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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

PROTECT ZANGLE COVE; COALITION TO PROTECT PUGET
SOUND HABITAT; AND WILD FISH CONSERVANCY,

Petitioner-Appellants

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE; JOE
STOHR, Acting Director of the Washington Department of Fish and
Wildlife; and PACIFIC NORTHWEST AQUACULTURE, LLC,

Respondents

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Christopher Lanese)

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

For the past 75 years, the Hydraulic Code has been a crucial bulwark of protection for Washington’s environment, ensuring that construction projects do not endanger fish and their habitats. But the Washington Department of Fish and Wildlife (“WDFW”) is now undermining the purpose of the Hydraulic Code, by refusing to enforce it against a commercial shellfish industry that has already spread across at least 25% of the state’s shorelines—becoming a primary source of the potentially devastating “hydraulic projects” that the Code was meant to manage.

As a result, while homeowners building fishing docks are subject to careful permitting, WDFW does not require that the aquaculture industry take *any* steps to protect wild fish life, even as it clears and dredges mile after mile of tideland, buries natural sediments under layer after layer of gravel, and sinks ton after ton of plastic pipe into the beach.

WDFW now claims that its authority to enforce the Hydraulic Code was removed by the Aquatic Farming Act of 1985 (“Aquatic Act”). That Act moved aquaculture out of the regulatory realm of hunting and fishing, into an agricultural paradigm. It thus specifies that aquatic farmers no longer need to follow various *fishing* regulations. Nowhere does the Aquatic Act say, in so many words or any others like them, that aquatic farmers do not need to adhere to the Hydraulic Code when constructing and operating their

facilities. Indeed, WDFW continued to require that aquaculture comply with the Code for 20 years after the Aquatic Act.

In 2007, however, the Washington Attorney General erroneously concluded that the Act's fish disease control provision had, quietly and unnoticed, removed WDFW's authority to enforce the Hydraulic Code against aquaculture. In 2015, WDFW codified that flawed Attorney General opinion into an equally flawed rule, WAC 220-660-040(2)(1). The trial court compounded this error by concurring that the Legislature had rendered the Hydraulic Code a dead letter against aquaculture.

But the Legislature does not hide whales in clamshells. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not hide "elephants in mouseholes" by altering fundamental details of a regulatory scheme in vague terms or ancillary provisions). The Legislature would not smuggle broad immunity from a crucial environmental regulation into an unrelated statute, without *any* express language indicating its intent to do so. To the contrary, any such exemption is irreconcilable with the plain language, purpose, statutory framework, and history of both the Aquatic Act and the Hydraulic Code.

II. ASSIGNMENT OF ERROR

The superior court erred in dismissing all Petitioners' claims with an order entered on December 11, 2018, based on its holding that RCW

77.115.010(2) deprives WDFW of the authority to regulate aquaculture facilities under the Hydraulic Code, RCW chapter 77.55. CP 1272.

III. STATEMENT OF ISSUES

1. Does the Hydraulic Code require WDFW to protect fish from harm caused by hydraulic projects undertaken by the aquaculture industry?
2. Did the trial court err in holding that RCW 77.115.010(2) removes WDFW's authority under the Hydraulic Code to protect fish from harm caused by hydraulic projects undertaken by the aquaculture industry?
3. Did the trial court err in failing to invalidate WAC 220-660-040(2)(1), which purports to exempt the aquaculture industry from the requirements of the Hydraulic Code?
4. Did the trial court err when failing to consider whether Pacific Northwest Aquaculture should be enjoined from constructing an aquaculture facility in Zangle Cove without a Hydraulic Code permit?
5. Should Petitioners be awarded fees and costs on appeal and below?

IV. STATEMENT OF THE CASE ¹

A. Procedural History

Petitioners Protect Zangle Cove, Coalition to Protect Puget Sound Habitat, and Wild Fish Conservancy filed a petition for judicial review and declaratory judgment on April 12, 2018, in Thurston County Superior Court. CP 1-27. Petitioners sought a declaration that WAC 220-660-040(2)(1) (appended as Ex. 1), which exempts aquaculture from the

¹ References are to the Clerk's Papers ("CP"); the certified Agency Record ("AR"), indexed at CP 105; the Report of Proceedings ("RP"), filed on April 8, 2019; and exhibits ("Ex. _") of certain relevant materials appended to this brief for the Court's convenience.

Hydraulic Code, is invalid. CP 25. Petitioners also sought a declaration under the Uniform Declaratory Judgments Act that WDFW's practice of exempting aquaculture from hydraulic permitting is invalid (CP 23-25); and an injunction to prevent Pacific Northwest Aquaculture ("PNA") from constructing a proposed geoduck farm on Zangle Cove without first obtaining a Hydraulic Project Approval ("HPA") permit. CP 26.

Taylor Shellfish Company, Inc. ("Taylor"), PNA's business partner and the country's largest commercial shellfish operator,² successfully moved to intervene. CP 106-14, 223-24. Just prior to the briefing on the merits, PNA moved for judgment on the pleadings, asking the court to dismiss Petitioners' request for an injunction against its Zangle Cove facility. CP 225-37. This motion was still pending as of the final hearing.

WDFW certified an agency record consisting of nine documents and 997 pages. CP 102-05; AR 1-997. Petitioners moved to supplement the record and for judicial notice (CP 273-81), seeking to add 34 exhibits. *See* CP 282-411 (Exs. A-C); CP 455-634 (Exs. D-Z); and CP 420-54 (Exs. AA-HH). The Court granted the motion without argument. CP 1282.

Petitioners submitted six additional exhibits in support of their reply

² *See* Taylor Shellfish Farms, "ESRI reports on Tide to Table," <https://www.taylorshellfishfarms.com/blog/around-the-sound/in-the-news/esri-reports-on-tide-to-table> (Dec. 6, 2017), visited July 5, 2019.

brief, as to which they asked the court to take judicial notice.³ Petitioners also submitted ten exhibits attached to declarations related to standing.⁴ The admission of these additional exhibits was not challenged. The superior court judge did not explicitly rule upon their admission, but did indicate he had “reviewed everything filed” in preparation for the merits hearing. RP 5.

The trial court heard argument on the petition on December 7, 2018. RP 1-50. Following that hearing, the judge indicated he would consider PNA’s motion for judgment on paper submissions alone. RP 49. On December 11, 2018, the court issued an order of dismissal, which reads in full:

The unambiguous, plain language of RCW 77.115.010(2) dictates that the Washington State Department of Fish and Wildlife does not have authority to regulate the conduct in question. The prohibition against the regulation of “aquatic products” and “aquatic farmers” necessarily, by definition, prohibits the regulation of the farming of those products by those farmers. This unambiguous, plain language renders further statutory construction inappropriate and renders any other pending motions moot. Accordingly, the Petitioners’ claims are DISMISSED.

CP 1272. The court did not rule on the outstanding motions.

Petitioners timely appealed. CP 1273.

³ See CP 1039-1125 (Supplemental Declaration of Claire Davis; Exs. II-NN); CP 1155 n. 2 (request for judicial notice); CP 1167-1251 (resubmission of Exs. II-NN on errata).

⁴ See CP 242-55 (Declaration of Patrick Townsend; Exs. 1-4); CP 1126-53 (Supplemental Townsend Declaration; Exs. 5-10); CP 1252-71 (resubmission of Exs. 5-8, and 10 on errata).

B. Background of Aquaculture Industry

1. Washington's Rapidly Growing Shellfish Aquaculture Industry Has a Significant Environmental Impact

Shellfish have been commercially cultivated in Washington for more than 150 years. In recent years, however, commercial aquaculture operations have expanded rapidly with the use of new techniques and materials. CP 287, 351-53, 361, 380-84, 1227, 1233. As of 2015, active and fallow commercial shellfish aquaculture occupied more than 50,000 shoreline acres in the state—or roughly 25% of the state's total shoreline. CP 286 (listing 37,000 active acres, 14,800 fallow acres, and 1,716 acres of new aquaculture activity); CP 1222 (Washington has 216,045 tideland acres). The U.S. Army Corps of Engineers ("Army Corps") estimates that by 2022, federal permitting may authorize more than 72,000 shoreline acres for commercial aquaculture, *equating to roughly one-third of the state's shorelines*. CP 1222-24.

Industrial shellfish aquaculture threatens fish and their aquatic ecosystems in myriad ways. CP 346-52, 472-81, 1270. By its nature, it replaces native species with a monoculture that dominates the ecosystem and consumes massive amounts of phytoplankton, which is a critical source of food for other species. CP 346, 362-79, 477, 1259-61. Commercial aquaculture facilities also disrupt critical nurseries, feeding grounds, shelters, and migratory corridors for numerous species. CP 472-81, 1266-

67. The industry employs methods that can degrade or destroy natural habitats, disrupt spawning, threaten water quality, kill competing species, and deprive predators of food. *See, e.g.*, CP 1270 (WDFW biologist describing how “[a]quaculture often involves multiple manipulations of natural habitat forming processes to maximize profits and growing conditions. . .with no regard for timing windows and ecological processes”).

The Army Corps indicates that two-thirds of active shellfish aquaculture overlaps with eelgrass (CP 357-58), which provides invaluable fish habitat and is a prime indicator of ecosystem health. CP 309, 314-15, 349. In its 2017 analysis, the Army Corps found that the state’s aquaculture industry was having a substantial cumulative impact on forage fish habitat, and was likely to adversely affect critical habitat for endangered species, including Chinook salmon. CP 1266; *see also* CP 349 (forage fish are a critical food source for endangered species including Chinook), 1270 (aquaculture destroys juvenile salmon habitat). In turn, Chinook salmon are the almost exclusive food source for the critically endangered Southern Resident Killer Whales. *See* CP 1171-76 (state orca task force recommends measures to protect and restore Chinook salmon habitat).

Among the aquaculture practices that pose the greatest threat to aquatic ecosystems are the operation of heavy equipment for bed preparation and harvest; the application of herbicides and pesticides to kill

competing species; the reliance on massive quantities of plastic tubing, netting, and bags to house and protect shellfish; the installation of structures such as rafts and platforms to facilitate cultivation; the burying of natural mudflats in layers of gravel to create seeding beds; and the destruction of habitats and release of sediments during harvesting. CP 317-20, 346-52, 362-79, 472-75, 1270. Structures and gear used at commercial facilities frequently break free and float away during storms, while ropes shed nylon fibers, and plastic materials release microplastics that contaminate the water and are swallowed by fish. CP 287-91, 351, 365, 368, 371, 373, 1254-57.

2. Commercial Shellfish Operations Involve a Variety of Uses of State Waters and Seabeds

As a first step toward installing an aquaculture facility, commercial shellfish operators typically clear tidelands of native plants and animals, often using heavy machinery. CP 329, 352. Operators have historically used insecticides such as carbaryl to kill burrowing shrimp, and herbicides such as glyphosate and imazapyr to kill *Spartina* and eelgrass. CP 316, 460. Depending on the type of species being grown, operators then use a variety of processes to plant, protect, and harvest shellfish, most of which involve extensive alteration to the tidelands. *See generally* CP 323-345 (describing techniques).

As most relevant here, geoduck operators typically insert six-inch

diameter polyvinyl chloride (“PVC”) tubes, approximately nine inches long, into the beach, leaving a few inches of tube protruding above the surface. CP 342-43. Typically, approximately 42,000 PVC tube sections will be placed per acre (CP 342), equating to about six miles of plastic pipe for each acre of beach. *See* CP 343 (photographs). The operator plants two to four juvenile geoduck seeds in each tube, or up to 168,000 geoducks per acre, and covers them all in plastic netting. CP 342. About five to seven years after planting, operators harvest the geoducks using pressured water, which liquefies the substrate to a depth of two to three feet. CP 292, 345.

Other techniques common in aquaculture of other shellfish species, including clams, oysters, and mussels, include burying natural sediment under several layers of gravel (CP 336-37); suspending shellfish from rafts or platforms secured near the beach (CP 323, 327); placing plastic net bags directly on the tidelands or attached to wood or metal racks driven into the substrate (CP 334); and mechanical “dredge” harvesting (CP 329-30).

3. Geoduck Facility is Under Development at Zangle Cove

Zangle Cove is a nearly pristine estuary located at the north end of Boston Harbor in Thurston County. *See* CP 490 (describing an area with a sandy beach, well-vegetated uplands of native forest, no public access, good water quality, no tideland structures, and no other aquaculture facilities). It is a critical habitat for endangered Puget Sound Chinook salmon and

steelhead. 50 C.F.R. § 226.212 (Mar. 25, 2016). PNA admits that several endangered species are present or could otherwise be affected by Zangle Cove construction, including Chinook, steelhead, and orcas. CP 497.

PNA, in partnership with Taylor, has begun constructing a commercial geoduck facility in Zangle Cove using many of the destructive practices described above. CP 107, 491-95. On its 47,900-square foot intertidal plot, PNA plans to insert approximately 47,900 PVC-tube sections, or about one per square foot, and plant about 152,000 geoducks. CP 491, 495. PNA intends to continue the operation in perpetuity on a five-to-six-year plant/harvest cycle. CP 492, 495.

PNA submitted an HPA application for its proposed operation on December 30, 2014. CP 501-04. WDFW closed PNA's application due to inactivity on July 18, 2016. CP 648.⁵ PNA began construction in early September 2018 *without an HPA permit*—roughly five months after the superior court action was filed—installing roughly 1,800 to 2,000 PVC tubes covered by mesh netting. CP 246, 249-55, 1127 ¶ 4.

C. Legislative and Regulatory Timeline

1. 1943: Legislature Passes Hydraulic Code to Protect Fish

The Legislature passed the first version of the Hydraulic Code in

⁵ Referencing WDFW's Aquatic Protection Permitting System Permit application ID 2529, at https://www.govonlinesaas.com/WA/WDFW/Public/Client/WA_WDFW/Public/Pages/SubReviewList.aspx (visited June 30, 2019).

1943. LAWS OF 1943, ch. 40 (CP 506-07). It required the Department of Fisheries (“Fisheries”) and the Department of Game (then separate entities) to issue written approval for every project that would “use, divert, obstruct or change the natural flow or bed of any river or stream” or “utilize any of the waters of the state.” *Id.*, §1. The agencies would only grant approval upon a showing of adequate plans for “protection of fish life.” *Id.*

2. 1977-1983: Fisheries Starts to Enforce Hydraulic Code in Coastal Waters, as Commercial Shellfish Industry Grows

It was not until 1977 that Fisheries began applying the Hydraulic Code to saltwater habitats and writing HPA permits for marine projects. CP 1208. In 1983, the Hydraulic Code was revised to explicitly encompass saltwater projects. LAWS OF 1983, 1st ex. s., ch. 46, §75 (CP 613) (codified at RCW 75.20.100). During this same time period, shellfish growers were developing new methods to produce shellfish seed, modify beach substrates and protect farmed shellfish in “containment systems,” leading commercial clam farms to become a “fast-growing industry.” CP 1227, 1233.

