not raised it. Alternatively, Amici's claim lacks merit because the *Gold and Fish* pamphlet rules derive directly from WDFW's published regulations. *Compare, e.g.* SR 140-53 (equipment, method, location and timing requirements in pamphlet), *with* Former WAC 220-110-201 (technical provisions), -202 through -205 (equipment requirements), -206 (timing and

location requirements)<sup>1</sup>; *see also* WAC 220-660-300 (containing equipment, method, location, and timing requirements). Amici fail to identify any substantive requirement in any version of the *Gold and Fish* pamphlet that were not also adopted as formal rules. This Court should decline to accept their argument and uphold WAC 220-660-300 as within WDFW's statutory authority under RCW 77.55.091.

**D. The Legislative History Invoked by Amici Cannot Overcome the Plain Language of RCW 77.55.091.**

When a statute's meaning is plain on its face and unambiguous, courts give effect to that plain meaning as an expression of legislative intent and will not look to legislative history to override the plain meaning. *Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 244-45, 350 P.3d 647 (2015). As detailed above, the language in RCW 77.55.091(3) yields only one reasonable interpretation: WDFW is authorized but not required to regulate small motorized methods of mineral prospecting via its *Gold and Fish* pamphlet. As a result, the Court should reject Amici's attempt to analyze legislative history in order to overcome the plain meaning of the statutory language. But even if the Court considers Amici's recitation of historic legislative antecedents, the Court will find no evidence of

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<sup>1</sup> References WAC provisions adopted December 4, 1998 via Washington State Register (WSR) 99-01-088. A link to this former regulation is at: <http://lawfilesext.leg.wa.gov/law/wsr/1999/01/99-01-088.htm>.

legislative intent supporting Amici’s strained interpretation of RCW 77.55.091(3).

1. The Legislative History of SHB 1565 Is Not Helpful Here

Amici relies on bill drafts, floor notes, and comments by Senators Hargrove and Rossi to support reading additional limiting language into RCW 77.55.091(3). Amici Br. 14-21. These excerpts of legislative history from different versions of bills introduced are neither binding nor reliable indicators of legislative intent. Statements of an individual legislator do not represent legislative intent. *Watson v. City of Seattle*, 189 Wn. 2d 149, 162, 401 P.3d 1 (2017). Judicial “examination of legislative history is intended to *supplement* textual analysis—not to replace it entirely. . . .” *Id.* at 163 (emphasis in original).

Neither statements made during a Senate committee hearing on April 4, 1997, nor previous draft versions of Laws of 1997, ch. 415 show intent to limit WDFW’s authority to regulate small motorized prospecting methods through the *Gold and Fish* pamphlet. The Legislature had introduced several versions of bills addressing mineral prospecting for consideration by April 4, 1997, and the testimony and context in which it was given during the hearing on that date do not clearly track which versions of which bills were being discussed. Some versions of the bills discussed involved complete exemptions of certain prospecting activities from all

regulatory oversight. Appendix A, B. Other versions subjected some mineral prospecting methods to regulation under the *Gold and Fish* pamphlet. Appendix C<sup>2</sup>. One version of one bill that did not pass expressly included smaller diameter suction dredges within the regulatory exemption for small scale prospecting and mining, and expressly subjected larger diameter suction dredges to individual permits. *See* Amici Br. at 16-17, n. 46. But the law as enacted in 1997 and carried forward to RCW 77.55.091 is entirely silent as to suction dredging. It does not expressly include suction dredging in the definition of “small scale prospecting and mining”, *see* RCW 77.55.011(21), but it also does not expressly subject suction dredging to individual permits as had been proposed in one bill version. One could interpret this difference in draft language as indicating legislative intent to leave deciding which methods of regulating suction dredge prospecting—pamphlet or individual permits—to WDFW’s discretion. These possible competing interpretations of what the bill history means show why this Court should be loathe to ascribe legislative intent from a failed amendment. *See Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d

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<sup>2</sup> Appendix A (5351-S AAS 3/13/97 S2365.1) can be found at the following link: <https://app.leg.wa.gov/billsummary?BillNumber=5351&Year=1997&Initiative=false>. Appendices B and C (1565-S AAS 4/14/97 S2761.2 and 1565-S AMS JACO ZENK 001) may be found at: <https://app.leg.wa.gov/billsummary?BillNumber=1565&Initiative=false&Year=1997>.

