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NO. 52643-3-II

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

CASCADIA WILDLANDS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Respondent,

and

RESOURCE COALITION, INC.,

Intervenor

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

This case asks whether the Washington Department of Fish and Wildlife (WDFW) has statutory authority to regulate a specific method of mineral prospecting – suction dredge prospecting – through a pamphlet instead of requiring prospectors to obtain individual permits. Under the plain language of RCW 77.55.091, WDFW is so authorized. Rather than circumventing statutory permitting requirements, WDFW’s *Gold and Fish* pamphlet acts as a permit, containing important information about fish and fish habitat and detailed rules that prospectors must follow while mineral prospecting in Washington.

WDFW first took this approach 20 years ago, after the Legislature directed it to use the pamphlet to minimize “the number of specific provisions of a written permit issued under [RCW 77.55].” RCW 77.55.091(3). WDFW’s decision represents a balance between two statutory mandates: protecting fish life and working with the prospecting community. As an expert in its field, WDFW is in the best position to adjust this balance as fish needs and technology evolve.

Appellant Cascadia Wildlands (Cascadia) fails to present a compelling reason to invalidate WDFW’s decades-old decision. Cascadia fails to show that WDFW’s 1999 decision is in conflict with the plain language or the intent and purpose of RCW 77.55.091. To the extent that

RCW 77.55.091 is ambiguous, WDFW's interpretation is entitled to deference. Cascadia's challenge must fail.

II. COUNTER STATEMENT OF THE ISSUES

1. Does WDFW have discretion to determine what types of mineral prospecting methods—other than small scale prospecting methods—to regulate via its *Gold and Fish* pamphlet, when the plain language of RCW 77.55.091 grants this authority, and when implementation of RCW 77.55 rests squarely within WDFW's expertise?
2. Is Cascadia Wildlands entitled to recover its attorney fees and costs against WDFW, when WDFW's decision to regulate suction dredge prospecting via the pamphlet was reasonably justifiable under the circumstances here?

III. COUNTER STATEMENT OF THE CASE

Individuals engaged in mineral prospecting (prospectors) use a variety of tools to search for and recover gold and other minerals, and those tools range from simple handheld ones like pans to motorized suction dredges on pontoon floats. WAC 220-660-030(94), (95); AR 3959. WDFW has defined many of these tools in rule, including the suction dredge. *See generally* WAC 220-660-030. A suction dredge is a machine with a gas engine that uses a suction hose to remove materials from stream beds and deposit them into an attached sluice box that floats on a platform. WAC 220-660-030(140); *Beatty v. Dep't of Fish and Wildlife*, 185 Wn. App. 426, 433, 341 P.3d 291 (2015). The sluice separates heavier minerals like gold and returns the remainder to the water. *Beatty*, 185 Wn. App. at 433.

Many methods of mineral prospecting affect the bed and flow of state waters and thus also have the potential to affect fish life; such hydraulic projects are therefore subject to WDFW's regulatory authority under RCW 77.55. *See generally*, RCW 77.55; AR 3051-52, 3959-60; SR 130. Under this authority, WDFW issues six different types of written permits depending on the circumstances and type of work. AR 3055. Most written permits require site review and approval of a specific work plan, including as-built drawings of proposed construction projects. AR 3055; *see also* SR 148 (referencing site review); *see also Beatty*, 185 Wn. App. at 432. This is not the case for mineral prospecting conducted pursuant to WDFW's *Gold and Fish* pamphlet. AR 3055.

WDFW does not track prospecting conducted in compliance with its *Gold and Fish* pamphlet because it does not require written permits for such activities. SR 22. That said, prospectors who wish to deviate from pamphlet rules must obtain written permits before doing so. SR 22. In 2006, WDFW issued 57 written permits for mineral prospecting activities deviating from pamphlet rules; the agency issues an average of around 2,500 permits per year. AR 3191-93; SR 22.

A. Regulation of Mineral Prospecting Before 1999

WDFW and its predecessor agencies began regulating hydraulic projects, including mineral prospecting, in 1943. AR 3046, 3960. Around

1980, WDFW created a set of generally applicable, written rules it called the *Gold and Fish Rules and Regulations for Mineral Prospecting and Placer Mining in Washington State* (“*Gold and Fish* pamphlet”) after a spike in the price of gold increased mineral prospecting in Washington. AR 3960, 3233; SR 8. The *Gold and Fish* pamphlet contains rules for prospectors to follow when engaged in mineral prospecting activities in Washington. AR 3960; SR 8. From 1980 to 1999, the pamphlet also served as a written permit for two types of small, non-motorized mineral prospecting methods: pans and sluices. AR 3960; SR 8. During this time, all other types of mineral prospecting methods still required individual permits, though the pamphlet did contain descriptions and timing for those other methods. AR 3960-61.