3. 1985: Legislature Passes Aquatic Farming Act to Distinguish Aquaculture from Fishing

In 1985, the Legislature recognized the emergence of a burgeoning commercial aquaculture industry with the passage of the Aquatic Farming Act (“Aquatic Act” or “Act”). Ex. 2 (LAWS OF 1985, ch. 457 (hereinafter “1985 ACT”)). (The purpose of the Act was to “encourage the development

and expansion of aquaculture,” directing that for legal purposes, “aquaculture should be considered a branch of the agricultural industry.” 1985 ACT, §1 (codified at RCW 15.85.010). Accordingly, the Aquatic Act transferred many regulatory responsibilities to the Department of Agriculture (“Agriculture”), and removed the authority of the Departments of Fisheries and Game to regulate “aquaculturists” in the same manner as “fishermen” (*id.*, §20)—for example, amending statutes that required fishing licenses to operate aquatic farms (*id.*, §18, codified as amended at RCW 77.65.010) and wholesale fish dealers’ licenses to sell farmed fish (*id.*, §20, codified as amended at RCW 77.65.010).

Meanwhile, the Act required Fisheries to maintain a registration of aquatic farms, and work with Agriculture on a program to control fish disease. *Id.*, §§8-11 (codified at ch. 77.115 RCW).⁶ **Section 8** of the Act is the primary provision at issue in this appeal. It specifies:

The director of fisheries shall adopt rules implementing this section. However, such rules shall have the prior approval of the director of agriculture and shall provide therein that the director of agriculture has provided such approval. . . . The authorities granted the department of fisheries by these rules and by [certain other statutes; not including the Hydraulic Code] constitute the only authorities of the department of fisheries to regulate private sector cultured aquatic products and aquatic farmers as defined in section 2 of this act.

⁶ Section 9 (former RCW 77.115.020) was later repealed. LAWS OF 2000, ch. 150, §2.

Id., §8(2) (codified as amended at RCW 77.115.010(2)). Notably, while Section 8 thus refers to “aquatic products” and “aquatic farmers,” it does not mention “aquaculture,” which the Act defines separately. *Id.*, §2(1) (codified at RCW 15.85.020).

Although the Aquatic Act makes specific amendments to several other existing statutes, it does not amend the Hydraulic Code, and does not exempt aquaculture from that Code or any other environmental regulation. *See, generally*, Ex. 2 (1985 ACT).

4. **1985-2005: Aquatic Farmers Required to Obtain HPA Permits**

For 20 years following the passage of the Aquatic Act, the Department of Fisheries, and then its successor organization, WDFW, continued to exercise their authority to regulate commercial aquaculture under the Hydraulic Code. Thus, the passage of the Aquatic Act appeared to work *no change whatsoever* in how the Hydraulic Code was applied to the aquaculture industry. *See, e.g.*, CP 551-52 (WDFW notifying aquatic farmer in 2000 that HPA permit was required for repairs to a net pen). Indeed, in 1999, WDFW organized a committee, including aquatic farmers, to help it develop rules to regulate aquaculture under the Hydraulic Code. CP 539. The rulemaking effort was halted the following year after “pushback from the aquaculture industry.” *See* CP 541, 544. Nevertheless, industry guidance materials continued to advise aquatic farmers about the need to obtain HPA

permits at least as late as 2005. *See* CP 1219 (1989 Sea Grant guidance for oyster farming, discussing the Aquatic Act, and explaining that an HPA permit is required for “floating structures such as rafts, or prior to any construction or modification work on or adjacent to a beach”); CP 1240 (2005 Sea Grant guidance for clam farming, advising farmers that HPA permits may be required depending on the methods used).

5. **1986-2005: Hydraulic Code Amended to Add, Clarify, and Consolidate Exemptions**

Over the course of those two decades, the Legislature added several exemptions to the Hydraulic Code. LAWS OF 1986, ch. 173, §1 (CP 423) (driving across a ford); LAWS OF 1994, ch. 257, §18 (CP 429) (hazardous contamination remediation); LAWS OF 1995, ch. 255, §4 (CP 433) (removal of invasive weeds); LAWS OF 1997, ch. 415 §2 (Ex. 3) (small-scale mining); LAWS OF 2002, ch. 20, §4 (CP 438) (removal of derelict fishing gear); LAWS OF 2002, ch. 68, §14 (CP 447) (emergency housing for sexual predators).

In 2005, the Legislature consolidated and organized the previously scattered exemptions to the Hydraulic Code into consecutive provisions. Ex. 4 (LAWS OF 2005, ch. 146 §§301-402 (exemptions), §1001 (specifying order)); *see* RCW 77.55.031 (driving across ford), .041 (derelict fishing gear), .051 (removal of spartina and loosestrife), .061 (hazardous remediation), .081 (removal of other noxious weeds), .and .091 (small scale

mining); *see also* former RCW 77.55.071 (2006) (housing for sexual predators; expired in 2009). *None of these amendments to the Hydraulic Code included an exemption for aquaculture practices.*

6. 2007: Attorney General Finds that the Aquatic Act Removed Authority to Enforce Hydraulic Code Against Aquaculture

In 2007, Attorney General Rob McKenna released a letter opinion which concluded that WDFW does not have the authority to require HPA permits for geoduck facilities. Ex. 5 (2007 Op. Att’y Gen. No. 1) (“AG Opinion”) (also at AR 951-58). The AG Opinion concedes that geoduck farms would require HPA permits absent an exemption; but concludes that the Aquatic Act removed WDFW’s authority to require HPA permits for the “planting, growing, or harvesting of geoducks.” AR 949-52. This opinion is qualified by a footnote indicating that WDFW *should* require HPA permits for a “boat ramp, dock, or other construction work at an aquatic farm,” because that “regulates construction; it does not regulate aquaculture products.” AR957 n.4.

7. 2007-2015: WDFW Is Befuddled in Wake of AG Opinion

WDFW staff was generally at a loss to reconcile the AG Opinion’s main conclusion with the language of footnote 4, finding itself unable to decipher the difference between HPA permits that regulate “aquaculture products” and those that regulate “construction work at an aquatic farm.” *See, e.g.*, CP 543 (“the logic of footnote #4 . . . escapes me”). Perhaps as a

result, WDFW did not “consistently exercise[]” its authority over HPA permitting for aquaculture in the wake of the AG Opinion. CP 548. Not surprisingly, WDFW heard “regular complaints” about this inconsistency. CP 543.

8. **2012: Legislature Approves Additional HPA Exemptions**

In 2012, the Legislature passed a bill to modify the state’s environmental protection programs “in order to streamline regulatory processes and achieve program efficiencies.” Ex. 6 (LAWS OF 2012, 1st sp. s., ch. 1, §1). Although the Hydraulic Code had not previously provided exemptions for any industry, the 2012 legislation amended the Code to exempt “forest practices hydraulic project[s],” upon incorporation of similar fish protection standards into the Department of Natural Resources rules regulating those practices. *Id.*, §201 (codified at RCW 77.55.361).

Initial versions of the 2012 legislation would have amended the Hydraulic Code to allow WDFW to assess variable fees for HPA applications, depending on whether proposed projects were of low, medium, or high complexity. Ex. 7 (S.B. 6406, 62nd Leg., Reg. Sess., §103 (Wash. 2012)). The original bill specified how WDFW was to categorize specific projects, deeming that “aquaculture” maintenance or repair projects were of low complexity, while other “aquaculture” projects were of medium complexity. *Id.* §103(2)(1), (3)(b). These cost-recovery provisions were

stripped from the final legislation. *See* Ex. 6 (LAWS OF 2012, 1st sp. s., ch. 1, §103 (setting flat application fee of \$150)). None of the legislation passed (or proposed) in 2012 made any mention of an HPA exemption for aquaculture practices.

9. **2015: WDFW Adopts WAC 220-660-040(2)(1) to Exempt Aquaculture from HPA Permitting**

WDFW issued a preproposal statement of inquiry for rulemaking related to the Hydraulic Code on July 18, 2011 (AR 1), and a notice of proposed rulemaking on July 2, 2014 (AR 2). Final rules were adopted effective July 1, 2015. Wash. St. Reg. 15-02-029. Among the new rules was WAC 220-660-040(2)(1), which exempts the “[i]nstallation or maintenance of tideland and floating private sector commercial fish and shellfish culture facilities” from HPA permitting, but requires a permit for “appurtenance structures, such as bulkheads or boat ramps.” Ex. 1, AR 18-19.

WDFW provided no scientific or policy basis for this exception (*see* Concise Explanatory Statement, AR 345-460), and the change was not evaluated in its Environmental Impact Statement (AR 461-948). Instead, WDFW referenced the Aquatic Act as the basis for the exemption (AR 2, 173), and included the AG Opinion in the rulemaking file (AR 949-58). In response to comments challenging the change, WDFW responded that it was mandated by the Aquatic Act. AR 390; *see also* AR 964, 968, 986-87.

V. ARGUMENT

A. Summary of Argument

It is undisputed that in the absence of an exemption, the Hydraulic Code would apply to aquaculture-related “hydraulic projects.” It is also undisputed that the Hydraulic Code contains no such exemption. By its unambiguous terms, the Hydraulic Code thus applies to aquaculture.

It is further undisputed that the Aquatic Act does not expressly exempt aquaculture from HPA permitting. Indeed, the central question in this case is not actually whether aquaculture is *exempt* from the requirements of the Hydraulic Code. Rather, the key issue is whether the Aquatic Act implicitly removed WDFW’s authority to *enforce* the Aquatic Code against aquaculture, even as it continued to hold the aquaculture industry subject to those laws. In its December 7, 2018 ruling, the superior court found that it had. CP 1272.

The superior court erred. By focusing exclusively on an isolated sentence from a single provision of the Aquatic Act, the court overlooked the Legislature’s careful use of defined terms in that provision, and failed to evaluate the meaning of that language within the context of both the Aquatic Act and the rest of the statutory scheme. When those factors are considered, as they must be, they show that the plain language of the Act does not remove WDFW’s authority to enforce the Hydraulic Code against

the aquaculture industry. Should any ambiguity remain, this conclusion is confirmed by the absence of any stated intent by the legislature to create such an exclusion, and reinforced by the conduct of the legislature, the agency, and the industry in the 20 years following the Act.

B. This Court Should Consider Issues of Statutory Interpretation De Novo, with No Deference to Agency Interpretation

This case revolves around an issue of statutory interpretation, which the Court reviews de novo. *See Spokane County v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 457, 430 P.3d 655 (2018). Although the Court will defer to an agency's interpretation in some cases, it does not do so where, as here, the interpretation relates to the scope of the agency's own authority. *See In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

Courts must give effect to the plain meaning of a statute when it is not ambiguous. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). When discerning a statute's plain meaning, courts must consider not only the statutory text, but also its context, and the statutory scheme as a whole. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *see State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017) (a statute's plain meaning must be ascertained "by construing that statute along with all related statutes as a unified whole and with an eye toward finding a harmonious statutory scheme").

C. The Hydraulic Code Unambiguously Regulates Projects Related to Commercial Aquaculture

1. The Hydraulic Code Regulates the Types of “Projects” Involved in Commercial Aquaculture

The Hydraulic Code requires any person undertaking a “hydraulic project” to first obtain an HPA permit, to ensure the “adequacy of the means proposed for the protection of fish life.” RCW 77.55.021(1). The Code defines a “hydraulic project” broadly as “the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” RCW 77.55.011(11).

WDFW’s sole criterion for granting or denying an HPA permit is whether a project provides adequate “[p]rotection of fish life.” RCW 77.55.021(7)(a). Specifically, WDFW will issue an HPA permit only if the project will result in “no net loss” of fish. WAC 220-660-080(3)(c). A permit may be granted with restrictions, such as limiting activity to certain windows during the year to minimize impact on fish (WAC 220-660-330); preventing removal of plants and other habitat features (WAC 220-660-290, -360(4)(b), (c)); imposing limitations on construction (WAC 220-660-380); and regulating the use of equipment, materials, and potential contaminants (WAC 220-660-360(7), (8)). WDFW may impose additional restrictions for “saltwater habitats of special concern,” such as the eelgrass beds and forage fish spawning areas where commercial aquaculture often takes place, which

“provide essential functions in the developmental life history of fish life.”

See WAC 220-660-320(2)(b), -320(3).

It is beyond dispute that most shellfish facilities at least “use” the state’s saltwater beds. *See* RCW 77.55.011(11). As the AG Opinion conceded, “inserting tubes and netting on the tidelands for geoduck aquaculture would be a hydraulic project[.]” Ex. 5 at AR 951. Indeed, WDFW’s rules specifically regulate numerous practices common at industrial shellfish facilities, including the removal of aquatic plants with machinery to clear aquaculture beds (*see* WAC 220-660-290(7)); dredging to harvest shellfish (*see* WAC 220-660-410); the use of docks, floats, and buoys to suspend shellfish (*see* WAC 220-660-380); and the installation of structures that alter the saltwater bottom, such as the PVC pipes used to house geoducks (*see* WAC 220-660-420).

2. The Hydraulic Code does not Exempt Aquaculture

The Hydraulic Code requires that “any person or government agency” obtain an HPA permit before starting a hydraulic project, “[e]xcept as provided” in a specific exemption. RCW 77.55.21(1). The Code lists several exemptions, such as for removing derelict fishing gear, clearing invasive plants, and forestry projects. *Id.*; *see* RCW 77.55.031-.091, .361. Projects related to aquaculture are not among these enumerated exemptions.

If the Legislature wanted to exempt aquaculture from the Hydraulic

Code, it clearly knew how to do so in an unambiguous fashion. In the years since the Aquatic Act, it explicitly passed several exemptions. *See discussion infra* at IV(C)(5) & (8). And, in 2005, it consolidated all existing exemptions into consecutive, easy-to-reference provisions in the Code. Ex. 4 (LAWS OF 2005, ch. 146, §§301-402); *see Spokane County*, 192 Wn.2d at 462 (2005 amendment was intended to increase clarity).

A basic tenet of statutory construction is that when a legislature specifically lists exceptions from certain provisions, any omissions from that list are intentional. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133-34, 814 P.2d 629 (1991). Because an exception for aquaculture is not included within the Code’s enumerated exemptions, the plain meaning of the statute is that ***there is no such exemption***. *See In re Custody of S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) (“A basic rule of statutory construction is that express exceptions in a statute exclude all other exceptions.”).

3. The Regulation of Commercial Aquaculture Indicates the Legislature Intended WDFW to Enforce Those Regulations

The superior court did not find that aquaculture is exempt from the requirements of the Hydraulic Code. Rather, it found that WDFW “does not have the authority” to enforce those requirements against aquaculture. CP 1272. But the Legislature does not ordinarily pass a statutory requirement only to prohibit its enforcement. To the contrary, the fact that the Hydraulic

Code plainly encompasses aquaculture projects “demonstrates that the legislature plainly intended the Department to be able to regulate [such] activities.” *See Spokane County*, 192 Wn.2d at 461; *see also Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 125, 864 P.2d. 1382 (1994) (agencies have the implied power to carry out their legislatively mandated purposes).