324 (1992) (refusing to find legislative intent in failed amendments because it would be speculation to presume a reason for the amendment's rejection).

Amici point to no legislative history specifically supporting their theory that the legislature really meant to say only “small scale prospecting and mining” when it used the more broad phrases, “mineral prospecting” and “prospecting methods” in RCW 77.55.091(3). No legislative history tied directly to the final version of SHB 1565 as enacted indicates that the Legislature intended to deny WDFW discretion to regulate other mining methods, in addition to small scale prospecting and mining, through its *Gold and Fish* pamphlet. No legislative history conclusively rebuts WDFW's plain reading of the language in RCW 77.55.091(3). That plain reading supports WDFW's implementing regulation in WAC 220-660-300, which regulates small motorized prospecting methods under the pamphlet. This Court should uphold that interpretation by affirming the superior court's order.

2. This Court Should Defer to WDFW's Interpretation of RCW 77.55.091 in Light of Legislative Acquiescence

Courts will also give “great weight” to agency construction “especially where the Legislature has silently acquiesced in that construction over a long period. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995). The Legislature's failure to amend a

statute interpreted by administrative regulation constitutes legislative acquiescence in the agency's interpretation of the statute. This is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628, *amended*, 945 P.2d 1119 (1997), *disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003); *see also Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 566, 958 P.2d 962 (1998) ("The Legislature's failure to amend a statute which has been interpreted by administrative regulation may constitute 'silent acquiescence' in the agency's interpretation of the statute.").

Here, this Court should interpret the Legislature's silence since 1997 as acquiescence to WDFW's interpretation. WDFW began regulating small motorized mining methods via its *Gold and Fish* pamphlet in 1999 after following the Legislature's direction to work with the prospecting community and update its pamphlet to clarify which methods were and were not consistent with its rules. AR 3960-62. The Legislature amended RCW 77.55.091 twice after 1997, and those amendments did not repudiate WDFW's interpretation. Originally codified at former RCW 75.20.330, the Legislature moved it to Title 77 RCW in 2000. Laws of 2000, c. 107, § 129. In 2005, the Legislature amended and moved this section to its current

position as part of its regulatory reform of WDFW's hydraulic project approval program. *See* Laws of 2005, ch. 146, § 402. In doing so, it amended the statutory language to its current version and separately moved the definition of "small scale prospecting and mining" to RCW 77.55.011 without altering the definition. *See id.* § 101. While Amici have actively participated in the Legislature and administrative processes to advocate for the limiting of suction dredge prospecting, the statute has not changed. Amici Br. at 1-3.

The plain language of RCW 77.55.091 precludes reliance on legislative history. The legislative history provides no support for Amici's attempt to read additional restrictive language into RCW 77.55.091(3). And in the 20 years that WDFW has been exercising its rulemaking authority under its interpretation of RCW 77.55.091, the Legislature has silently acquiesced. Thus, this Court should uphold the superior court's order dismissing Cascadia's petition, and it should deny Amici their requested relief.

### **III. CONCLUSION**

Amici raise new claims and issues that this Court should not consider here. Even if they were properly before this Court, they lack merit. WAC 220-660-300 is a valid rule within WDFW's delegated rulemaking authority under the plain language of RCW 77.55.091. This Court should

affirm the Thurston County Superior Court's order dismissing Cascadia's  
Petition for Judicial Review.

RESPECTFULLY SUBMITTED this 8th day of July, 2019.