B. The Gold and Fish Pamphlet

By 1999, WDFW had been regulating pan and sluice methods through the pamphlet for almost 20 years; however, per Substitute House Bill (SHB) 1565, it endeavored to further streamline permitting and reduce the number of written permits issued for mineral prospecting activities. AR 3960-62. WDFW also began regulating suction dredge prospecting via the pamphlet at this time. AR 3962. WDFW worked with the regulated community for about a year to develop new rules and publish an updated pamphlet in 1999. AR 3234, 3961-62.

As long as prospectors follow the rules laid out in WDFW's *Gold and Fish* pamphlet, their activities are compatible with protecting fish life. AR 3965-66, SR 130-31. The pamphlet contains information about impacts of mineral prospecting on fish habitat and specific rules. SR 19; *see also* SR 120-55 (WDFW's 1999 *Gold and Fish* pamphlet and 2005 Addendum); WAC 220-660-300(3). For example, it expressly directs prospectors to avoid disturbing fish eggs and juvenile fish (fry):

If fish eggs or fry are encountered during excavation of the bed, operations shall immediately cease and WDFW shall be notified immediately. No further excavations shall occur until all eggs and fry have emerged from the gravel. Further approval shall be required by WDFW prior to resuming mineral prospecting or placer mining activities in that stream.

SR at 142.

The pamphlet also directs prospectors to safely collect and return fish entrapped in pools; cease operations upon observing fish in distress, a fish kill, or a problem with water quality; to screen pump intakes; and to refrain from activities in specific areas closed for spawning. SR 19; *see also* SR 125-55. Pamphlet rules also restrict the size and spacing of equipment and the number of prospectors at a site—all to mitigate risk to fish due to a high concentration of prospectors or equipment in one area. AR 3965-67. Failure to comply with the pamphlet could result in a civil penalty of up to one hundred dollars per day or a gross misdemeanor punishable by a fine,

imprisonment, or both. SR 123. Adhering to the pamphlet does not relieve individuals of their obligations to obtain other permits as required by federal, other state, and local government jurisdictions. SR 127, 133-36.

Prospectors who use suction dredges must also adhere to equipment requirements and limit activities to authorized timeframes called work windows. WAC 220-660-300(5)(a). WDFW lists work windows in the pamphlet and in rule, and it has organized them by stream/tributary and the county in which each is located. SR 148-53; WAC 220-660-300(7). WDFW designed the work windows to protect fish spawning activity and egg development through fry development. *Beatty*, 185 Wn. App. at 433. WDFW bases timing for work windows in each stream on the spawning habits of fish species residing in that particular stream. *Id.*

C. 2009 Updates to WDFW's Rules and Pamphlet

In 2009, WDFW significantly amended its rules and pamphlet requirements after working with federal and state agencies, tribes, environmental interest groups, and prospectors. AR 3730-31 (regarding pamphlet), 3234-35. The most recent version of the *Gold and Fish* pamphlet was published in April 2009. AR 3731, 3963.

Former WACs 220-110-201 through 220-110-206 specifically addressed mineral prospecting activities and required prospectors using suction dredges – then classified as Class II equipment – to adhere to the

Gold and Fish pamphlet, to maintain the pamphlet on the job site at all times, and to adhere to all work windows and location restrictions set forth in former WAC 220-110-206 through WAC 220-110-209. Former WAC 220-110-020(52) (defining “mineral prospecting equipment”); former WAC 220-110-200; former WAC 220-110-201.¹ Further, prospectors using suction dredges were required to adhere to express limitations on equipment features, including limits on the diameters of suction intake nozzles and dredge hoses, and sluice width. *See* former WAC 220-110-202(1)-(4); *Beatty*, 185 Wn. App. at 432-33.

D. 2012 Rule Amendments and Adoption of WAC 220-660-300

In 2011, WDFW began a three-year process to overhaul WAC chapter 220-110. AR 2, 3046-3161, 3166. The majority of its proposed changes did not focus specifically on mineral prospecting. AR 3138-39, 3220-21, 3234, 3594, 3761, 3962. Instead, WDFW proposed the changes to its hydraulic code regulations to incorporate statutory changes, current science, updated technology, and simpler permitting for some activities, in a manner that was reasonable, cost-effective, and scientifically supported. AR 3046.