Petitioners submit that the plain language of the Hydraulic Code regulates hydraulic projects by the aquaculture industry, and gives WDFW the authority to enforce those regulations. *E.g.*, RCW 77.55.021(1) (hydraulic projects “shall . . . secure the approval of the department”); *id.* (7)(b) (“the department has forty-five calendar days . . . to grant or deny approval of a permit”); RCW 77.55.291 (civil penalty authority).⁷ Should the Court find this meaning ambiguous, however, it should construe the Code so as to effectuate its purpose. *See Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (in construing a statute, courts should consider the “general object to be accomplished and consequences that would result from construing the particular statute in one way or another.”).

The purpose of the Hydraulic Code is to protect fish, by regulating projects that use or effect state waters. RCW 77.55.011(11), .21(1) . The Code’s exemptions are narrow and qualified, aimed at (1) encouraging low-

⁷ RCW 77.55.291 was repealed effective July 28, 2019. Laws of 2019, ch. 290, §14(2). The new legislation specifies a range of WDFW enforcement options. *Id.* at §§5-11.

impact practices that benefit aquatic habitats;⁸ (2) allowing low-impact activities that pose little risk to the aquatic environment;⁹ and (3) avoiding duplicative regulation where the project is subject to other specified legal requirements that meet or exceed the Code’s standards for protecting fish.¹⁰

It would frustrate the purpose of the Code to read into it a broad, unstated, and unqualified exemption for an entire industry, especially one that is a primary source of high-impact hydraulic projects that pose a significant threat to fish life over long stretches of the Washington coast. Because it is the “duty of the court to reconcile apparently conflicting statutes,” the Court should avoid implying such an exemption within another statute, “if this can be achieved without distortion of the language used.” *See State v. Fagalde*, 85 Wn.2d 730, 736, 539 P.2d 86 (1975).

D. The Aquatic Act Does Not Exempt Commercial Aquaculture from the Hydraulic Code

1. Aquatic Act Does Not Contain Exemption from Hydraulic Code, or Any Amendment to Hydraulic Code

In the process of shifting aquaculture out of the fishing paradigm,

⁸ *See* RCW 77.55.041 (removal of derelict fishing gear); .051 (removal of invasive plants by hand); and .061 (remediation of hazardous substances).

⁹ *See* RCW 77.55.031 (driving across an established ford); .091 (small scale prospecting or mining if done in accordance with established rules).

¹⁰ *See, e.g.*, RCW 77.55.101 (Code’s requirements are superseded by an environmental excellence program agreement, which has higher environmental standards, *see* RCW 43.21K.020); .111 (allowing WDFW to enter into habitat incentives agreements it determines are in the best interests of protecting fish); .361 (Code does not apply to forest practices hydraulic projects, as long as forest practice rules have adequate fish protection standards).

the Aquatic Act removed the authority for the Departments of Game and Fisheries to regulate aquatic farmers and their products under the licensing schemes used for fishermen and wild fish. The Act made these changes through a long list of *express* exemptions, duly incorporated into the relevant chapters of the state code. 1985 ACT §§18, 20, 21-25 (Ex. 2).¹¹

The Aquatic Act included no similar provisions exempting aquaculture from the Hydraulic Code—or *any* amendments to the Hydraulic Code. In other words, the Legislature chose not to include such an amendment among the Act’s statutory exemptions. The plain meaning of the Act, therefore, is that it did not create any such exemption. *See In re Monks Club*, 64 Wn.2d 845, 849, 394 P.2d 804 (1964) (“express exceptions in a statute exclude all other exceptions, and cannot be extended by implication”).

2. Superior Court Erred in Finding that the Aquatic Act Removes WDFW’s Authority to Enforce Code Against Aquaculture

The superior court did not find that the Aquatic Act created a Hydraulic Code *exemption* for aquaculture, but rather that it “dictates that

¹¹ For example, Section 18 amended the chapter on fishing licenses to provide that a commercial fishing license was not required for the production, harvest, delivery, processing, or sale of “aquatic products.” 1985 ACT, §18(3) (codified as amended at RCW 77.65.010(4)). Section 20 amended the same chapter to eliminate the requirement that “aquaculturists” need wholesale fish dealer’s licenses. *Id.*, §20(3). Section 21 removed “aquatic products” from the definition of “game fish.” *Id.*, §21(2) (codified at RCW 77.08.020(2)). Sections 22, 23, 24, and 25 provided that “aquatic products” were not subject to the licensing and regulations for “game farms,” including that aquatic products be tagged as wildlife. *Id.*, §§22-24 (codified at RCW 77.12.570, .590 and .600); *id.*, §25 (codified as amended at RCW 77.65.490).

[WDFW] *does not have authority* to regulate the conduct in question.” CP 1272. In support, the court points to Section 8, the same provision highlighted in the AG Opinion. *Compare id.* (citing codification at RCW 77.115.010(2)) *with* Ex. 5 at AR 951-52 (same). In addition, the AG Opinion points to Section 17 of the Act. *See* Ex. 5 at AR 952 (citing RCW 77.12.047(3)).

But Sections 8 and 17 of the Act only remove WDFW’s authority to license *who* can farm and *what* they farm. They do not eliminate the farmers’ duty to get permits for hydraulic projects, nor WDFW’s authority and duty under the Hydraulic Code to issue such permits.

a. Superior Court and AG Opinion Both Ignore Legislature’s Deliberate Use of Defined Terms

In interpreting a statute, a court is required to (1) use the terms as defined by the Legislature, and (2) interpret each statutory provision in accordance with the specific words that the Legislature chose to use. *See United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005) (“It is an axiom of statutory interpretation that where a term is defined [the courts] will use that definition.”); *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (“When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings.”). Both the superior court and the AG Opinion erred by failing to account for the Aquatic Act’s careful use of language.

The Aquatic Act defines three related, but distinct, terms. An “**aquatic farmer**” is a “**person**” who cultivates “aquatic products.” RCW 15.85.020(2) (emphasis added). “Private sector cultured **aquatic products**” are the plants and animals cultivated on “aquatic farms” by an “aquatic farmer,” including clams, mussels and oysters. RCW 15.85.020(3) (emphasis added). And “**aquaculture**” is the “**process**” of cultivating “private sector culture aquatic products” by “an aquatic farmer.” RCW 15.85.020(1) (emphasis added). Having defined those terms separately, the Legislature used them selectively when designating the continued authority to be exercised by Fisheries, now WDFW.

First, Section 17 of the Act takes away the agency’s rulemaking authority only as to **aquatic products**. The Fish and Wildlife Commission has rulemaking authority on a broad array of topics related to fishing, including specifying the times, places, and manner in which fish and shellfish may be taken; regulating how they may be transported and sold; and authorizing how they may be released. RCW 77.12.047(1). But, in accordance with Section 17, the Commission now lacks the authority to make such rules as to commercially farmed fish or shellfish:

Except for subsection (1)(g) of this section [rules specifying required statistical and biological reports], this section does not apply to private sector cultured **aquatic products** as defined in RCW 15.85.020.

RCW 77.12.047(3) (emphasis added).

Second, in the context of the disease control and inspection program, Section 8 repeats the restriction on the agency's authority to regulate **aquatic products**, and also limits its authority as to the **persons** that cultivate them. As the current statute now reads:

The authorities granted the department by [rules adopted by the Commission with the approval of the Department of Agriculture] and by RCW 77.12.047(1)(g) [statistical and biological reports], 77.60.060 [restricted shellfish areas], 77.60.080 [imported oyster seed], 77.65.210 [delivery of offshore fish to Washington ports], 77.115.030 [disease inspection and control], and 77.115.040 [aquatic farmer registration] constitute the only authorities of the department to regulate private sector cultured **aquatic products** and aquatic **farmers** as defined in RCW 15.85.020.

RCW 77.115.010(2). Thus, in accordance with Section 8, WDFW may not license or control farmed fish or shellfish, or impose special regulations on the people who farm fish or shellfish—as it does with people who take wild fish from state waters. This limitation was expressly implemented through other sections of the Aquatic Act, which repealed or amended statutes that gave the agency such authority—including requirements that aquatic farmers get commercial fishing licenses and wholesale fish dealer's licenses (§§18, 20), and provisions that regulated aquatic products like game fish or wildlife from game farms (§§21-25). Ex. 2.

The Legislature thus took care to distinguish between **aquatic**

farmers, the **products** they raise, and the “**process**” of cultivating such products. That distinction is important in many ways. For example, Section 17 eliminates the agency’s rulemaking authority only as to aquatic **products**, but allows it to continue to make rules regarding aquatic farmers—such as the rules required to enforce aquatic farm registration requirements. *See* Ex. 2 (1985 ACT, §§11, §17(3)). Since the Act, WDFW has thus continued to issue and amend rules related to aquatic farmers. *See* WAC 220-370-060 (requiring registration of aquatic farmers); WAC 220-370-150 (educational programs for aquatic farmers).

b. Aquatic Act Explicitly Retains WDFW’s Authority to Regulate and Develop Rules for Aquaculture

Significantly, neither Section 8 nor Section 17 of the Aquatic Act limit the agency’s authority to regulate, or make rules regarding, “**aquaculture**”—the “**process**” of cultivating “private sector cultured aquatic products” by “an aquatic farmer.” RCW 15.85.020(1). There is thus **no conflict** between the Act and WDFW’s duties under the Hydraulic Code.

The Hydraulic Code is agnostic as to persons and products. It does not care who is driving pylons or PVC pipes into the beach, or whether they are doing so in order to plant geoducks, install a recreational dock, or build a waterfront restaurant. The Code is concerned only with the *process* used for a project, and the effect it will have on fish. *Spokane County*, 192 Wn2d

at 456 (WDFW’s “authority encompasses hydraulic projects, which are defined based on their effects on waters of the state”).

The superior court erred in ignoring this distinction, and reading Section 8 to remove WDFW’s authority to regulate “aquaculture,” even though the Legislature deliberately decided not to include that prohibition. CP 1272; *see Lake*, 169 Wn.2d at 526 (courts “must not add words where the legislature has chosen not to include them”).

The AG Opinion, meanwhile, seems to recognize the distinction between regulating a “product” and regulating a “process,” but uses it to arrive at an irrational conclusion. While concluding that WDFW’s regulation of geoduck planting and harvesting would be an impermissible use of its authority to regulate “aquatic products,” the AG Opinion reasoned that WDFW *could* require HPA permits for “the construction of a boat ramp, dock or other construction work at an aquatic farm . . . because the permit regulates construction; it does not regulate aquaculture products.” Ex. 5 at AR952, 957 n. 4. As WDFW staff noted, the “logic” of that distinction is difficult to fathom. *See* CP 543. The insertion of PVC pipe into the beach and the construction of a dock at an aquatic farm would both qualify as “hydraulic projects.” AR 951; *see also, e.g.*, CP 323 (cultured mussels are typically grown on built structures such as rafts, floats, or piers). Both are part of “aquaculture,” i.e. the “process” used to cultivate aquatic

“products.” Under the careful terms used by the Aquatic Act, WDFW retains the authority to issue permits for both.

E. Any Exemption to the Hydraulic Code is Inconsistent with the Aquatic Act’s Purpose, Provisions and Context

An analysis of the “plain meaning” of Sections 8 and 17 of the Aquatic Act *must* include not only an examination of the precise words used in those provisions, but also an evaluation of the context of the entire statutory scheme at the time the Legislature adopted those provisions. *Burns*, 161 Wn.2d at 140; *see State v. Moses*, 145 Wn.2d 370, 375, 37 P.3d 1216 (2002) (examining meaning of statute within its historic context). Neither the superior court nor the AG Opinion performed such an analysis. If they had, it would have reinforced the conclusion that Sections 8 and 17 did not create an effective exemption from the Hydraulic Code.

1. Exception Would be Contrary to Provisions of Aquatic Act

The purpose of the Aquatic Act is to “encourage the development and expansion of aquaculture,” shifting the regulation of aquaculture activities away from the Departments of Fisheries and Game to Agriculture, to give it the “**same status** as other agricultural activities[.]” Ex. 2 (1985 ACT, §1) (emphasis added) (aquaculture should be “considered a branch of the agricultural industry” for the “purposes of any laws”). Toward this end, the Act removes the primary jurisdiction for regulating “aquatic products” and “aquatic farmers” from Fisheries, and transfers it to Agriculture, to be

overseen alongside the rest of agriculture. *Id.*, §§3, 4, 7, 13, 14, 15.

Other types of agriculture have long been under the primary jurisdiction of the Department of Agriculture; this does not mean they have been exempted from environmental regulations administered by other agencies, including the Hydraulic Code. To the contrary, roughly 14% of all HPA permits are granted for “agricultural purposes.” AR 166. In addition, the Hydraulic Code contains provisions unique to agricultural practices.¹² And the Supreme Court recently confirmed that the Hydraulic Code applies to so-called “upland projects” that would be typical of agriculture. *Spokane County*, 192 Wn.2d at 465.

It would thus be contrary to the Aquatic Act’s purpose of giving aquaculture the “same status” as agriculture to elevate it above all other agricultural activities by giving it immunity from environmental laws. The Court should reject such an interpretation, because if “statutory language is susceptible of two constructions—one of which will promote the purpose of the statute and the second of which will defeat it—courts will adopt the former.” *State v. Wiggins*, 114 Wn. App. 478, 482, 57 P.3d 1199 (2002) (internal citation omitted).

¹² For example, in 1986 the Legislature added provisions relating to the diversion of water for agricultural irrigation and stock watering purposes. LAWS OF 1986, ch. 173 §§1-2 (codified at RCW 77.55.281(9)-(11)) (CP 422-24). In 1988, the Legislature added provisions relating to stream bank stabilization projects to protect farmland. LAWS OF 1988, ch. 272 §1 (codified at RCW 77.55.281 (9)-(11)) (CP 574).

More fundamentally, it would make no sense within the broader statutory scheme for the Legislature to have hidden a far-reaching exemption impacting huge stretches of the Washington shoreline within an Act that purports to transfer the responsibility for overseeing aquaculture from one agency to another, much less in a provision that establishes a cooperative program between the two agencies for disease control. *See Ex. 2* (1985 ACT, §8). This is especially true when the Court considers, as it must, the full context of the Act, which otherwise carefully references each exemption within the statute containing the regulation in question. *See id.*, §§16-28 (amending provisions currently codified as RCW 77.12.047, .570, .590, .600 and 77.65.010, .280, .490, while repealing other provisions).