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I hereby certify that I served a true and correct copy of the foregoing document on the following via the COA e-filing portal and via email pursuant to an Electronic Service Agreement on the date below as follows:

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

DATED this 8th day of July, 2019 at Olympia, Washington.

s/ Jeanne Roth  
JEANNE ROTH, Legal Assistant

# APPENDIX A

1 5351-S AAS 3/13/97 S2365.1

2 SSB 5351 - S AMD - 125

3 By Senators Benton and Hargrove

4

ADOPTED 3/13/97

5 Strike everything after the enacting clause and insert the  
6 following:

7 "NEW SECTION. **Sec. 1.** The legislature finds that small scale  
8 prospecting and mining is an important part of the heritage of the  
9 state. The legislature further finds that small scale prospecting and  
10 mining provide economic benefits to the state, and help to meet the  
11 national security demand and industrial demand for minerals. The  
12 legislature further finds that it is critical that small scale miners  
13 and prospectors be allowed access to open public lands in the state.  
14 The legislature further finds that mineral prospecting and mining  
15 activities can be conducted in a manner that is consistent with fish  
16 habitat and fish-life population. Now, therefore, the legislature  
17 declares that small scale prospecting and mining must not be  
18 unreasonably regulated. The legislature further declares that small  
19 scale prospecting and mining must not be unfairly limited or obstructed  
20 from access to open public lands. The legislature further declares  
21 that all restrictions or regulations of small scale prospecting and  
22 mining activities must be based on sound scientific evidence and  
23 applicable documentation supporting the need for such restrictions.

24 **Sec. 2.** RCW 75.20.100 and 1993 sp.s. c 2 s 30 are each amended to  
25 read as follows:

26 In the event that any person or government agency desires to  
27 construct any form of hydraulic project or perform other work that will  
28 use, divert, obstruct, or change the natural flow or bed of any of the  
29 salt or fresh waters of the state, such person or government agency  
30 shall, before commencing construction or work thereon and to ensure the  
31 proper protection of fish life, secure the written approval of the  
32 department as to the adequacy of the means proposed for the protection  
33 of fish life. This approval shall not be unreasonably withheld.  
34 Except as provided in RCW 75.20.1001 (~~and 75.20.1002~~), the department  
35 shall grant or deny approval within forty-five calendar days of the

1 receipt of a complete application and notice of compliance with any  
2 applicable requirements of the state environmental policy act, made in  
3 the manner prescribed in this section. The applicant may document  
4 receipt of application by filing in person or by registered mail. A  
5 complete application for approval shall contain general plans for the  
6 overall project, complete plans and specifications of the proposed  
7 construction or work within the mean higher high water line in salt  
8 water or within the ordinary high water line in fresh water, and  
9 complete plans and specifications for the proper protection of fish  
10 life. The forty-five day requirement shall be suspended if (1) after  
11 ten working days of receipt of the application, the applicant remains  
12 unavailable or unable to arrange for a timely field evaluation of the  
13 proposed project; (2) the site is physically inaccessible for  
14 inspection; or (3) the applicant requests delay. Immediately upon  
15 determination that the forty-five day period is suspended, the  
16 department shall notify the applicant in writing of the reasons for the  
17 delay. Approval is valid for a period of up to five years from date of  
18 issuance. The permittee must demonstrate substantial progress on  
19 construction of that portion of the project relating to the approval  
20 within two years of the date of issuance. If the department denies  
21 approval, the department shall provide the applicant, in writing, a  
22 statement of the specific reasons why and how the proposed project  
23 would adversely affect fish life. Protection of fish life shall be the  
24 only ground upon which approval may be denied or conditioned. Chapter  
25 34.05 RCW applies to any denial of project approval, conditional  
26 approval, or requirements for project modification upon which approval  
27 may be contingent. If any person or government agency commences  
28 construction on any hydraulic works or projects subject to this section  
29 without first having obtained written approval of the department as to  
30 the adequacy of the means proposed for the protection of fish life, or  
31 if any person or government agency fails to follow or carry out any of  
32 the requirements or conditions as are made a part of such approval, the  
33 person or director of the agency is guilty of a gross misdemeanor. If  
34 any such person or government agency is convicted of violating any of  
35 the provisions of this section and continues construction on any such  
36 works or projects without fully complying with the provisions hereof,  
37 such works or projects are hereby declared a public nuisance and shall  
38 be subject to abatement as such.