¹ Former chapter 220-110 WAC may be found at the following link: <http://leg.wa.gov/CodeReviser/WACArchive/Documents/2005/WAC220.pdf>

The rule at issue here, WAC 220-660-300, is the product of WDFW consolidating former WACs 220-110-200, -201, -202, and -206. AR 3220, 3539, 3486-87.

WDFW ultimately adopted three substantive changes to its rules governing mineral prospecting activities. AR 3138-39, 3220-21, 3761, 3962. First, WDFW adopted rules allowing for mineral prospecting activities on beaches to be regulated via its *Gold and Fish* pamphlet to simplify permitting. AR 3967-68. Second, it adopted rules allowing for individuals to use the *Gold and Fish* pamphlet as approval for mineral prospecting using non-motorized mini-high bankers, again to simplify permitting. AR 3055. Third, WDFW adopted changes related to timing windows for mineral prospecting in order to reduce risk of impacts to spawning and incubating fish, based on new data regarding timing of spawning and presence of fish in particular waters. AR 3966-68.

E. The Proceedings Below

On June 30, 2017, Cascadia, an Oregon-based, non-profit environmental interest group, filed a Petition for Declaratory Judgment and review of WDFW Rulemaking under the Washington Administrative Procedures Act (APA). Clerk's Papers (CP) 1-23. The original petition sought invalidation of WAC 220-600-300 "and the Gold & Fish Pamphlet ... as they are applied to motorized mining" on the basis that such an

application was: (1) *ultra vires*; (2) arbitrary and capricious; (3) adopted without compliance with statutory rulemaking procedures; and (4) amounted to a “failure to take non-discretionary action”. CP 18-22. The original petition also sought remand for rulemaking and costs and attorney fees. CP 22.

On August 10, 2017, the Thurston County Superior Court granted an unopposed motion by Resource Coalition, Inc., a Washington-based, non-profit, mineral prospecting interest group, to intervene. CP 24-33. Resource Coalition opposed Cascadia’s claims, like WDFW, and sought dismissal of Cascadia’s petition. CP 233.

On October 19, 2018, following a hearing on the merits of two of Cascadia’s four claims, the Thurston County Superior Court concluded that WAC 220-660-300 was adopted within WDFW’s statutory authority, and that WDFW had substantially complied with APA rulemaking procedures. CP 263-265. It thus dismissed those claims. CP 264. After the superior court’s ruling, Cascadia agreed to dismiss its remaining claims. CP 271-273. Cascadia timely appeals the superior court’s October 19, 2018 order.

IV. ARGUMENT

In compliance with the Legislature’s 1997 mandate – now at RCW 77.55.091 – and applying its expert knowledge of how to best minimize impacts of hydraulic projects on fish life, WDFW worked with the

prospecting community and updated its *Gold and Fish* pamphlet to apply to suction dredge prospecting in addition to the specifically required categories of mineral prospecting methods. A plain reading of RCW 77.55.091 reveals that WDFW was authorized but not required to do this.

Cascadia's seeks invalidation of "every aspect of [WAC 220-660-300] that allows prospecting and mining methods which exceeded the statutory definition of 'small scale prospecting and mining' to operate without an HPA permit." App. Br. at 3, fn. 2, 10. Cascadia's position is not consistent with the plain language of RCW 77.55.091. However, even if the language of this provision were ambiguous, this Court should defer to WDFW's expertise in its reasonable interpretation.

Because Cascadia has failed to meet its burden to show that WDFW's 1999 decision to use its *Gold and Fish* pamphlet to regulate suction dredge prospecting was clearly contrary to statute, this Court should affirm the superior court's dismissal of Cascadia's petition.

A. Standard of Review

The APA establishes the exclusive means for obtaining judicial review of agency action in Washington. *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 603, 374 P.3d 151 (2016) (quoting RCW 34.05.510). Judicial review of rules is governed by RCW 34.05.570(2), which allows for invalidation of a rule only upon a finding

that it (1) is unconstitutional; (2) exceeds the agency's statutory authority; (3) was adopted without compliance with rulemaking procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c); *Hillis*, 131 Wn.2d, 381, 932 P.2d 139 (1997).