2. Other Provisions of the Aquatic Act Explicitly Contemplate Continued Enforcement of Hydraulic Code

Other provisions of the Aquatic Act make it absolutely clear that the Legislature did not intend to render the Hydraulic Code unenforceable against aquaculture. Indeed, the Act’s only reference to the Hydraulic Code *confirms* that it will continue to apply to aquaculture—and that Fisheries will continue to have the authority to regulate the “process” used to cultivate aquatic products. According to Section 19 of the Act:

a mechanical harvester license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, on a clam farm unless the requirements of RCW 75.20.100 [the Hydraulic Code permit

provision] are fulfilled for the proposed activity.

Ex. 2 (1985 ACT, §19) (underlines in original, denoting language added by Act).

If the Act removed the agency’s ability to enforce the Hydraulic Code to regulate the process by which aquatic farmers cultivated their aquatic products, then the agency would no longer be able to issue HPA permits related to the mechanical harvest of clams. As a result, the provision that the Legislature *added* in Section 19—to provide that an HPA permit was an alternate way to gain approval for the use of a mechanical or hydraulic device—would be meaningless and superfluous. Such a reading would violate the basic principle that courts must interpret a statute “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Spokane County*, 192 Wn.2d at 458 (internal citation omitted). The fact that Section 19 explicitly maintained regulations over the process by which aquatic farmers could harvest clams “demonstrates that the legislature plainly intended the Department to be able to regulate [such] activities.” *See Spokane County*, 192 Wn.2d at 461.

3. The Superior Court’s Interpretation Would Create Absurd Results within the Context of the 1984 Statutory Scheme

Another tenet of statutory construction is that the Court should avoid an interpretation that “produces absurd results because we presume that the legislature did not intend absurd results.” *City of Seattle v. Winebrenner*,

167 Wn.2d 451, 464, 219 P.3d 686 (2009). Within the context of the statutory scheme at the time of the Aquatic Act, the superior court's interpretation would produce such absurd results.

At the time of the Act's adoption in 1985, the Hydraulic Code was administered by both Fisheries and the Department of Game, with permit applications directed toward "the department having jurisdiction of the site," and the departments responsible for "mutually agree[ing] on which one department shall administer the provisions of this section." Former RCW 75.20.100 (1984) (CP 603).¹³ The two departments were later consolidated into what is now WDFW, which was given sole responsibility over the Code. LAWS OF 1993, 1st sp. s., ch. 2, §30 (CP 622).

In 1985, however, the Departments of Fisheries and Game were still separate entities, each with the authority to enforce the Hydraulic Code. But Sections 8 and 17 of the Act *only implicate the authority of the Department of Fisheries*. See Ex. 2 (1985 ACT §8(2)) (relating to the authority of the "department of fisheries"); *id.*, §17(1) (limiting power of the "director" to adopt rules); former RCW 75.08.011(1) (1984) (CP 1248) (defining "director" as the "director of fisheries"). The Legislature could not have

¹³ Prior to a 1983 amendment, hydraulic applications were to be approved by both the "director of fisheries and the director of game." LAWS OF 1983, 1st ex. s., ch. 46, §75 (CP 613). The 1983 legislative history indicates the intent of the new language was to change approval procedures so the "workload is divided between the Fisheries and Game Departments." FINAL LEGIS. REP., 48th Wash. Leg., Reg. Sess. (1983) at 93-94 (CP 618-19).

created an effective exemption from the requirements of the Hydraulic Code by limiting the permit-issuing authority of only one of the two departments with jurisdiction to enforce that Code. *See also* Laws of 1986, ch. 173, §1 (CP 422) (reaffirming that persons undertaking a hydraulic project must “secure the written approval of the department of fisheries *or the department of game*” (emphasis added)). Such an interpretation would lead to the absurd result that while Fisheries would be forbidden to enforce the Hydraulic Code against aquaculture in 1986, the Department of Game would have had its own authority to do so until the departments merged.

F. The Legislature Did Not Intend to Exempt Aquaculture from the Hydraulic Code

The Court’s purpose in construing a statute is to ascertain and carry out the Legislature’s intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10. If a statute’s plain meaning is clear, then the court must give effect to that plain meaning and the inquiry goes no further. *Id.* Petitioners contend that the Hydraulic Code unambiguously establishes that WDFW has a duty to regulate commercial aquaculture, and that the Aquatic Act does not relieve the agency of that duty. However, if the Court finds that the provisions of the Act are ambiguous, it must look to other tools of statutory construction to attempt to ascertain legislative intent. *Alfredo Cerrillo v. Esparza*, 158 Wn.2d 194, 201 142 P.3d 155 (2006).

When the intent of the Legislature is examined through the use of these tools, it further confirms that the Aquatic Act did not remove WDFW's authority to enforce the Hydraulic Code against aquaculture.

1. History of the Aquatic Act Shows the Legislature Did Not Even Consider Such an Exemption

Legislative history serves a key role in divining intent, and courts will examine it when provisions of an act appear to conflict. *Bigsby*, 189 Wn.2d at 216. What is most notable about the legislative history regarding the Aquatic Act's changes to the Hydraulic Code is that there *is none*. Exempting an entire industry from both the procedural and substantive requirements of the Hydraulic Code would have been an unprecedented step with far-reaching and long-lasting consequences. As such it would be expected to elicit at least passing legislative discussion and deliberation.

Neither the Senate nor the House reports contain any mention of a Hydraulic Code exemption or immunity, despite detailing the Act's other exemptions. The House Bill Report calls out the Act's exemption of aquatic products from licensing requirements for harvest, delivery, processing, and wholesaling (*see* 1985 ACT §§18, 20), removal of aquatic products from requirements related to game fish and game farms (*see id.* §§21-25); and repeal of statutes requiring oyster and clam farm licenses (*see id.* §§28-29). H.B. REP. ON ENGROSSED S.B. 3067, 49th Leg., Reg. Sess. (Wash. 1985)

(CP 626-29). The final bill report, while less specific, likewise makes no mention of the Hydraulic Code. Ex. 8 (FINAL B. REP. ON S.B. 3067, 49th Leg., Reg. Sess. (Wash. 1985)) at 1-3

It is implausible that the Legislature would enact such a significant rollback of environmental protections without (1) any explicit provision in the Act providing for such an exemption; (2) any mention in the Act of the Hydraulic Code (other than the addition of one reference to its use for permitting clam harvesting); or (3) any discussion in the legislative history of the existence of, need for, or consequences from such an exemption. *The fact that the legislative history nowhere mentions such an exemption is compelling evidence that the Legislature never meant it to exist.*

Subsequent history confirms that neither the legislature, the agency, nor the industry believed that such an exemption existed even *after* the passage of the Act. Indeed, for decades after it was enacted, **nobody** construed the Aquatic Act to deprive the Department of Fisheries (or later, WDFW) of the authority to regulate commercial aquaculture under the Hydraulic Code. *See discussion, supra*, at IV(C)(4)-(8). WDFW continued to require the aquaculture industry to obtain HPA permits, and started the process of developing rules to specifically govern such permits. *See* CP 539 (discussion of rules process); *In Re Shorelines Substantial Development Permit Denied by Kitsap County to Mark Holland, Holland v. Kitsap Cty.*,

SHB No. 86-22, 1987 WL 56639 (Wash. Shore. Hrg. Bd. 1987), at *2 (describing the granting of an HPA permit for a net pen in 1986).

Moreover, industry guidance continued to advise prospective aquatic farmers of the need to secure HPA permits. *See* CP 1218-19 (1989 guidance for oyster farmers); CP 1240 (2005 guidance for clam farmers). And the Legislature continued to propose legislation to set special fee schedules for aquaculture-related HPA permits, under the apparent belief that they were still governed by the Hydraulic Code. *See* Ex. 7 (S.B. 6406, 62nd Leg., Reg. Sess. (Wash. 2012)).

2. Legislature Subsequently Enacted New Version of Hydraulic Code without an Aquaculture Exemption

If the Act is interpreted to deprive WDFW of the authority to require HPA permits for aquaculture projects, then it is in direct conflict with the Hydraulic Code, which provides WDFW with such authority. When there is an apparent conflict between two statutes, the rules of construction provide that the “latest enacted provision prevails when it is more specific than its predecessor.” *State v. J.P.*, 149 Wn.2d 444, 452, 69 P.3d 318 (2003) (internal quotation and citation omitted); *see also State v San Juan Cty.*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984) (the rule is that “as between two conflicting parts of a statute, that part latest in order of position will prevail, where the first part is not more clear and explicit than the last part”).

The Aquatic Act was passed in 1985. The Hydraulic Code was enacted in its barest form in 1943. Based on these dates, the AG Opinion concludes that the Aquatic Act was a later enactment. Ex. 5 at AR 951. However, the Hydraulic Code has been significantly altered in subsequent legislation, including amendments in 1986, 1994, 1995, 2002, and 2012 that added express exemptions. *See discussion, supra*, at IV(5) and (8).

Also significant to this discussion are the changes the Legislature made to the Hydraulic Code in 2005 to improve the “efficiency and predictability of the hydraulic project approval program.” FINAL B. REP. ON SECOND SUBSTITUTE H.B. 1346, 59th Leg., Reg. Sess. (Wash. 2005) (CP 450). The 2007 AG Opinion dismissed this legislation as simply a recodification of the Hydraulic Code. Ex. 5 at AR 951. But it provides a significant window into the Legislature’s understanding of the state of the law. *See* Ex. 9 (2016 Op. Att’y Gen. No. 6), at *8 (characterizing the 2005 legislation as a “significant reenactment”); *Spokane County*, 192 Wn.2d at 426 (examining legislative history of 2005 bill to determine Legislature’s understanding of the state of the law). As part of its effort to make the Hydraulic Code easier to use, the Legislature consolidated numerous exemptions and placed them in order. *Supra* at IV(C)(5). Aquaculture’s absence from the compiled exemptions is a significant indication that the 2005 Legislature did not understand such an exemption to exist.

The Hydraulic Code is also more specific as to the only issue of concern here. The AG Opinion dismisses the Hydraulic Code as “substantially broader” than RCW 77.115.010(2), because it applies to “all work and construction in salt and fresh waters.” Ex. 5 at AR 951. That is a meaningless comparison. The question is not whether the *entire* Hydraulic Code is broader than a single provision of the Aquatic Act. Of course it is. Rather, the question is whether the later statutory provision that appears to conflict with an earlier provision is “more clearly worded [and] more specific.” *San Juan Cty.*, 102 Wn.2d at 320.

The purported conflict between the statutes is over a potential exemption to the Hydraulic Code. Section 8 of the Aquatic Act is related to fish diseases and does not mention the Hydraulic Code, much less provide any “clear” or “specific” exemptions to its requirements. RCW 77.115.010(2). On the other hand, the Hydraulic Code, especially after its reorganization in 2005, clearly and specifically lists the exemptions to its requirements. In the event of an apparent conflict, this later, more specific enactment provides the best expression of legislative intent.

G. WAC 220-660-040(2)(I) is Invalid

A challenge to an agency rule is governed by the Administrative Procedure Act, under which “[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a).

The court “shall declare the rule invalid” if “the rule exceeds the statutory authority of the agency.” RCW 34.05.570(2)(c).

The validity of WAC 220-660-040(2)(1) rises or falls based on the Court’s determination of whether the Aquatic Act created an effective exemption for the aquaculture industry from the Hydraulic Code. Unless there is a specific statutory exemption, the Hydraulic Code requires that every person obtain an HPA permit from WDFW before beginning work on a hydraulic project. RCW 77.55.021. WDFW has no authority to exempt an entire industry from the requirements of this statute. Yet WAC 220-660-040(2)(1) purports to exempt “[i]nstallation or maintenance of tideland and floating private sector commercial fish and shellfish culture facilities” from HPA permitting. Ex. 1, AR 18-19.

Because neither the Hydraulic Code nor the Aquatic Act exempt the aquaculture industry from the requirements of the Hydraulic Code, WAC 220-660-040(2)(1) exceeds WDFW’s authority and must be invalidated.

H. Pacific Northwest Aquaculture Should be Enjoined from Further Construction at Zangle Cove Without a Permit

Petitioners sought a declaration pursuant to the Uniform Declaratory Judgments Act (“UDJA”), chapter 7.24 RCW, that WDFW must enforce the Hydraulic Code against aquaculture (CP 23-25); and an injunction preventing PNA from constructing a commercial geoduck facility in Zangle

Cove without an HPA permit (CP 26). This Court reviews decisions denying declaratory judgment and injunctive relief for abuse of discretion. *Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359 (1990) (declaratory judgment); *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831 (2007) (injunction).

The superior court did not reach the issues of declaratory judgment and injunctive relief because it determined Petitioners' claims failed on the statutory interpretation issue. That failure to exercise discretion to consider these claims on the merits was an abuse of discretion. *See In re Detention of Mines*, 165 Wn. App. 112, 125, 266 P.3d 242 (2011). It would be reasonable for this Court to remand, directing the superior court to address these matters in the first instance. However, this Court's direct consideration of these claims would promote efficiency.

The UDJA gives courts the power to "declare rights, status, and other legal relations," including the rights of persons affected by "statute, municipal ordinance, contract or franchise." RCW 7.24.010, 0.20. Courts in UDJA actions may also grant other necessary or proper relief. RCW 7.24.080. That relief includes a permanent injunction. *Ronken v. Bd. of County Commissioners of Snohomish Cty.*, 89 Wn.2d 304, 311, 572 P.2d 1 (1977). To obtain injunctive relief, a party must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that

right, and (3) that the acts complained of will result in actual and substantial injury. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). Courts examine these requirements in light of the relative interests of the parties and the public. *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

PNA initially sought an HPA permit, but abandoned its application. CP 501-04, 648. For the reasons discussed above, the Hydraulic Code's permitting requirements apply to PNA's project. *See also* CP 493-95 (description of proposed construction). Petitioners and the public have a clear legal right to the protection of fish that is provided for in the Hydraulic Code. The fear of invasion of that right is well founded: PNA commenced construction during the pendency of this suit (CP 1127); and intends to operate the Zangle Cove farm in perpetuity (CP 492, 495). And these acts will result in actual and substantial injury to Petitioners' aesthetic and recreational interests, including their interest in a healthy Zangle Cove ecosystem with abundant fish life. *E.g.*, CP 238-40, 242-46, 256-59, 268-71, 1126-30. Finally, the relative interests of the parties and the public interest both weigh in favor of an injunction. An injunction will not prevent PNA from constructing an aquaculture facility at Zangle Cove, but will merely require that in doing so, it take precautions to protect fish life. Requiring such compliance will not do irreparable harm to PNA's interests. On the other

hand, the public has a substantial interest in seeing the fair, consistent, and equitable enforcement of its laws. Allowing hydraulic projects to proceed without the protections provided by the Hydraulic Code will cause lasting harm to the waterways that the state manages in the public trust. *See Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 259-60, 413 P.3d 549 (2018) (describing the public trust doctrine).

Declaratory judgment and an injunction are appropriate. The superior court abused its discretion by failing to consider the merits of either claim. This decision should be reversed, with either a judgment granting the relief that Petitioners sought, or a remand to the superior court for consideration of the factual issues raised by these claims.