1 For the purposes of this section and RCW 75.20.103, "bed" shall  
2 mean the land below the ordinary high water lines of state waters.  
3 This definition shall not include irrigation ditches, canals, storm  
4 water run-off devices, or other artificial watercourses except where  
5 they exist in a natural watercourse that has been altered by man.

6 The phrase "to construct any form of hydraulic project or perform  
7 other work" shall not include the act of driving across an established  
8 ford. Driving across streams or on wetted stream beds at areas other  
9 than established fords requires approval. Work within the ordinary  
10 high water line of state waters to construct or repair a ford or  
11 crossing requires approval.

12 In case of an emergency arising from weather or stream flow  
13 conditions or other natural conditions, the department, through its  
14 authorized representatives, shall issue immediately upon request oral  
15 approval for removing any obstructions, repairing existing structures,  
16 restoring stream banks, or to protect property threatened by the stream  
17 or a change in the stream flow without the necessity of obtaining a  
18 written approval prior to commencing work. Conditions of an oral  
19 approval shall be reduced to writing within thirty days and complied  
20 with as provided for in this section. Oral approval shall be granted  
21 immediately upon request, for a stream crossing during an emergency  
22 situation.

23 This section shall not apply to the construction of any form of  
24 hydraulic project or other work which diverts water for agricultural  
25 irrigation or stock watering purposes authorized under or recognized as  
26 being valid by the state's water codes, or when such hydraulic project  
27 or other work is associated with streambank stabilization to protect  
28 farm and agricultural land as defined in RCW 84.34.020. These  
29 irrigation or stock watering diversion and streambank stabilization  
30 projects shall be governed by RCW 75.20.103.

31 This section does not apply to small scale prospecting and mining  
32 activities, which are governed by section 3 of this act.

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

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

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

5 SSB 5351 - S AMD - 125

6 By Senators Benton and Hargrove

7

ADOPTED 3/13/97

8 On page 1, line 1 of the title, after "mining;" strike the  
9 remainder of the title and insert "amending RCW 75.20.100; adding a new  
10 section to chapter 75.20 RCW; and creating a new section."

--- END ---

# APPENDIX B

1 5351-S AAS 3/13/97 S2365.1

2 SSB 5351 - S AMD - 125

3 By Senators Benton and Hargrove

4

ADOPTED 3/13/97

5 Strike everything after the enacting clause and insert the  
6 following:

7 "NEW SECTION. **Sec. 1.** The legislature finds that small scale  
8 prospecting and mining is an important part of the heritage of the  
9 state. The legislature further finds that small scale prospecting and  
10 mining provide economic benefits to the state, and help to meet the  
11 national security demand and industrial demand for minerals. The  
12 legislature further finds that it is critical that small scale miners  
13 and prospectors be allowed access to open public lands in the state.  
14 The legislature further finds that mineral prospecting and mining  
15 activities can be conducted in a manner that is consistent with fish  
16 habitat and fish-life population. Now, therefore, the legislature  
17 declares that small scale prospecting and mining must not be  
18 unreasonably regulated. The legislature further declares that small  
19 scale prospecting and mining must not be unfairly limited or obstructed  
20 from access to open public lands. The legislature further declares  
21 that all restrictions or regulations of small scale prospecting and  
22 mining activities must be based on sound scientific evidence and  
23 applicable documentation supporting the need for such restrictions.

24 **Sec. 2.** RCW 75.20.100 and 1993 sp.s. c 2 s 30 are each amended to  
25 read as follows:

26 In the event that any person or government agency desires to  
27 construct any form of hydraulic project or perform other work that will  
28 use, divert, obstruct, or change the natural flow or bed of any of the  
29 salt or fresh waters of the state, such person or government agency  
30 shall, before commencing construction or work thereon and to ensure the  
31 proper protection of fish life, secure the written approval of the  
32 department as to the adequacy of the means proposed for the protection  
33 of fish life. This approval shall not be unreasonably withheld.  
34 Except as provided in RCW 75.20.1001 (~~and 75.20.1002~~), the department  
35 shall grant or deny approval within forty-five calendar days of the