The validity of an agency rule is a question of law subject to de novo review, *Wash. Restaurant Ass'n v. Wash. State Liquor Bd.*, 200 Wn. App. 119, 126, 401 P.3d 428 (2017), as is the extent of an agency's rule-making authority. *Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). In answering such questions, this Court sits in the same position as the superior court, applying APA standards directly to the agency record. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

A court will invalidate a rule if it "exceeds the statutory authority of the agency" but not if the rule is reasonably consistent with the governing statutes. *Wash. Restaurant Ass'n*, 200 Wn. App. at 127 (invalidating license fee rules as inconsistent with Title 66 RCW and interpreting case law). When an agency rule is reasonably consistent with the governing statutes, the agency acts within its statutory rule-making authority, and courts presume the rule to be valid. *Id.*, citing *Wash. State Hosp. Ass'n v. Dep't of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015). The wisdom and desirability of a rule is not a question for the court's review; the court's

purpose is to ascertain and give effect to the Legislature's intent. *Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998) (upholding rule requiring modern gun hunters to wear fluorescent orange while hunting). The court will consider the declaration of purpose contained in the statute to determine the breadth of authority the Legislature has delegated to an agency, and if an operative statute can be construed in a manner consistent with its broad statement of purpose, it should be so construed. *Id.*

A party who attacks the validity of a rule therefore has the burden of presenting *compelling* reasons why the rule is in conflict with the intent and purpose of the statute being implemented. RCW 34.05.570(1)(a); *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986) (emphasis added). Here, Cascadia has failed to meet its burden, this Court should affirm the superior court's dismissal of its claim.

B. RCW 77.55.091 Authorizes But Does Not Require WDFW to Regulate Suction Dredge Prospecting via its *Gold and Fish Pamphlet*

In 1997, the Washington Legislature passed Substitute House Bill (SHB) 1565, Section 2 of which provides:

(1) Small scale prospecting and mining shall not require written approval under this chapter if the prospecting is conducted in accordance with provisions established by the department.

(2) By December 31, 1998, the department shall adopt rules applicable to small scale prospecting and mining activities

subject to this section. The department shall develop the rules in cooperation with the recreational mining community and other interested parties.

(3) Within two months of adoption of the rules, the department shall distribute an updated gold and fish pamphlet that describes methods of mineral prospecting that are consistent with the department's rule. The pamphlet shall be written to clearly indicate the prospecting methods that require written approval 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 approval issued under this chapter.

(4) For the purposes of this chapter, "small scale prospecting and mining" means only the use of the following methods: Pans, nonmotorized sluice boxes, concentrators, and minirocker boxes for the discovery and recovery of minerals.

Laws of 1997, ch. 415, § 2.

The Legislature re-codified this section twice after 1997 without substantively amending it. Originally codified at former RCW 75.20.330, the Legislature moved it to Title 77 RCW in 2000, after the former Washington Department of Fisheries merged with the former Washington Department of Wildlife to form WDFW. Laws of 2000, ch. 107, § 129. In 2005, the Legislature moved this section to its current position as part of its regulatory reform of WDFW's hydraulic project approval program. *See generally*, Laws of 2005, ch. 146. In doing so, it amended the statutory language to its current version and moved but did not amend the definition

of “small scale prospecting and mining” to RCW 77.55.011. *See id.* The current version – RCW 77.55.091 – provides:

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

(3) Within two months of adoption of the rules, the department shall distribute an updated gold and fish pamphlet that describes methods of mineral prospecting that are consistent with the department’s rule. The 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. 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.

(emphasis to changes added).

WDFW acted within the scope of its statutory authority when it decided in 2014 to continue to regulate suction dredge prospecting via its *Gold and Fish* pamphlet instead of individualized permits. An agency’s powers are not limited to those expressly granted by the Legislature in the words of the statute but include those necessarily implied by the statutory grant. *Wash. Pub. Ports Ass’n*, 148 Wn.2d at 646. Agency rules may fill gaps in an existing statute if necessary to effectuate a general statutory

scheme. *Pierce Cty v. State*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008); *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 646; *Armstrong*, 91 Wn.App. at 537.

By its plain language, RCW 77.55.091 prohibits WDFW from requiring individual permits for small-scale mineral prospecting, but it does not expressly prohibit WDFW from regulating suction dredge prospecting via the same regulatory tool that it uses to regulate small scale prospecting and mining. To the contrary, the statute is silent on how WDFW is to regulate suction dredge prospecting, and it has remained silent since its enactment in 1997 despite WDFW's practice of regulating this method via its *Gold and Fish* pamphlet for the past 20 years. When taken in the context of WDFW's broad regulatory authority over hydraulic projects, WAC 220-660-300 is not *ultra vires* in authorizing prospectors who suction dredge to use the *Gold and Fish* pamphlet as their permits for such mineral prospecting activities in compliance therewith.