I. Petitioners Should Receive Attorneys’ Fees and Costs

Attorneys’ fees are available to the prevailing party on appeal where authorized by “contract, statute, or a recognized ground in equity.” *Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296-297, 149 P.3d 666 (2006). Should the Court invalidate WDFW’s rule, Petitioners are entitled to attorney fees and expenses from WDFW under the Equal Access to Justice Act (“EAJA”), which allows such fees to be collected by a “qualified party that prevails in a judicial review of an agency action.” RCW 4.84.350(1). The EAJA provides up to \$25,000 in attorney fees for each level of review. RCW 4.84.350(2); *Costanich v.*

Washington State Dep't of Soc. & Health Servs., 164 Wn.2d 925, 933-35, 194 P.3d 988 (2008).

As non-profit entities, CP 77-78, Petitioners are “qualified parties” under the EAJA. RCW 4.84.340(5). Should WDFW’s rule be found invalid, Petitioners will meet the EAJA’s other requirements, by being “prevailing parties” on that “significant issue,” and obtaining “some benefit” from the remedy to the harms done by WDFW’s illegal acts. *See* RCW 4.84.350(1). The Court should authorize an award of fees and costs on appeal, including reasonable attorneys’ fees pursuant to RAP 18.1 and RCW 4.84.350. For the reasons described above, the Court should also award Petitioners their costs on appeal, as provided in RAP 14.2.

Petitioners likewise requested an award of fees below. CP 26. The superior court should have determined that Petitioners were the prevailing party, and awarded them fees under the EAJA. The Court should remand to the superior court for appropriate consideration of a fee and cost award.

VI. CONCLUSION

The fundamental purpose of the Hydraulic Code is threatened by the rapid construction of industrial aquaculture facilities along Washington’s coastlines, without regard for the protection of fish life that the Code demands. Because there is no statutory support for WDFW’s exemption of the aquaculture industry from the requirements of the Hydraulic Code,

Petitioners respectfully request that the Court: (1) reverse the December 11, 2018 holding of the superior court; (2) hold that WAC 220-660-040(2)(l) is invalid for exceeding WDFW's statutory authority; (3) award Petitioners fees and costs on appeal; (4) remand to the superior court for consideration of whether to award additional fees; and (5) enjoin PNA from further construction at Zangle Cove without a permit, or alternatively remand to the superior court for consideration of the request for injunctive relief.

RESPECTFULLY SUBMITTED this 8th day of July 2019.

ANIMAL & EARTH ADVOCATES PLLC

By



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*Attorneys for Petitioner-Appellants Protect
Zangle Cove, Coalition to Protect Puget
Sound Habitat, and Wild Fish Conservancy*

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I caused to be served a copy of the foregoing document to be delivered in the manner indicated below to the following persons at the following addresses:

Bob Ferguson, Attorney General Attn: Division of Fish, Wildlife and Parks 1125 Washington Street SE Olympia, WA 98501 NoelleC@atg.wa.gov JeanneR@atg.wa.gov fwdef@atg.wa.gov	<input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Samuel W. Plauce, IV Jesse G. Denike Plauche & Carr LLP 811 First Avenue, Suite 630 Seattle, WA 98104 Jesse@plauchecarr.com Billy@plauchecarr.com Sarah@plauchecarr.com	<input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery

DATED: July 8, 2019

s/Claire Loeb Davis

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Index of Exhibits to Appellants' Opening Brief

Protect Zangle Cove, et al., v.

Washington Department of Fish and Wildlife, et al.

No. 52906-8-II

Ex. 1	WAC 220-660-040
Ex. 2	Aquatic Farming Act, LAWS OF 1985, ch. 457 (also at CP 793-809)
Ex. 3	LAWS OF 1997, ch. 415
Ex. 4	LAWS OF 2005, ch. 146
Ex. 5	2007 Attorney General Opinion No. 1 (also at AR 951-58)
Ex. 6	LAWS OF 2012, 1st sp. s., ch. 1,
Ex. 7	S.B. 6406, 62 nd Leg., Reg. Sess. (Wash. 2012)
Ex. 8	FINAL B. REP. ON S.B. 3067, 49th Leg., Reg. Sess. (Wash. 1985)
Ex. 9	2016 Attorney General Opinion No. 6

EXHIBIT 1

WAC 220-660-040

Applicability of hydraulic project approval authority.

(1) **When an HPA is required:** A person must obtain an HPA from the department before conducting a hydraulic project, unless the activity is exempt from this requirement as provided in subsection (2) of this section.

(2) **No HPA is required for the following hydraulic projects:**

- (a) Installing oyster stakes, boundary markers, or property line markers by hand or with hand-held tools;
- (b) Driving across an established ford (RCW **77.55.031**);
- (c) Remedial actions by the department of ecology or a person under a consent decree, order, or agreed order under RCW **70.105D.090** (RCW **77.55.061**). Although no HPA is required, the department of ecology must ensure compliance with the substantive requirements of this chapter;
- (d) Landscape management plans approved by the department and the department of natural resources under RCW **76.09.350**(2) serve as an HPA for the life of the plan if fish are selected as one of the public resources covered under the plan (RCW **77.55.201**);
- (e) Removing derelict fishing gear according to the guidelines described in RCW **77.12.865** (RCW **77.55.041**);
- (f) Removing crab pots and other shellfish gear under a permit issued under RCW **77.70.500**;
- (g) An activity conducted solely to remove or control *Spartina* (RCW **77.55.051**);
- (h) An activity conducted solely to remove or control purple loosestrife performed with hand-held tools, hand-held equipment, or equipment carried by a person (RCW **77.55.051**);
- (i) Installing or removing a portable boat hoist in a lake if the hoist:
 - (i) Is not permanently installed;
 - (ii) Does not have a frame length greater than fifteen feet;
 - (iii) Does not have armoring or other structures installed for a foundation or protection;
 - (iv) Does not have a canopy;
 - (v) Is not installed or removed using equipment operated on the bed;
 - (vi) Is not installed at the inlet or outlet of any stream;
 - (vii) Does not require any dredging, filling, pile driving, or any other bed modifications during installation or removal;
 - (viii) Is not modified during or after installation by adding docks, ramps, floats, or other structures that add surface area to the hoist or allow for moorage of additional watercraft; and
 - (ix) Is not installed in any of the following sockeye salmon-bearing lakes during times of the year when spawning and egg incubation is occurring in beach areas:

Table 1

Authorized Work Times to Install Portable Boat Hoists in Lakes with Sockeye Spawning Beaches

Lake Name and Water Resource Inventory Area ((WRIA) in parentheses)	Authorized Work Times
Baker (04)	June 15 - August 15
Cle Elum (39)	September 1 - March 31
Osoyoos (49)	May 15 - September 30
Ozette (20)	August 1 - October 31

Pleasant (20)	August 1 - October 31
Sammamish (08)	July 15 - September 30
Washington (08)	July 15 - September 30

(j) Installing, maintaining, or removing scientific measurement devices if:

(i) All work conducted waterward of the OHWL is done by hand or with hand-held tools;

(ii) The project does not create a blockage to fish passage, even temporarily; and

(iii) The project does not include dewatering the job site, placing fill or concrete, or excavating or grading the bed or bank.

(k) Forest practices hydraulic projects, as defined in chapter **76.09** RCW and governed in Title 222 WAC; and

(l) Installation or maintenance of tideland and floating private sector commercial fish and shellfish culture facilities (RCW **77.12.047**). However, an HPA is required to construct accessory hydraulic structures, such as bulkheads or boat ramps.

[Statutory Authority: RCW **77.04.012**, **77.04.020**, and **77.12.047**. WSR 15-02-029 (Order 14-353), § 220-660-040, filed 12/30/14, effective 7/1/15.]

EXHIBIT 2

senate and the environmental affairs committee of the house of representatives, prior to each legislative session.

Passed the House April 22, 1985.

Passed the Senate April 18, 1985.

Approved by the Governor May 21, 1985.

Filed in Office of Secretary of State May 21, 1985.

CHAPTER 457

[Engrossed Senate Bill No. 3067]

AQUATIC FARMING

AN ACT Relating to aquatic farming; amending RCW 15.65.020, 15.66.010, 43.23.030, 46.16.090, 75.08.080, 75.28.010, 75.28.280, 75.28.300, 77.08.020, 77.12.570, 77.12.590, 77.12.600, and 77.32.010; adding a new section to chapter 75.08 RCW; adding a new chapter to Title 15 RCW; adding a new chapter to Title 75 RCW; creating new sections; repealing RCW 75.28.265 and 75.28.282; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature declares that aquatic farming provides a consistent source of quality food, offers opportunities of new jobs, increased farm income stability, and improves balance of trade.

The legislature finds that many areas of the state of Washington are scientifically and biologically suitable for aquaculture development, and therefore the legislature encourages promotion of aquacultural activities, programs, and development with the same status as other agricultural activities, programs, and development within the state.

The legislature finds that aquaculture should be considered a branch of the agricultural industry of the state for purposes of any laws that apply to or provide for the advancement, benefit, or protection of the agriculture industry within the state.

The legislature further finds that in order to ensure the maximum yield and quality of cultured aquatic products, the department of fisheries should provide diagnostic services that are workable and proven remedies to aquaculture disease problems.

It is therefore the policy of this state to encourage the development and expansion of aquaculture within the state. It is also the policy of this state to protect wildstock fisheries by providing an effective disease inspection and control program and prohibiting the release of salmon or steelhead trout by the private sector into the public waters of the state and the subsequent recapture of such species as in the practice commonly known as ocean ranching.

NEW SECTION. Sec. 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Aquaculture" means the process of growing, farming, or cultivating private sector cultured aquatic products in marine or freshwaters and includes management by an aquatic farmer.

(2) "Aquatic farmer" is a private sector person who commercially farms and manages the cultivating of private sector cultured aquatic products on the person's own land or on land in which the person has a present right of possession.

(3) "Private sector cultured aquatic products" are native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms under the supervision and management of a private sector aquatic farmer or that are naturally set on aquatic farms which at the time of setting are under the active supervision and management of a private sector aquatic farmer. When produced under such supervision and management, private sector cultured aquatic products include, but are not limited to, the following plants and animals:

SCIENTIFIC NAME	COMMON NAME
Enteromorpha	green nori
Monostroma	awo-nori
Ulva	sea lettuce
Laminaria	konbu
Nereocystis	bull kelp
Porphyra	nori
Iridaea	
Haliotis	abalone
Zhamys	pink scallop
Hinnites	rock scallop
Tatinopecten	Japanese or weathervane scallop
Protothaca	native littleneck clam
Tapes	manila clam
Saxidomus	butter clam
Mytilus	mussels
Crassostrea	Pacific oysters
Ostrea	Olympia and European oysters
Pacifasticus	crayfish
Macrobrachium	freshwater prawn
Salmo and Salvelinus	trout, char, and Atlantic salmon
Oncorhynchus	salmon
Ictalurus	catfish
Cyprinus	carp
Acipenseridae	sturgeon

(4) "Department" means the department of agriculture.

(5) "Director" means the director of agriculture.

NEW SECTION. Sec. 3. The department is the principal state agency for providing state marketing support services for the private sector aquaculture industry.

NEW SECTION. Sec. 4. The department shall exercise its authorities, including those provided by chapters 15.64, 15.65, 15.66, and 43.23 RCW, to develop a program for assisting the state's aquaculture industry to market and promote the use of its products. The department shall consult with the advisory council in developing such a program.

NEW SECTION. Sec. 5. The director shall establish identification requirements for private sector cultured aquatic products to the extent that identifying the source and quantity of the products is necessary to permit the departments of fisheries and game to administer and enforce Titles 75 and 77 RCW effectively. The rules shall apply only to those private sector cultured aquatic products the transportation, sale, processing, or other possession of which would otherwise be required to be licensed under Title 75 or 77 RCW if they were not cultivated by aquatic farmers. The rules shall apply to the transportation or possession of such products on land other than aquatic lands and may require that they be: (1) Placed in labeled containers or accompanied by bills of lading or sale or similar documents identifying the name and address of the producer of the products and the quantity of the products governed by the documents; or (2) both labeled and accompanied by such documents.

The director shall consult with the directors of the departments of fisheries and game to ensure that such rules enable the departments of fisheries and game to enforce the programs administered under those titles. If rules adopted under chapter 69.30 RCW satisfy the identification required under this section for shellfish, the director shall not establish different shellfish identification requirements under this section.

****NEW SECTION. Sec. 6. (1) There is hereby created the aquaculture advisory council. The council shall consist of the following voting members appointed by the governor: One representative of private sector freshwater fin fish farmers; one representative of private sector marine fin fish farmers who does not practice ocean ranching; one representative of private sector marine shellfish farmers; one representative of marine plant farmers; one representative of farmers of oysters native to the state; and one representative of a state-wide sports fishing association or group. Each member shall serve a term of three years. The following shall serve as voting, ex officio members of the advisory council: A representative of the department of agriculture; a representative of the department of game; a representative of the department of fisheries; and the veterinary pathologist referred to in section 8(5) of this act. A representative of the department of natural resources shall serve as a nonvoting member of the advisory council.***

(2) The council shall advise the departments of agriculture, fisheries, and game on all aspects of aquatic farming including the performance, operation, expansion, development, promotion, and interdepartmental coordination.

(3) Any vacancies on the council shall be filled in the same manner as the original appointment.

(4) The council shall select a chairman by vote of the council members. A quorum consisting of at least six voting members must be present to conduct council business. The council shall meet at the call of the chairman or at the request of the director.

(5) The council shall expire June 30, 1991.

*Sec. 6 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 7. The department shall adopt rules under chapter 34.04 RCW to implement this chapter.

***NEW SECTION.** Sec. 8. (1) The director of agriculture and the director of fisheries shall jointly develop, in consultation with the aquaculture advisory council, a program of disease inspection and control for aquatic farmers as defined in section 2 of this act. The program shall be administered by the department of fisheries under rules established under this section. The purpose of the program is to protect the aquaculture industry and wildstock fisheries from a loss of productivity due to aquatic diseases or maladies. As used in this section "diseases" means, in addition to its ordinary meaning, infestations of parasites or pests. The disease program may include, but is not limited to, the following elements:

- (a) Disease diagnosis;
- (b) Import and transfer requirements;
- (c) Provision for certification of stocks;
- (d) Classification of diseases by severity;
- (e) Provision for treatment of selected high-risk diseases;
- (f) Provision for containment and eradication of high-risk diseases;
- (g) Provision for destruction of diseased cultured aquatic products;
- (h) Provision for quarantine of diseased cultured aquatic products;
- (i) Provision for coordination with state and federal agencies;
- (j) Provision for development of preventative or control measures;
- (k) Provision for cooperative consultation service to aquatic farmers;

and

- (l) Provision for disease history records.