1 receipt of a complete application and notice of compliance with any  
2 applicable requirements of the state environmental policy act, made in  
3 the manner prescribed in this section. The applicant may document  
4 receipt of application by filing in person or by registered mail. A  
5 complete application for approval shall contain general plans for the  
6 overall project, complete plans and specifications of the proposed  
7 construction or work within the mean higher high water line in salt  
8 water or within the ordinary high water line in fresh water, and  
9 complete plans and specifications for the proper protection of fish  
10 life. The forty-five day requirement shall be suspended if (1) after  
11 ten working days of receipt of the application, the applicant remains  
12 unavailable or unable to arrange for a timely field evaluation of the  
13 proposed project; (2) the site is physically inaccessible for  
14 inspection; or (3) the applicant requests delay. Immediately upon  
15 determination that the forty-five day period is suspended, the  
16 department shall notify the applicant in writing of the reasons for the  
17 delay. Approval is valid for a period of up to five years from date of  
18 issuance. The permittee must demonstrate substantial progress on  
19 construction of that portion of the project relating to the approval  
20 within two years of the date of issuance. If the department denies  
21 approval, the department shall provide the applicant, in writing, a  
22 statement of the specific reasons why and how the proposed project  
23 would adversely affect fish life. Protection of fish life shall be the  
24 only ground upon which approval may be denied or conditioned. Chapter  
25 34.05 RCW applies to any denial of project approval, conditional  
26 approval, or requirements for project modification upon which approval  
27 may be contingent. If any person or government agency commences  
28 construction on any hydraulic works or projects subject to this section  
29 without first having obtained written approval of the department as to  
30 the adequacy of the means proposed for the protection of fish life, or  
31 if any person or government agency fails to follow or carry out any of  
32 the requirements or conditions as are made a part of such approval, the  
33 person or director of the agency is guilty of a gross misdemeanor. If  
34 any such person or government agency is convicted of violating any of  
35 the provisions of this section and continues construction on any such  
36 works or projects without fully complying with the provisions hereof,  
37 such works or projects are hereby declared a public nuisance and shall  
38 be subject to abatement as such.

1 For the purposes of this section and RCW 75.20.103, "bed" shall  
2 mean the land below the ordinary high water lines of state waters.  
3 This definition shall not include irrigation ditches, canals, storm  
4 water run-off devices, or other artificial watercourses except where  
5 they exist in a natural watercourse that has been altered by man.

6 The phrase "to construct any form of hydraulic project or perform  
7 other work" shall not include the act of driving across an established  
8 ford. Driving across streams or on wetted stream beds at areas other  
9 than established fords requires approval. Work within the ordinary  
10 high water line of state waters to construct or repair a ford or  
11 crossing requires approval.

12 In case of an emergency arising from weather or stream flow  
13 conditions or other natural conditions, the department, through its  
14 authorized representatives, shall issue immediately upon request oral  
15 approval for removing any obstructions, repairing existing structures,  
16 restoring stream banks, or to protect property threatened by the stream  
17 or a change in the stream flow without the necessity of obtaining a  
18 written approval prior to commencing work. Conditions of an oral  
19 approval shall be reduced to writing within thirty days and complied  
20 with as provided for in this section. Oral approval shall be granted  
21 immediately upon request, for a stream crossing during an emergency  
22 situation.

23 This section shall not apply to the construction of any form of  
24 hydraulic project or other work which diverts water for agricultural  
25 irrigation or stock watering purposes authorized under or recognized as  
26 being valid by the state's water codes, or when such hydraulic project  
27 or other work is associated with streambank stabilization to protect  
28 farm and agricultural land as defined in RCW 84.34.020. These  
29 irrigation or stock watering diversion and streambank stabilization  
30 projects shall be governed by RCW 75.20.103.

31 This section does not apply to small scale prospecting and mining  
32 activities, which are governed by section 3 of this act.