Here, Cascadia has failed to provide a compelling reason such a rule conflicts with the plain language, intent, and purpose of RCW 77.55.091. *Hi-Starr, Inc.*, 106 Wn.2d at 459. Further, to the extent that the language of RCW 77.55.091 could be construed as ambiguous, WDFW's interpretation should be entitled to deference, as implementation of this statute sits squarely within the four corners of the WDFW's unique expertise.

1. This Court Should Uphold WDFW’s Decision to Regulate Suction Dredging via Its *Gold and Fish* Pamphlet as Reasonably Consistent with RCW 77.55.091

Under the plain language of RCW 77.55.091, WDFW is authorized but not required to regulate suction dredge prospecting via its *Gold and Fish* pamphlet. Statutory interpretation, reviewed de novo, begins with the statute’s plain meaning. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The Legislature “is presumed to intend the plain meaning of its language.” *State v. Garcia*, 179 Wn.2d 828, 836, 318 P.3d 266 (2014); *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010) (“Where statutory language is unambiguous, courts accept that the Legislature means exactly what it says”). Thus, if a statute’s meaning is plain on its face, courts must give effect to that plain meaning as an expression of Legislative intent. *Wash. Pub. Ports Ass’n*, 148 Wn.2d at 646.

To ascertain a statute’s plain meaning, courts look to “the entire ‘context of the statute in which the provision is found, [as well as] related provisions, amendments to the provision, and the statutory scheme as a whole’” for guidance. *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 432 P.3d 805, 808 (2019), citing *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015); *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010) (“enacted statement of legislative purpose is included in a plain reading of a statute”); *Lake*, 169 Wn.2d at

526; *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (plain meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision).

That said, courts must not add words where the Legislature has chosen not to include them, and they must construe statutes to give effect to all of the language in the statute. *Lake*, 169 Wn.2d at 526. When the Legislature uses two different terms in the same statute, courts presume that it intends the terms to have different meanings. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). When words are not defined by statute, the court may refer to dictionary definitions and to common usage in light of the context in which the word is used. *Armstrong*, 91 Wn. App. at 538. Courts also consider the subject matter within which words are used and the statutory context in which they appear. *Id.*

It “is well settled that the word ‘shall’ in a statute is presumptively imperative and operates to create a duty.” *Erection Co. v. Dep't of Labor and Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). The “word ‘shall’ in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.” *Id.*

Further, courts “assume [] the legislature [did] not intend to create inconsistent statutes,” and that instead, “[s]tatutes are to be read together,

whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008).

Additionally, “a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Spokane Cty. v. Dep’t. of Fish and Wildlife*, 192 Wn.2d 453, 457, 430 P.3d 655 (2018), citing *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003).

The provisions in RCW 77.55.091(1), (2), and (3) are similar in that they all contain the term “shall” at least once. In the absence of legislative intent to interpret the term differently, this Court should interpret “shall” as imposing a mandatory obligation on WDFW. *Erection Co*, 121 Wn.2d at 518. Thus, RCW 77.55.091(1) prohibits WDFW from requiring an individual permit before a prospector can undertake small-scale mineral prospecting activities. Similarly, RCW 77.55.091(2) obligates WDFW to adopt rules applicable to small-scale mineral prospecting in cooperation with prospectors and other stakeholders. RCW 77.55.091(2). Additionally, RCW 77.55.091(3) obligates WDFW to distribute an updated *Gold and Fish* pamphlet “that describes methods of mineral prospecting that are consistent” with its rules. Subsection (3) also obligates WDFW to indicate which prospecting methods require compliance with the pamphlet. Finally,

this provision obligates WDFW to use the pamphlet in a manner so as to minimize written permit provisions issued under RCW 77.55. RCW 77.55.091(3).

While similar, the differences between RCW 77.55.091(1), (2), and (3) are apparent. RCW 77.55.091(1) and (2) contain the phrase “small scale prospecting and mining” while RCW 77.55.091(3) does not. To accept Cascadia’s interpretation of RCW 77.55.091(3) to apply only to small scale mineral prospecting would require reading the words “small scale” into that provision. This Court should decline Cascadia’s invitation to do so.