(2) The director of fisheries shall adopt rules implementing this section. However, such rules shall have the prior approval of the director of agriculture and shall provide therein that the director of agriculture has provided such approval. The director of agriculture or the director's designee shall attend the rule-making hearings conducted under chapter 34.04 RCW and shall assist in conducting those hearings. The authorities granted the department of fisheries by these rules and by RCW 75.08.080(1)(g), 75.24-.080, 75.24.110, 75.28.125, and sections 9, 10, and 11 of this act constitute

the only authorities of the department of fisheries to regulate private sector cultured aquatic products and aquatic farmers as defined in section 2 of this act. Except as provided in subsection (3) of this section, no action may be taken against any person to enforce these rules unless the department has first provided the person an opportunity for a hearing. In such a case, if the hearing is requested, no enforcement action may be taken before the conclusion of that hearing.

(3) The rules adopted under this section shall specify the emergency enforcement actions that may be taken by the department of fisheries, and the circumstances under which they may be taken, without first providing the affected party with an opportunity for a hearing. Neither the provisions of this subsection nor the provisions of subsection (2) of this section shall preclude the department of fisheries from requesting the initiation of criminal proceedings for violations of the disease inspection and control rules.

(4) It is unlawful for any person to violate the rules adopted under subsection (2) or (3) of this section or to violate section 11 of this act.

(5) In administering the program established under this section, the department of fisheries shall use the services of a pathologist licensed to practice veterinary medicine.

(6) The director in administering the program shall not place constraints on or take enforcement actions in respect to the aquaculture industry that are more rigorous than those placed on the department of fisheries, the department of game, or other fish-rearing entities.

(7) Whenever a civil action for damages is brought by an aquatic farmer as defined in section 2 of this act against the department of fisheries as a result of the department's ordering and obtaining the destruction of the farmer's private sector cultured aquatic product as defined in section 2 of this act, the court may award the farmer damages not exceeding three times the actual damages sustained if the court determines that the department was unreasonable in concluding that the risks presented by the disease or infestation warranted the destruction of the product.

*Sec. 8 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 9. The directors of agriculture and fisheries shall jointly adopt by rule, in the manner prescribed in section 8(2) of this act, a schedule of user fees for the disease inspection and control program established under section 8 of this act. The fees shall be established such that the program shall be entirely funded by revenues derived from the user fees by the beginning of the 1987-89 biennium.

There is established in the state treasury an account known as the aquaculture disease control account which is subject to appropriation. Proceeds of fees charged under this section shall be deposited in the account. Moneys from the account shall be used solely for administering the disease inspection and control program established under section 8 of this act.

NEW SECTION. Sec. 10. (1) The director of fisheries shall consult regarding the disease inspection and control program established under section 8 of this act with the department of game, federal agencies, and Indian tribes to assure protection of state, federal, and tribal aquatic resources and to protect private sector cultured aquatic products from disease that could originate from waters or facilities managed by those agencies.

(2) With regard to the program, the director of fisheries may enter into contracts or interagency agreements for diagnostic field services with government agencies and institutions of higher education and private industry.

(3) The director of fisheries shall provide for the creation and distribution of a roster of biologists having a speciality in the diagnosis or treatment of diseases of fish or shellfish. The director shall adopt rules specifying the qualifications which a person must have in order to be placed on the roster.

NEW SECTION. Sec. 11. All aquatic farmers as defined in section 2 of this act shall register with the department of fisheries. The director shall develop and maintain a registration list of all aquaculture farms. Registered aquaculture farms shall provide the department production statistical data. The state veterinarian and the department of game shall be provided with registration and statistical data by the department.

NEW SECTION. Sec. 12. A new section is added to chapter 75.08 RCW to read as follows:

(1) It is unlawful for any person other than the United States, an Indian tribe recognized as such by the federal government, the state, a subdivision of the state, or a municipal corporation or an agency of such a unit of government to release salmon or steelhead trout into the public waters of the state and subsequently to recapture and commercially harvest such salmon or trout. This section shall not prevent any person from rearing salmon or steelhead trout in pens or in a confined area under circumstances where the salmon or steelhead trout are confined and never permitted to swim freely in open water.

(2) A violation of this section constitutes a gross misdemeanor.

Sec. 13. Section 2, chapter 256, Laws of 1961 as amended by section 2, chapter 7, Laws of 1975 1st ex. sess. and RCW 15.65.020 are each amended to read as follows:

The following terms are hereby defined:

(1) "Director" means the director of agriculture of the state of Washington or his duly appointed representative. The phrase "director or his designee" means the director unless, in the provisions of any marketing agreement or order, he has designated an administrator, board or other designee to act for him in the matter designated, in which case "director or his designee" means for such order or agreement the administrator, board or other person(s) so designated and not the director.

(2) "Department" means the department of agriculture of the state of Washington.

(3) "Marketing order" means an order issued by the director pursuant to this chapter.

(4) "Marketing agreement" means an agreement entered into and issued by the director pursuant to this chapter.

(5) "Agricultural commodity" means any distinctive type of agricultural, horticultural, viticultural, floricultural, vegetable or animal product, including private sector cultured aquatic products as defined in section 2 of this 1985 act, either in its natural or processed state, including bees and honey but not including timber or timber products. The director is hereby authorized to determine (on the basis of common usage and practice) what kinds, types or sub-types should be classed together as an agricultural commodity for the purposes of this chapter.

(6) "Production area" and "marketing area" means any area defined as such in any marketing order or agreement in accordance with RCW 15.65.350. "Affected area" means the marketing or production area so defined in such order, agreement or proposal.

(7) "Unit" of an agricultural commodity means a unit of volume, weight, quantity, or other measure in which such commodity is commonly measured. The director shall designate in each marketing order and agreement the unit to be used therein.

(8) "Affected unit" means in the case of marketing agreements and orders drawn on the basis of a production area, any unit of the commodity specified in or covered by such agreement or order which is produced in such area and sold or marketed or delivered for sale or marketing; and "affected unit" means, in the case of marketing agreements and orders drawn on the basis of marketing area, any unit of the commodity specified in or covered by such agreement or order which is sold or marketed or delivered for sale or marketing within such marketing area: **PROVIDED**, That in the case of marketing agreements "affected unit" shall include only those units which are produced by producers or handled by handlers who have assented to such agreement.

(9) "Affected commodity" means that part or portion of any agricultural commodity which is covered by or forms the subject matter of any marketing agreement or order or proposal, and includes all affected units thereof as herein defined and no others.

(10) "Producer" means any person engaged in the business of producing any agricultural commodity for market in commercial quantities. "Affected producer" means any producer of an affected commodity. "To produce" means to act as a producer. For the purposes of RCW 15.65.140 and 15.65.160 as now or hereafter amended "producer" shall include bailees who contract to produce or grow any agricultural product on behalf of a

bailor who retains title to the seed and its resulting agricultural product or the agricultural product delivered for further production or increase.

(11) "Handler" means any person who acts, either as principal, agent or otherwise, in processing, selling, marketing or distributing an agricultural commodity which was not produced by him. "Affected handler" means any handler of an affected commodity. "To handle" means to act as a handler.

(12) "Producer-handler" means any person who acts both as a producer and as a handler with respect to any agricultural commodity. A producer-handler shall be deemed to be a producer with respect to the agricultural commodities which he produces, and a handler with respect to the agricultural commodities which he handles, including those produced by himself.

(13) "Cooperative association" means any incorporated or unincorporated association of producers which conforms to the qualifications set out in the act of congress of the United States of February 18, 1922 as amended, known as the "Capper-Volstead Act" and which is engaged in making collective sales or in marketing any agricultural commodity or product thereof or in rendering service for or advancing the interests of the producers of such commodity on a nonprofit cooperative basis.

(14) "Member of a cooperative association" means any producer who markets his product through such cooperative association and who is a voting stockholder of or has a vote in the control of or is a party to a marketing agreement with such cooperative association with respect to such product.

(15) "Producer marketing" or "marketed by producers" means any or all operations performed by any producer or cooperative association of producers in preparing for market and marketing, and shall include: (a) selling any agricultural commodity produced by such producer(s) to any handler; (b) delivering any such commodity or otherwise disposing of it for commercial purposes to or through any handler.

(16) "Commercial quantities" as applied to producers and/or production means such quantities per year (or other period of time) of an agricultural commodity as the director finds are not less than the minimum which a prudent man engaged in agricultural production would produce for the purpose of making such quantity of such commodity a substantial contribution to the economic operation of the farm on which such commodity is produced. "Commercial quantities" as applied to handlers and/or handling means such quantities per year (or other period of time) of an agricultural commodity or product thereof as the director finds are not less than the minimum which a prudent man engaged in such handling would handle for the purpose of making such quantity a substantial contribution to the handling operation in which such commodity or product thereof is so handled. In either case the director may in his discretion: (a) determine that substantial quantity is any amount above zero; and (b) apply the quantity so

determined on a uniform rule applicable alike to all persons which he finds to be similarly situated.

(17) "Commodity board" means any board established pursuant to RCW 15.65.220. "Board" means any such commodity board unless a different board is expressly specified.

(18) "Sell" includes offer for sale, expose for sale, have in possession for sale, exchange, barter or trade.

(19) "Section" means a section of this chapter unless some other statute is specifically mentioned. The present includes the past and future tenses, and the past or future the present. The masculine gender includes the feminine and neuter. The singular number includes the plural and the plural includes the singular.

(20) "Represented in a referendum" means that a written document evidencing approval or assent or disapproval or dissent is duly and timely filed with or mailed to the director by or on behalf of an affected producer and/or a volume of production of an affected commodity in a form which the director finds meets the requirements of this chapter.

(21) "Person" as used in this chapter shall mean any person, firm, association or corporation.

Sec. 14. Section 15.66.010, chapter 11, Laws of 1961 as last amended by section 6, chapter 288, Laws of 1983 and RCW 15.66.010 are each amended to read as follows:

For the purposes of this chapter:

(1) "Director" means the director of agriculture of the state of Washington or any qualified person or persons designated by the director of agriculture to act for him concerning some matter under this chapter.

(2) "Department" means the department of agriculture of the state of Washington.

(3) "Marketing order" means an order issued by the director pursuant to this chapter.

(4) "Agricultural commodity" means any distinctive type of agricultural, horticultural, viticultural, vegetable, and/or animal product, including private sector cultured aquatic products as defined in section 2 of this 1985 act, within its natural or processed state, including bees and honey but not including timber or timber products. The director is authorized to determine what kinds, types or subtypes should be classed together as an agricultural commodity for the purposes of this chapter.

(5) "Producer" means any person engaged in the business of producing or causing to be produced for market in commercial quantities any agricultural commodity. For the purposes of RCW 15.66.060, 15.66.090, and 15.66.120, as now or hereafter amended "producer" shall include bailees who contract to produce or grow any agricultural product on behalf of a bailor who retains title to the seed and its resulting agricultural product or the agricultural product delivered for further production or increase.

(6) "Affected producer" means any producer of an affected commodity.

(7) "Affected commodity" means any agricultural commodity for which the director has established a list of producers pursuant to RCW 15.66.060.

(8) "Commodity commission" or "commission" means a commission formed to carry out the purposes of this chapter under a particular marketing order concerning an affected commodity.

(9) "Unit" means a unit of volume, quantity or other measure in which an agricultural commodity is commonly measured.

(10) "Unfair trade practice" means any practice which is unlawful or prohibited under the laws of the state of Washington including but not limited to Titles 15, 16 and 69 RCW and chapters 9.16, 19.77, 19.80, 19.84, and 19.83 RCW, or any practice, whether concerning interstate or intrastate commerce that is unlawful under the provisions of the act of Congress of the United States, September 26, 1914, chapter 311, section 5, 38 U.S. Statutes at Large 719 as amended, known as the "Federal Trade Commission Act of 1914", or the violation of or failure accurately to label as to grades and standards in accordance with any lawfully established grades or standards or labels.

(11) "Person" includes any individual, firm, corporation, trust, association, partnership, society, or any other organization of individuals.

(12) "Cooperative association" means any incorporated or unincorporated association of producers which conforms to the qualifications set out in the act of Congress of the United States, Feb. 18, 1922, chapter 57, sections 1 and 2, 42 U.S. Statutes at Large 388 as amended, known as the "Capper-Volstead Act" and which is engaged in making collective sales or in marketing any agricultural commodity or product thereof or in rendering service for or advancing the interests of the producers of such commodity on a nonprofit cooperative basis.

(13) "Member of a cooperative association" or "member" means any producer of an agricultural commodity who markets his product through such cooperative association and who is a voting stockholder of or has a vote in the control of or is under a marketing agreement with such cooperative association with respect to such product.

Sec. 15. Section 43.23.030, chapter 8, Laws of 1965 as last amended by section 5, chapter 248, Laws of 1983 and RCW 43.23.030 are each amended to read as follows:

The director of agriculture shall exercise all the powers and perform all the duties relating to the development of markets, for agricultural products, state and federal cooperative marketing programs, land utilization for agricultural purposes, water resources, transportation, and farm labor as such

matters relate to the production, distribution and sale of agricultural commodities including private sector cultured aquatic products as defined in section 2 of this 1985 act.

Sec. 16. Section 46.16.090, chapter 12, Laws of 1961 as last amended by section 45, chapter 136, Laws of 1979 ex. sess. and RCW 46.16.090 are each amended to read as follows:

Motor trucks or trailers may be specially licensed based on the maximum gross weight thereof for fifty percent of the various amounts set forth in the schedule provided in RCW 46.16.070, when such trucks or trailers are owned and operated by farmers, but only if the following condition or conditions exist:

(1) When such trucks or trailers are to be used for the transportation of such farmer's own farm, orchard, or dairy products, or such farmer's own private sector cultured aquatic products as defined in section 2 of this 1985 act, from point of production to market or warehouse, and of supplies to be used on ~~((his))~~ the farmer's farm: PROVIDED, That fish other than those that are such private sector cultured aquatic products and forestry products shall not be considered as farm products; and/or

(2) When such trucks or trailers are to be used for the infrequent or seasonal transportation by one such farmer for another farmer in ~~((his))~~ the farmer's neighborhood of products of the farm, orchard, ~~((or))~~ dairy, or aquatic farm owned by such other farmer from point of production to market or warehouse, or supplies to be used on such other farm, but only if such transportation for another farmer is for compensation other than money: PROVIDED, HOWEVER, That farmers shall be permitted an allowance of an additional eight thousand pounds, within the legal limits, on motor trucks or trailers, when used in the transportation of such farmer's own farm machinery between ~~((his))~~ the farmer's own farm or farms and for a distance of not more than thirty-five miles from ~~((his))~~ the farmer's farm or farms.

The department shall prepare a special form of application to be used by farmers applying for licenses under this section, which form shall contain a statement to the effect that the vehicle or trailer concerned will be used subject to the limitations of this section. The department shall prepare special insignia which shall be placed upon all such vehicles or trailers to indicate that the vehicle or trailer is specially licensed, or may, in its discretion, substitute a special license plate for such vehicles or trailers for such designation.