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

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

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

5 SSB 5351 - S AMD - 125

6 By Senators Benton and Hargrove

7 ADOPTED 3/13/97

8 On page 1, line 1 of the title, after "mining;" strike the  
9 remainder of the title and insert "amending RCW 75.20.100; adding a new  
10 section to chapter 75.20 RCW; and creating a new section."

--- END ---

2 SHB 1565 - S COMM AMD

3 By Committee on Natural Resources & Parks

4 ADOPTED 4/14/97

5 Strike everything after the enacting clause and insert the  
6 following:

7 "NEW SECTION. **Sec. 1.** The legislature finds that small scale  
8 prospecting and mining is an important part of the heritage of the  
9 state. The legislature further finds that small scale prospecting and  
10 mining provide economic benefits to the state, and help to meet the  
11 national security demand and industrial demand for minerals. The  
12 legislature further finds that it is critical that small scale miners  
13 and prospectors be allowed access to open public lands in the state.  
14 The legislature further finds that mineral prospecting and mining  
15 activities can be conducted in a manner that is consistent with fish  
16 habitat and fish-life population. Now, therefore, the legislature  
17 declares that small scale prospecting and mining must not be  
18 unreasonably regulated. The legislature further declares that small  
19 scale prospecting and mining must not be unfairly limited or obstructed  
20 from access to open public lands. The legislature further declares  
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22 mining activities must be based on sound scientific evidence and  
23 applicable documentation supporting the need for such restrictions.

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31 proper protection of fish life, secure the written approval of the  
32 department as to the adequacy of the means proposed for the protection  
33 of fish life. This approval shall not be unreasonably withheld.  
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6 overall project, complete plans and specifications of the proposed  
7 construction or work within the mean higher high water line in salt  
8 water or within the ordinary high water line in fresh water, and  
9 complete plans and specifications for the proper protection of fish  
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11 ten working days of receipt of the application, the applicant remains  
12 unavailable or unable to arrange for a timely field evaluation of the  
13 proposed project; (2) the site is physically inaccessible for  
14 inspection; or (3) the applicant requests delay. Immediately upon  
15 determination that the forty-five day period is suspended, the  
16 department shall notify the applicant in writing of the reasons for the  
17 delay. Approval is valid for a period of up to five years from date of  
18 issuance. The permittee must demonstrate substantial progress on  
19 construction of that portion of the project relating to the approval  
20 within two years of the date of issuance. If the department denies  
21 approval, the department shall provide the applicant, in writing, a  
22 statement of the specific reasons why and how the proposed project  
23 would adversely affect fish life. Protection of fish life shall be the  
24 only ground upon which approval may be denied or conditioned. Chapter  
25 34.05 RCW applies to any denial of project approval, conditional  
26 approval, or requirements for project modification upon which approval  
27 may be contingent. If any person or government agency commences  
28 construction on any hydraulic works or projects subject to this section  
29 without first having obtained written approval of the department as to  
30 the adequacy of the means proposed for the protection of fish life, or  
31 if any person or government agency fails to follow or carry out any of  
32 the requirements or conditions as are made a part of such approval, the  
33 person or director of the agency is guilty of a gross misdemeanor. If  
34 any such person or government agency is convicted of violating any of  
35 the provisions of this section and continues construction on any such  
36 works or projects without fully complying with the provisions hereof,  
37 such works or projects are hereby declared a public nuisance and shall  
38 be subject to abatement as such.

1 For the purposes of this section and RCW 75.20.103, "bed" shall  
2 mean the land below the ordinary high water lines of state waters.  
3 This definition shall not include irrigation ditches, canals, storm  
4 water run-off devices, or other artificial watercourses except where  
5 they exist in a natural watercourse that has been altered by man.

6 The phrase "to construct any form of hydraulic project or perform  
7 other work" shall not include the act of driving across an established  
8 ford. Driving across streams or on wetted stream beds at areas other  
9 than established fords requires approval. Work within the ordinary  
10 high water line of state waters to construct or repair a ford or  
11 crossing requires approval.