Rather than adding the words “small scale” to RCW 77.55.091(3) or interpret different terms used in the same statute (“small scale prospecting and mining”, “mineral prospecting”, and “prospecting methods”) to have the same meaning, this Court should interpret RCW 77.55.091 as WDFW has done: this statute authorizes but does not require WDFW to regulate mineral prospecting methods other than small scale methods via its *Gold and Fish* pamphlet.

WDFW’s decisions to update its *Gold and Fish* pamphlet in 1999 and to continue in 2014 to use that pamphlet to regulate small-scale and suction dredge prospecting methods were reasonably consistent with the plain language of RCW 77.55.091. WDFW worked with its community for about a year to develop new rules and update and publish its *Gold and Fish*

pamphlet. AR 3962. In doing so, WDFW added three types of “small scale” mineral prospecting methods to its pamphlet rules: mini-rocker boxes, mini high-bankers, and other small concentrators. AR 3960. It also added suction dredge prospecting. AR 3960. And it did these things in an effort to use the pamphlet to “minimize the number of specific provisions of a written approval issued under” RCW 77.55: by 1999, prospectors were able to use the *Gold and Fish* pamphlet for mineral prospecting activities instead of having to obtain individual permits, provided that they complied with all pamphlet rules designed to protect fish life. RCW 77.55.091(3); SR 8. WDFW’s actions at issue here are in compliance with the statute.

WDFW’s rules are presumed valid, and Cascadia has failed to present a compelling reason that WDFW’s decision to include suction dredging as an approved pamphlet method was outside the scope of its authority. This Court should therefore affirm the superior court’s order and deny Cascadia its requested relief.

2. To the Extent that RCW 77.55.091 is Ambiguous, the Legislative History Does Not Contradict WDFW’s Interpretation

If the statute is unambiguous after a review of the plain meaning, then the court’s inquiry is at an end. *Lake*, 169 Wn.2d at 526. But if, after a plain meaning analysis, the statute still remains susceptible to more than one reasonable meaning, courts may then resort to aids of construction,

including but not limited to Legislative history and the circumstances surrounding its enactment, to determine Legislative intent. *Id*; *Pierce Cty v. State*, 144 Wn. App. 783 at 806; *Anthis v. Copland*, 173 Wn.2d 752, 270 P.3d 574 (2012). Here, Cascadia argues that one line in the bill reports submitted for SHB 1565 “eviscerates” the Department’s interpretation of RCW 77.55.091. App. Br. at 25. Its reliance on this one line, however, is inapposite, because that sentence was not describing the impact of the law but the background, or status quo, of the agency’s practice at the time.

Legislative bill reports may be helpful in ascertaining Legislative intent, but language contained in legislative reports and floor notes are not binding on courts. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (courts may look to legislative history for assistance in discerning legislative intent). They “may be relevant in the interpretation of a statute being enacted, but they do not represent binding pronouncements of the state of the law existing before the enactment.” *Dep’t of Labor and Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991). Even a Legislator’s comments from the floor of the Legislature are not necessarily indicative of intent, and comments about the purpose of an amendment which does not become part of the enacted legislation, “particularly where that legislation is in sharp contrast to the enacted legislation, cannot serve as evidence of legislative intent.” *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118

Wn.2d 46, 63, 821 P.2d 18 (1991). Courts generally do not speculate as to the reason the Legislature has rejected a proposed amendment. *Id.* at 64. Preliminary reports to the Legislature are also not indicative of legislative intent. *Id.* at 65.

Here, the content of the Legislature’s bill reports for SHB 1565, which were published before the law became effective, is not helpful to discern Legislative intent as to whether WDFW is authorized to regulate suction dredge prospecting through its *Gold and Fish* pamphlet. Cascadia points to one specific sentence that appears in all of the legislative reports: “Gold mining using ... dredging require a written HPA permit”. App. Br. at 25; Final B. Rep., Substitute H.B. 1565, 55 Leg., Reg., Sess. (Wash. 1997). Contrary to Cascadia’s argument, this sentence is not reasonably interpreted to be a “mandate”, but is instead more reasonably interpreted as a description of WDFW’s permitting practice as that practice existed when the Legislature was considering the bill. This sentence is contained in the reports’ section entitled “Background,” and is written in present tense. Final B. Rep., Substitute H.B. 1565, 55 Leg., Reg., Sess. (Wash. 1997). Its context in the final bill report is:

The Department of Fish and Wildlife is authorized to regulate mining activities within the high watermark of streams, rivers, and other water bodies of the state. The regulation occurs through the hydraulic permit approval (HPA) process. A written HPA is not required for persons

who pan for gold using hand tools, including panning, mini-rocker boxes, and certain non-motorized sluice boxes if the persons follow the provisions in the department's Gold and Fish-- pamphlet. The Gold and Fish—pamphlet that describes when, where, and how gold mining can take place. *Gold mining using motorized sluice boxes and dredging require a written HPA permit.*

Final B. Rep., Substitute H.B. 1565, 55 Leg., Reg., Sess. (Wash. 1997) (emphasis added).