Operation of such a specially licensed vehicle or trailer in transportation upon public highways in violation of the limitations of this section is a traffic infraction.

Sec. 17. Section 75.08.080, chapter 12, Laws of 1955 as last amended by section 15, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.08.080 are each amended to read as follows:

(1) The director may adopt, amend, or repeal rules as follows:

(a) Specifying the times when the taking of food fish or shellfish is lawful or unlawful.

(b) Specifying the areas and waters in which the taking and possession of food fish or shellfish is lawful or unlawful.

(c) Specifying and defining the gear, appliances, or other equipment and methods that may be used to take food fish or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed.

(d) Regulating the possession, disposal, landing, and sale of food fish or shellfish within the state, whether acquired within or without the state.

(e) Regulating the prevention and suppression of diseases and pests affecting food fish or shellfish.

(f) Regulating the size, sex, species, and quantities of food fish or shellfish that may be taken, possessed, sold, or disposed of.

(g) Specifying the statistical and biological reports required from fishermen, dealers, boathouses, or processors of food fish or shellfish.

(h) Classifying species of marine and freshwater life as food fish or shellfish.

(i) Classifying the species of food fish and shellfish that may be used for purposes other than human consumption.

(j) Other rules necessary to carry out this title and the purposes and duties of the department.

(2) Subsections (1)(a), (b), (c), (d), and (f) of this section do not apply to(:

~~(a) Licensed oyster farms or oysters produced thereon; or~~

~~(b)) private tideland owners and lessees of state tidelands, when they take or possess oysters, clams, cockles, borers, or mussels, excluding razor clams, produced on their own private tidelands or their leased state tidelands for personal use.~~

(3) Except for subsection (1)(g) of this section, this section does not apply to private sector cultured aquatic products as defined in section 2 of this 1985 act. Subsection (1)(g) of this section does apply to such products.

Sec. 18. Section 75.28.010, chapter 12, Laws of 1955 as last amended by section 101, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.010 are each amended to read as follows:

(1) Except as otherwise provided by this title, a license or permit issued by the director is required to:

(a) Commercially fish for or take food fish or shellfish;

(b) Deliver food fish or shellfish taken in offshore waters;

(c) Operate a charter boat; or

~~(d) ((Operate a commercial food fish or shellfish farm; or~~

~~(e))) Engage in processing or wholesaling food fish or shellfish.~~

(2) It is unlawful to engage in the activities described in subsection (1) of this section without having in possession the licenses or permits required by this title.

(3) No license or permit is required for the production or harvesting of private sector cultured aquatic products as defined in section 2 of this 1985 act or for the delivery, processing, or wholesaling of such aquatic products. However, if a means of identifying such products is required by rules adopted under section 5 of this 1985 act, the exemption from licensing or permit requirements established by this subsection applies only if the aquatic products are identified in conformance with those rules.

Sec. 19. Section 75.28.280, chapter 12, Laws of 1955 as last amended by section 125, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.280 are each amended to read as follows:

~~((1) A clam farm license is required for the licensee to operate a commercial clam farm of one or more tracts of lands on tidelands or beds of navigable waters. The annual license fee is fifteen dollars for residents and nonresidents.~~

~~A clam farm license is not required for subtidal geoduck tracts for which licenses have been obtained under RCW 75.28.287.~~

~~(2) An oyster farm license is required for the licensee to operate a commercial oyster farm on tidelands or beds of navigable waters. The annual license fee is fifteen dollars for residents and nonresidents.~~

~~(3) Separate clam farm and oyster farm licenses are required for each of the following districts as defined by rule of the director: Northern Puget Sound district, southern Puget Sound district, Grays Harbor district, and Willapa Harbor district.~~

~~(4)) A mechanical harvester license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, on a clam farm unless the requirements of RCW 75.20.100 are fulfilled for the proposed activity. The annual license fee is three hundred dollars for residents and nonresidents.~~

Sec. 20. Section 75.28.300, chapter 12, Laws of 1955 as last amended by section 132, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.300 are each amended to read as follows:

A wholesale fish dealer's license is required for:

(1) A business in the state to engage in the commercial processing of food fish or shellfish, including custom canning or processing of personal use food fish or shellfish.

(2) A business in the state to engage in the wholesale selling, buying, or brokering of food fish or shellfish. A wholesale fish dealer's license is not required of those businesses which buy exclusively from Washington licensed wholesale dealers and sell solely at retail.

(3) Fishermen (~~or aquaculturists~~) who land and sell their catch or harvest in the state to anyone other than a licensed wholesale dealer within or outside the state.

(4) A business to engage in the commercial manufacture or preparation of fertilizer, oil, meal, caviar, fish bait, or other byproducts from food fish or shellfish.

The annual license fee is thirty-seven dollars and fifty cents. A wholesale fish dealer's license is not required for persons (~~buying or selling oyster seed for transplant~~) engaged in the processing, wholesale selling, buying, or brokering of private sector cultured aquatic products as defined in section 2 of this 1985 act. However, if a means of identifying such products is required by rules adopted under section 5 of this 1985 act, the exemption from licensing requirements established by this subsection applies only if the aquatic products are identified in conformance with those rules.

Sec. 21. Section 77.08.020, chapter 36, Laws of 1955 as last amended by section 10, chapter 78, Laws of 1980 and RCW 77.08.020 are each amended to read as follows:

(1) As used in this title or rules of the commission, "game fish" means those species of the class Osteichthyes that shall not be fished for except as authorized by rule of the commission and includes:

SCIENTIFIC NAME	COMMON NAME
Ambloplites rupestris	rock bass
Coregonus clupeaformis	lake white fish
Ictalurus furcatus	blue catfish
Ictalurus melas	black bullhead
Ictalurus natalis	yellow bullhead
Ictalurus nebulosus	brown bullhead
Ictalurus punctatus	channel catfish
Lepomis cyanellus	green sunfish
Lepomis gibbosus	pumpkinseed
Lepomis gulosus	warmouth
Lepomis macrochirus	bluegill
Lota lota	burbot or fresh water ling
Micropterus dolomieu	smallmouth bass
Micropterus salmoides	largemouth bass
Oncorhynchus nerka (in its landlocked form)	kokanee or silver trout
Perca flavescens	yellow perch
Pomixis annularis	white crappie
Pomixis nigromaculatus	black crappie
Prosopium williamsoni	mountain white fish
Salmo aquabonita	golden trout

SCIENTIFIC NAME	COMMON NAME
Salmo clarkii	cutthroat trout
Salmo gairdnerii	rainbow or steelhead trout
Salmo salar	Atlantic salmon
Salmo trutta	brown trout
Salvelinus fontinalis	eastern brook trout
Salvelinus malma	Dolly Varden trout
Salvelinus namaycush	lake trout
Stizostedion vitreum	Walleye
Thymallus arcticus	arctic grayling

(2) Private sector cultured aquatic products as defined in section 2 of this 1985 act are not game fish.

Sec. 22. Section 77.28.020, chapter 36, Laws of 1955 as last amended by section 98, chapter 78, Laws of 1980 and RCW 77.12.570 are each amended to read as follows:

The commission shall adopt rules specifying the procedures, qualifications, and conditions for issuing a game farm license and governing the operation of game farms. Private sector cultured aquatic products as defined in section 2 of this 1985 act are exempt from regulation under this section.

Sec. 23. Section 77.28.080, chapter 36, Laws of 1955 as amended by section 100, chapter 78, Laws of 1980 and RCW 77.12.590 are each amended to read as follows:

Wildlife given away, sold, or transferred by a licensed game farmer shall have attached to each wildlife member, package, or container, a tag, seal, or invoice as required by the commission. Private sector cultured aquatic products as defined in section 2 of this 1985 act are exempt from regulation under this section.

Sec. 24. Section 77.28.090, chapter 36, Laws of 1955 as amended by section 101, chapter 78, Laws of 1980 and RCW 77.12.600 are each amended to read as follows:

A common carrier may transport wildlife shipped by a licensed game farmer if the wildlife is tagged, sealed, or invoiced as provided in RCW 77.12.590. Packages containing wildlife shall have affixed to them tags or labels showing the name of the licensee and the consignee. For purposes of this section, wildlife does not include private sector cultured aquatic products as defined in section 2 of this 1985 act. However, if a means of identifying such products is required by rules adopted under section 5 of this 1985 act, this exemption from the definition of wildlife applies only if the aquatic products are identified in conformance with those rules.

Sec. 25. Section 77.32.010, chapter 36, Laws of 1955 as last amended by section 2, chapter 284, Laws of 1983 and RCW 77.32.010 are each amended to read as follows:

(1) Except as otherwise provided in this chapter, a license issued by the commission is required to:

- (a) Hunt for wild animals or wild birds or fish for game fish;
- (b) Practice taxidermy for profit;
- (c) Deal in raw furs for profit;
- (d) Act as a fishing guide;
- (e) Operate a game farm;
- (f) Purchase or sell anadromous game fish; or
- (g) Use department–managed lands or facilities as provided by rule of the commission.

(2) A permit issued by the director is required to:

- (a) Conduct, hold, or sponsor hunting or fishing contests or competitive field trials using live wildlife;
- (b) Collect wild animals, wild birds, game fish, or protected wildlife for research or display; or
- (c) Stock game fish.

(3) Aquaculture as defined in section 2 of this 1985 act is exempt from the requirements of this section, except when being stocked in public waters under contract with the department of game.

*NEW SECTION. Sec. 26. (1) The department of fisheries shall report to the legislature on the expenditure of funds needed to implement the disease program called for in section 8 of this act. The report shall detail the percentage of the funds originating from user fees and the percentage of the funds from the state general fund. The report shall be delivered to the legislature by January 1, 1987.

(2) The department shall survey the boundaries of the state's Puget Sound oyster reserves and shall assess the ability of those lands to support aquatic products if actively cultivated. The department shall submit a report to the legislature by January 1, 1986, identifying its findings regarding the support capacity of the reserves and the optimum use of the reserves for cultivating aquatic products.

*Sec. 26 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 27. (1) Sections 1 through 7 of this act shall constitute a new chapter in Title 15 RCW.

(2) Sections 8 through 11 of this act shall constitute a new chapter in Title 75 RCW.

NEW SECTION. Sec. 28. The following acts or parts of acts are each repealed:

(1) Section 2, chapter 35, Laws of 1971, section 124, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.265; and

(2) Section 10, chapter 212, Laws of 1955, section 126, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.282.

Passed the Senate April 16, 1985.

Passed the House April 9, 1985.

Approved by the Governor May 21, 1985, with the exception of certain items which are vetoed.

Filed in Office of Secretary of State May 21, 1985.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to several portions, Substitute Senate Bill No. 3067, entitled:

"AN ACT Relating to aquatic farming."

Section 6 would create an aquaculture advisory council appointed by the Governor. I wholeheartedly support the purpose of the council, which will bring together private interests with the state agencies responsible for aquaculture promotion and regulation. This cooperation is essential to a successful program. However, the council should more appropriately be appointed by and report to the Director of the Department of Agriculture, who has the prime responsibility for promotion under the Act. The Director has authority under existing statute to appoint such an advisory body. The Director should consult the Departments of Fisheries and Natural Resources in making appointments.

Section 8(7) would provide treble damages in civil actions by aquatic farmers in cases where Department of Fisheries' orders for the destruction of aquatic products are held to be unreasonable. Treble damages against the state are without precedent and are, I believe, excessive and unnecessary. However, removing this provision in no way suggests that the Department should not be accountable for its actions. When the Department has committed an unreasonable act, the courts should continue, as under current law, to award actual and consequential damages.

Section 26(2) would require the Department of Fisheries to survey the boundaries of the state's Puget Sound oyster reserves, assess their ability to support aquaculture, and report to the legislature regarding their optimum use. The Department of Fisheries reports that the surveys required by this subsection would cost more than \$500,000, for which no funding has been provided. In recognition of the need to enhance Puget Sound oyster reserves, I have signed into law Substitute Senate Bill No. 4041. This requires that Fisheries categorize the reserves according to their best uses. It further requires that Fisheries undertake a pilot Olympia oyster cultivation project.

With the exception of Sections 6, 8(7) and 26(2), which I have vetoed, Substitute Senate Bill No. 3067 is approved."

CHAPTER 458

[Substitute Senate Bill No. 3384]

SALMON ENHANCEMENT

AN ACT Relating to salmon enhancement; amending RCW 75.08.065, 75.48.120, and 77.12.420; adding a new chapter to Title 75 RCW; prescribing penalties; making an appropriation; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. Currently, many of the salmon stocks of Washington state are critically reduced from their sustainable level. The best interests of all fishing groups and the citizens as a whole are served by

EXHIBIT 3

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1565

Chapter 415, Laws of 1997

55th Legislature
1997 Regular Session

SMALL SCALE PROSPECTING AND MINING--REVISIONS

EFFECTIVE DATE: 7/27/97

Passed by the House April 26, 1997
Yeas 98 Nays 0

CLYDE BALLARD
**Speaker of the
House of Representatives**

Passed by the Senate April 26, 1997
Yeas 42 Nays 1

BRAD OWEN
President of the Senate

Approved May 19, 1997

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1565** as passed by the House of Representatives and the Senate on the dates hereon set forth.

TIMOTHY A. MARTIN
Chief Clerk

FILED

May 19, 1997 - 7:24 p.m.

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1565

Passed Legislature - 1997 Regular Session
AS RECOMMENDED BY THE CONFERENCE COMMITTEE

State of Washington 55th Legislature 1997 Regular Session

By House Committee on Natural Resources (originally sponsored by Representatives Mielke, Pennington, Carrell, Mulliken, Thompson and Cairnes)

Read first time 03/05/97.

1 AN ACT Relating to small scale prospecting and mining; adding a new
2 section to chapter 75.20 RCW; and creating a new section.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** The legislature finds that small scale
5 prospecting and mining: (1) Is an important part of the heritage of
6 the state; (2) provides economic benefits to the state; and (3) can be
7 conducted in a manner that is beneficial to fish habitat and fish
8 propagation. Now, therefore, the legislature declares that small scale
9 prospecting and mining shall be regulated in the least burdensome
10 manner that is consistent with the state's fish management objectives
11 and the federal endangered species act.

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

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

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

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

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

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

Passed the House April 26, 1997.

Passed the Senate April 26, 1997.

Approved by the Governor May 19, 1997.

Filed in Office of Secretary of State May 19, 1997.

EXHIBIT 4

PART 3
EXEMPTION FROM HYDRAULIC PROJECT APPROVAL

NEW SECTION. Sec. 301. The act of driving across an established ford is exempt from a permit. Driving across streams or on wetted streambeds at areas other than established fords requires a permit. Work within the ordinary high water line of state waters to construct or repair a ford or crossing requires a permit.