12 In case of an emergency arising from weather or stream flow  
13 conditions or other natural conditions, the department, through its  
14 authorized representatives, shall issue immediately upon request oral  
15 approval for removing any obstructions, repairing existing structures,  
16 restoring stream banks, or to protect property threatened by the stream  
17 or a change in the stream flow without the necessity of obtaining a  
18 written approval prior to commencing work. Conditions of an oral  
19 approval shall be reduced to writing within thirty days and complied  
20 with as provided for in this section. Oral approval shall be granted  
21 immediately upon request, for a stream crossing during an emergency  
22 situation.

23 This section shall not apply to the construction of any form of  
24 hydraulic project or other work which diverts water for agricultural  
25 irrigation or stock watering purposes authorized under or recognized as  
26 being valid by the state's water codes, or when such hydraulic project  
27 or other work is associated with streambank stabilization to protect  
28 farm and agricultural land as defined in RCW 84.34.020. These  
29 irrigation or stock watering diversion and streambank stabilization  
30 projects shall be governed by RCW 75.20.103.

31 This section does not apply to small scale prospecting and mining  
32 activities, which are governed by section 3 of this act.

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

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

1           (2) For the purposes of this chapter, "small scale prospecting and  
2 mining" means only the use of the following methods: Pans, sluice  
3 boxes, concentrators, and mini-rocker boxes for the discovery and  
4 recovery of minerals."

5 SHB 1565 - S COMM AMD

6           By Committee on Natural Resources & Parks

7

ADOPTED 4/14/97

8           On page 1, line 1 of the title, after "mining;" strike the  
9 remainder of the title and insert "amending RCW 75.20.100; adding a new  
10 section to chapter 75.20 RCW; and creating a new section."

--- END ---

# APPENDIX C

2 SHB 1565 - S AMD - 310  
3 By Senator Jacobsen

4  
5 Strike everything after the enacting clause and insert the  
6 following:

7 "NEW SECTION. **Sec. 1.** The legislature finds that small scale  
8 prospecting and mining: (1) Is an important part of the heritage of  
9 the state; (2) provides economic benefits to the state, and helps to  
10 meet the national security demand and industrial demand for minerals;  
11 and (3) can be conducted in a manner that is beneficial to fish habitat  
12 and fish propagation. Now, therefore, the legislature declares that  
13 small scale prospecting shall be regulated in the least burdensome  
14 manner that is consistent with the state's fish management objectives.

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

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

22 (2) By December 31, 1998, the department shall adopt rules to  
23 regulate small scale mineral prospecting activities subject to this  
24 section. The department shall develop the rules in cooperation with  
25 the recreational mining community and other interested parties.

26 (3) Rules adopted for small scale prospecting activities shall not  
27 require an environmental analysis under chapter 43.21C RCW as a  
28 condition for obtaining a written approval. Small scale prospecting  
29 activities requiring a written approval under this section shall  
30 complete a written application as provided by the department. The  
31 department shall specify by rule the maximum length of time for the  
32 department to make a decision on a permit application. In no event  
33 shall the department take more than thirty days to make a decision on  
34 a permit issued under this section.

1 (4) Within two months of adoption of the rules, the department  
2 shall distribute an updated gold and fish pamphlet that describes  
3 methods of mineral prospecting that are consistent with the  
4 department's rule. The pamphlet shall be written to clearly indicate  
5 the prospecting methods that require written approval under this  
6 chapter and the prospecting methods that require compliance with the  
7 pamphlet. To the extent possible, the department shall use the  
8 provisions of the gold and fish pamphlet to minimize the number of  
9 specific provisions of a written approval issued under this section.

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

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

18 SHB 1565 - S AMD - 310  
19 By Senator Jacobsen

20  
21 On page 1, line 1 of the title, after "mining;" strike the  
22 remainder of the title and insert "adding a new section to chapter  
23 75.20 RCW; and creating a new section."

--- END ---

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

**July 08, 2019 - 3:36 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 52643-3  
**Appellate Court Case Title:** Cascadia Wildlands, Appellant v. Fish and Wildlife, Respondent  
**Superior Court Case Number:** 17-2-03912-5

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