The final bill report then goes on to summarize WDFW's mandate in SHB 1565, but in doing so, it neither references suction dredging nor other forms of motorized mineral prospecting:

By December 31, 1998, the Department of Fish and Wildlife is directed to adopt a rule to regulate small scale prospecting activities. The department must cooperate with the small scale prospecting community and other interested parties in developing the rule. Within two months of rule adoption, the department must update and distribute a revised Gold and Fish—pamphlet.

Small scale mineral prospecting— is defined as activities that use pans, sluice boxes, concentrators, or mini-rocker boxes. Small-scale mineral prospecting activities do not require a written HPA permit if the provisions established by the department are followed.

Final B. Rep., Substitute H.B. 1565, 55 Leg., Reg., Sess. (Wash. 1997).

Adopting Cascadia's interpretation of this bill report language would not be reasonable, as there is no reference to suction dredge prospecting in the section summarizing the impacts of the bill, and the reference that Cascadia points out simply reflects the reality at the time,

which was that WDFW was requiring individualized permits for suction dredge methods of mineral prospecting. As previously explained, WDFW complied with the Legislature’s mandate under RCW 77.55.091. WDFW worked with the community for about a year to develop the new rules and update its pamphlet, which was published in 1999. AR 3962. In addition to covering small scale mineral prospecting methods in its updated *Gold and Fish* pamphlet, WDFW added suction dredging, which was allowed under RCW 77.55.091(3). AR 3962. WDFW’s decision to regulate suction dredge prospecting through the pamphlet is not inconsistent with the Legislative history of RCW 77.55.091. This Court should decline Cascadia Wildland’s request to rely upon a passing statement in the background section of a bill report to add language into RCW 77.55.091(3) that would restrict the *Gold and Fish* pamphlet only to small scale methods of mineral prospecting.

3. To the Extent RCW 77.55.091 May Be Ambiguous, WDFW’s Interpretation Is Entitled to Deference

In reviewing matters within an agency’s discretion, “the court shall limit its function to assuring that the agency has exercised its discretion in accordance with the law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” *Puget Sound Harvesters Ass’n v. Dep’t of Fish and Wildlife*, 182 Wn. App. 857, 867, 332 P.3d 1046 (2014), citing *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483,

502 n. 12, 39 P.3d 961 (2002). Substantial deference to agency views “[is] appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency’s expertise.” *Id.*, citing *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). Further, 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 the law.” *Id.*, citing *NW Steelhead & Salmon Council of Trout Unlimited v. Dep’t of Fisheries*, 78 Wn. App. 778, 786-87, 896 P.2d 1292 (1995).

WDFW has broad regulatory authority over activities that impact fish life and fish habitat. RCW 77.04.012; RCW 77.04.013 (stating Legislative purpose of managing all fish and shellfish species “under a single comprehensive set of goals, policies, and objectives”); RCW 77.12.047(1); *Creveling v. Dep’t of Fish and Wildlife*, 142 Wn. App. 827, 831, 177 P.3d 136 (2008). It is authorized under chapter 77.55 RCW to regulate hydraulic projects in a reasonable manner so as to protect fish life. RCW 77.55.021; *Spokane Cty. v. Dep’t of Fish and Wildlife*, 192 Wn.2d 453, 455, 430 P.3d 655 (2018).

The requirement to secure WDFW’s approval via an individualized permit is not absolute or without exception. The Legislature has expressly recognized pamphlets as forms of written approvals complying with chapter

77.55 RCW. Further, several specific requirements and other exemptions to the general permit rule are outlined in chapter 77.55 RCW. Driving across an established ford; removing crab, shellfish, and derelict fishing gear; and removing and controlling spartina and purple loosestrife with handheld tools and equipment are all activities expressly exempt from the general permitting requirement. RCW 77.55.031. Also exempted are “pamphlet hydraulic projects”, include hydraulic projects “for the removal or control of aquatic noxious weeds conducted under the aquatic plants and fish pamphlet”, which serves as the permit required under RCW 77.55.021. RCW 77.55.011(17); RCW 77.55.181. Mineral prospecting activities conducted under WDFW’s *Gold and Fish* pamphlet under RCW 77.55.091 are also “pamphlet hydraulic projects”. RCW 77.55.011(17).

WDFW’s ability to exercise discretion in deciding whether to require individualized permits for suction dredge mineral prospecting projects makes sense in the context of its broad regulatory authority and RCW 77.55 as a whole. RCW 77.55 concerns the specialized field of regulating hydraulic projects for the protection of fish life. WDFW must ensure permit conditions are reasonably related to the hydraulic project to be approved, and it must also require proper protection for fish. RCW 77.55.231(1). This statute requires WDFW to refrain from imposing conditions that attempt to optimize conditions for fish life or that are out of

proportion to the project's impact. *Id.* RCW 77.55.021(7)(a) authorizes WDFW to deny or condition permits, but only for the protection of fish life. WDFW's implementation of these mandates necessitates that it develop and maintain biological expertise, and it also necessitates that WDFW develop some level of expertise in the types of construction projects and activities (including mineral prospecting) that would be subject to regulation.

The Washington State Supreme Court recently recognized WDFW's expertise in the field of hydraulic project regulation in its decision in *Spokane Cty. v. Dep't of Fish and Wildlife*, 192 Wn.2d 453, 430 P.3d 655 (2018). That case concerned the geographic scope of permitting authority delegated to WDFW, as Spokane County was challenging rules adopted in 2015 that applied to bridge maintenance and construction even if the work would occur above the ordinary high-water line. *Id.* at 455. Concluding that "the legislature intended the Department's regulatory jurisdiction to include projects above the ordinary high-water line that affect state waters," the Court stated, "we defer to the Department's expertise in determining which projects meet that standard." *Id.* at 462.

WDFW's expertise in this complex area is also reflected in the *Gold and Fish* pamphlet. It contains a wealth of information, including a description of the impacts of mineral prospecting activities on fish habitat, specific prospecting rules, and instructions for how to minimize effects of

mineral prospecting on fish habitat. SR 19; *see also* SR 125-55. It directs prospectors to avoid disturbing fish eggs, fry, and freshwater mussels; safely collect and return any fish entrapped in pools created during excavation; cease operations when fish are observed in distress, a fish kill occurs, or water quality problems arise; screen pump intakes; and refrain from activities in streams and tributaries closed for spawning (i.e. outside of prescribed work windows). SR 19; *see also* SR 125-55. In developing these rules, WDFW conducted site-specific assessments of risk to fish and fish life in each of Washington's streams and tributaries. As long as all rules, regulations, and instructions contained in the pamphlet are followed, then mineral prospecting is, in WDFW's expert opinion, compatible with fish and their habitat and ensure the protection of fish life. SR 130-31.

The plain language of RCW 77.55.091 is not ambiguous, and WDFW's decisions at issue here were appropriately within the scope of its authority under that statute. However, to the extent that this Court does find ambiguity, it should defer to WDFW's interpretation, as the statute falls within an area in which WDFW has unique expertise. WDFW's use of the pamphlet to regulate suction dredge prospecting is consistent with the language in RCW 77.55.091(3) because it "minimize(s) the number of specific provisions of a written permit issued under [RCW 77.55]." RCW

77.55.091(3). This Court should therefore affirm the superior court's order at issue here and deny Cascadia's requested relief.

C. This Court Should Deny Cascadia's Request for Attorney Fees

Cascadia's request for attorney fees should be denied because the Department acted reasonably and in good faith in promulgating WAC 220-660-300. A prevailing party in a judicial review of an agency action is statutorily entitled to attorney fees "unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350. Here, WDFW's promulgation of WAC 220-660-300 was reasonable and in good faith in light of its interpretation of RCW 77.55.091. That good faith interpretation has been carried out in practice by the agency for nearly 20 years before Cascadia's challenge. In light of the circumstances in this case, the Department's action at issue here is justified, and even if Cascadia did obtain relief under the APA, it should not be awarded attorney fees or costs. Thus, this Court should deny their request for attorneys' fees and costs.

V. CONCLUSION

This Court should affirm the order of the superior court.

RESPECTFULLY SUBMITTED this 17th day of April, 2019.

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DATED this 17th day of April, 2019 at Olympia, Washington.

s/ Jeanne Roth
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