Sec. 302. RCW 77.55.330 and 2002 c 20 s 4 are each amended to read as follows:

The removal of derelict fishing gear does not require ~~((written approval))~~ a permit under this chapter if the gear is removed according to the guidelines described in RCW 77.12.865.

NEW SECTION. Sec. 303. (1) An activity conducted solely for the removal or control of spartina does not require a permit.

(2) An activity conducted solely for the removal or control of purple loosestrife and which is performed with handheld tools, handheld equipment, or equipment carried by a person does not require a permit.

PART 4
**COMPLIANCE THROUGH GUIDELINES,
AGREEMENTS, AND PAMPHLETS**

Sec. 401. RCW 77.55.150 and 1995 c 255 s 4 are each amended to read as follows:

(1) ~~((An activity conducted solely for the removal or control of spartina shall not require hydraulic project approval.~~

~~(2) An activity conducted solely for the removal or control of purple loosestrife and which is performed with hand held tools, hand held equipment, or equipment carried by a person when used shall not require hydraulic project approval.~~

~~(3))~~ By June 30, 1997, the department ~~((of fish and wildlife))~~ shall develop rules for projects conducted solely for the removal or control of various aquatic noxious weeds other than spartina and purple loosestrife and for activities or hydraulic projects for controlling purple loosestrife not covered by ~~((subsection (2)))~~ section 303(2) of this ~~((section, which projects will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state))~~ act. Following the adoption of the rules, the department shall produce and distribute a pamphlet describing the methods of removing or controlling the aquatic noxious weeds that are approved under the rules. The pamphlet serves as the ~~((hydraulic project approval))~~ permit for any project that is conducted solely for the removal or control of such aquatic noxious weeds and that is conducted as described in the pamphlet~~((:)).~~ No further ~~((hydraulic project approval))~~ permit is required for such a project.

(2) From time to time as information becomes available, the department shall adopt similar rules for additional aquatic noxious weeds or additional activities for removing or controlling aquatic noxious weeds not governed by ~~((subsection (1) or (2) of this section))~~ sections 303 (1) and (2) of this act and shall produce and distribute one or more pamphlets describing these methods of

removal or control. Such a pamphlet serves as the ~~((hydraulic project approval))~~ permit for any project that is conducted solely for the removal or control of such aquatic noxious weeds and that is conducted as described in the pamphlet~~((s))~~. No further ~~((hydraulic project approval))~~ permit is required for such a project.

~~((4))~~ As used in this section, "spartina," "purple loosestrife," and "aquatic noxious weeds" have the meanings prescribed by RCW 17.26.020.

~~((5))~~ (3) Nothing in this section shall prohibit the department ~~((of fish and wildlife))~~ from requiring a ~~((hydraulic project approval))~~ permit for those parts of hydraulic projects that are not specifically for the control or removal of spartina, purple loosestrife, or other aquatic noxious weeds.

Sec. 402. RCW 77.55.270 and 1997 c 415 s 2 are each amended to read as follows:

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

Sec. 403. RCW 77.55.280 and 2001 c 253 s 54 are each amended to read as follows:

When a private landowner is applying for ~~((hydraulic project approval))~~ a permit under this chapter and that landowner has entered into a habitat incentives agreement with the department and the department of natural resources as provided in RCW 77.55.300 ~~((as recodified by this act))~~, the department shall comply with the terms of that agreement when evaluating the request for ~~((hydraulic project approval))~~ a permit.

Sec. 404. RCW 77.55.300 and 2000 c 107 s 229 are each amended to read as follows:

(1) Beginning in January 1998, the department ~~((of fish and wildlife))~~ and the department of natural resources shall implement a habitat incentives program based on the recommendations of federally recognized Indian tribes, landowners, the regional fisheries enhancement groups, the timber, fish, and wildlife cooperators, and other interested parties. The program shall allow a private landowner to enter into an agreement with the departments to enhance habitat on the landowner's property for food fish, game fish, or other wildlife

PART 10
MISCELLANEOUS

NEW SECTION. Sec. 1001. The following sections are each codified or recodified in chapter 77.55 RCW in the following order:

Section 101 of this act
Section 201 of this act
Section 301 of this act
RCW 77.55.330
Section 303 of this act
RCW 77.55.030
RCW 77.55.360
RCW 77.55.150
RCW 77.55.270
RCW 77.55.020
RCW 77.55.280
RCW 77.55.300
RCW 77.55.130
RCW 77.55.200
RCW 77.55.220
RCW 77.55.340
RCW 77.55.210
RCW 77.55.290
RCW 77.55.160
Section 507 of this act
RCW 77.55.010
Section 508 of this act
RCW 77.55.350
RCW 77.55.230
RCW 77.55.090
RCW 77.55.120
RCW 77.55.260
Section 605 of this act
RCW 77.55.140
RCW 77.55.170
RCW 77.55.180.

NEW SECTION. Sec. 1002. The following sections are each recodified as a new chapter in Title 77 RCW in the following order:

RCW 77.55.040
RCW 77.55.050
RCW 77.55.060
RCW 77.55.070
RCW 77.55.080
RCW 77.55.310
RCW 77.55.320
RCW 77.55.240.

Sec. 1003. RCW 76.09.050 and 2003 c 314 s 4 are each amended to read as follows:

EXHIBIT 5

[back](#)



Rob McKenna | 2005-Current | Attorney General of Washington

DEPARTMENT OF FISH AND WILDLIFE – SHORELINE MANAGEMENT ACT – DEPARTMENT OF ECOLOGY - Extent to which hydraulic project approval permits or shoreline substantial development permits are required for the planting, growing, and harvesting of farm-raised geoduck clams.

- 1. The Department of Fish and Wildlife may not require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, or harvesting of farm-raised geoduck clams by private parties.**
- 2. The planting, growing, and harvesting of farm-raised geoduck clams would require a substantial development permit under the Shoreline Management Act if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.**
- 3. Where a geoduck clam culture project would require a substantial development permit, the local government and the Department of Ecology would have a variety of enforcement options available; in some cases, conditional use permits might also be used to regulate this practice.**

January 4, 2007

Honorable	Patricia	Lantz	
State	Representative,	26th	District
P.	O.	Box	40600
Olympia, WA	98504-0600		Cite
			AGO 2007 No. 1
			As:

Dear Representative Lantz:

By letter previously acknowledged, you have requested an opinion on the following questions, which we have paraphrased slightly for clarity:

- 1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?**
- 2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?**
- 3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?**

[original page 2] BRIEF ANSWERS

We answer the first question in the negative. RCW 77.115.010(2) limits application of Washington Department of Fish and Wildlife (WDFW) regulatory powers with respect to private sector cultured aquatic products. The limitation prevents WDFW from requiring a hydraulic project approval permit to regulate the planting, growing, and harvesting of geoducks grown by private aquaculturalists.

Regarding the second question, we conclude that farm-raised geoducks may require a substantial development permit under circumstances where the particular geoduck planting project causes substantial interference with normal public use of the surface waters. Projects that do not meet this description would not require a substantial development permit.

In answer to the third question, local government and the Department of Ecology may take informal or formal civil enforcement actions against a substantial development that is undertaken without a permit. Alternatively, conditional use permits may be used to manage this type of aquaculture if the approved shoreline master program includes such a requirement.

BACKGROUND

Your questions concern a new type of shellfish farming that takes place on lower elevations of intertidal lands.^[1] The process involves four-inch diameter PVC pipe cut into approximately one-foot lengths. The short PVC tube is inserted in the beach, leaving a few inches above the surface. A shellfish grower places tiny juvenile geoduck clams into the sandy substrate protected by the tube. The tube itself, or the general area, is covered with netting. Together, the tube and netting protect the juvenile geoduck from predators until it grows large enough to bury itself to a safer depth. After the geoduck has grown a sufficient amount to avoid predation (which requires several months), the shellfish grower removes the netting and tubes. The geoduck farming site may occupy many acres of tideland.

Approximately five years after planting, geoducks reach their marketable (and impressive) size as one of the world's largest burrowing clams. At that point, the shellfish grower harvests the clams which have "burrowed" two or three feet below the surface. A water jet loosens the substrate around the clam's shell and siphon (also called the "neck"), allowing the harvester to remove the geoduck from the muck.

The harvest incidentally releases silt and sediment which may temporarily be found in the surrounding water. Kent S. Short & Raymond Walton, Ebasco Environmental, *Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting* (April 1992) (copy on file). Removing a geoduck from the beach therefore results in a temporary depression where the substrate was loosened and the geoduck removed. See generally **[original page 3]** *Washington Shell Fish, Inc., v. Pierce Cy.*, 132 Wn. App. 239, 131 P.3d 326 (2006) (petition for review denied Jan. 3, 2007) (discussing geoduck aquaculture).^[2]

1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?

Your first question concerns the requirement for a hydraulic project approval (HPA) issued by the WDFW under the authority of RCW 77.55.021. That statute provides, in part:

(1) Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a **hydraulic project**, the person or government agency shall, before commencing work thereon, secure **the approval of the department in the form of a permit** as to the adequacy of the means proposed for the protection of fish life.

RCW 77.55.021(1) (emphasis added). A “hydraulic project” is “the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” RCW 77.55.011(7). The work of inserting tubes and netting on the tidelands for geoduck aquaculture would be a hydraulic project because it is “work” that “uses” and “changes” the “bed of any of the salt or freshwaters of the state.” *Id.* An HPA permit would thus be required for geoduck aquaculture unless there is some exception. The exception is in the statutes that address WDFW disease inspection powers for private sector cultured aquatic products.

RCW 77.115.010(2) provides, in part:

The authorities granted the department by [the rules implementing a program of disease inspection and control for aquatic farmers] and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, 77.115.020, 77.115.030, and 77.115.040 **constitute the only authorities of the department to regulate** private sector cultured aquatic products and aquatic farmers as defined in RCW 15.85.020.

(Emphasis added.)

[original page 4] Farm-raised geoducks are within the definition of private sector cultured aquatic products because they are “native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms”. RCW 15.85.020(3). An “aquatic farmer” is a private sector person who “commercially farms and manages the cultivating of private sector cultured aquatic products on the person’s own land or on land in which the person has a present right of possession.” RCW 15.85.020(2). The case of *State v. Hodgson*, 60 Wn. App. 12, 802 P.2d 129 (1990), illustrates that privately planted geoducks can be private sector cultured aquatic products.^[3]

RCW 77.115.010(2) allows WDFW to regulate private sector cultured aquatic products only by using the enumerated statutes, which do not include the HPA permit. We reach this conclusion after considering the two canons of statutory construction identified in your letter and by examining the language of the statute and the statutory scheme.

First, we examine whether the HPA statute is a later enacted statute that might apply to geoduck farming regardless of RCW 77.115.010(2). This concept does not apply, however, because the general HPA requirement dates back to the 1940s. *See* Laws of 1943, ch. 40, § 1. The HPA law, indeed, existed when the original version of RCW 77.115.010(2) was adopted in Laws of 1985, ch. 457, § 8. *See former* RCW 75.20.100 (1985 HPA statute). Thus, although a 2005 bill recodified the HPA law, we do not conclude that it is a new legal requirement. We therefore cannot conclude that HPA authority reflects a latter enactment outside the scope of RCW 77.115.010(2).

Second, we examine whether the HPA law is more specific than RCW 77.115.010(2), because a more specific statute is given effect if there is a conflict with a general statute. *See Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). However, the HPA law is substantially broader than RCW 77.115.010(2), applying to all work and construction in salt and fresh waters. In contrast, RCW 77.115.010(2) has a narrow scope. We therefore conclude that RCW 77.115.010(2) is a later enactment and more specific with regard to WDFW authority to regulate private sector cultured aquatic products.

Next, we consider that RCW 77.115.010(2) does not mention the HPA permit or terms that address HPA requirements. The HPA statute refers to “construction” or “work” that “uses” or “changes” the bed or flow of state waters. RCW 77.55.021(1). In contrast, RCW 77.115.010(2) does not use any of these terms. Moreover, other statutes in RCW 77.55 provide explicit exemptions to the HPA permit. *See* RCW 77.55.031–.071 (describing activities that might use or change the beds of state waters such as crossing an established ford, removing derelict fishing gear, abatement of certain noxious plants, hazardous waste cleanups, and construction of housing for sexually violent predators). It is arguable that these express **[original page 5]** exemptions in RCW 77.55 should be interpreted as

providing the only exceptions to the HPA permit. *See In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) (express exceptions in a statute exclude all other exceptions).

However, we do “not construe statutes so as to render language meaningless.” *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000). RCW 77.115.010(2) has no meaning if it does not reflect a legislative intent to limit WDFW authority to regulate private sector cultured aquatic products. We therefore construe RCW 77.115.010(2) as a limit on WDFW regulation of private sector cultured geoducks using the following guidance.

First, RCW 77.115.010(2) acts as an exception and must be read narrowly. *See State v. Turpin*, 94 Wn.2d 820, 825, 620 P.2d 990 (1980) (statutory provisos should be strictly construed with doubts resolved in favor of the general provisions to which the proviso does not strictly apply). We also avoid absurd or unintended consequences. *Frat. Order of Eagles, Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (The courts “will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.”). Thus, we do not read RCW 77.115.010(2) disjunctively as a limit on WDFW regulation of any registered aquatic farmer, because that leads to absurd results where, for example, WDFW could not regulate an aquatic farmer who is hunting because the laws regulating hunting are not on the statutory list. We read RCW 77.115.010(2) conjunctively. Thus, it limits regulations when applied to both the private sector cultured aquatic products *and* the aquatic farmer.^[4]

We also rely on RCW 77.12.047(3) to reach our conclusion. This statute provides that rules adopted by the Fish and Wildlife Commission shall not apply to private sector cultured aquatic products, except for rules adopted under RCW 77.12.047(1)(g) (allowing WDFW to adopt rules “specifying the statistical and biological reports required from fishers, dealers, boathouses, or processors of wildlife, fish or shellfish.”) Under this statute, WDFW rules governing the time, place, and manner for taking wild fish, shellfish, and wildlife are not applicable to private sector cultured aquatic products. We conclude that if an HPA permit were used to regulate geoduck planting and harvesting, it would sidestep this express limit on the use of WDFW rules, confounding express legislative intent.

Finally, we consider that the HPA permit is enforced primarily using criminal sanctions under RCW 77.15.300. Interpretation of whether an HPA permit is required must therefore consider the rule of lenity. Under the rule of lenity, if two possible constructions of a statute imposing a criminal penalty are permissible, the criminal statute will be construed against the state and in favor of the accused. *See, e.g., State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). A person planting geoducks without an HPA permit would properly invoke the rule of lenity to argue for the above interpretation of RCW 77.115.010(2) limiting the HPA permit requirement.^[5]

[original page 6] 2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?

Background – The Shoreline Management Act

The Legislature enacted the Shoreline Management Act (SMA) to protect and to manage the private and public shorelines of Washington State; to further public health, public rights of navigation, land, vegetation, and wildlife; and to plan for and foster reasonable and appropriate shoreline uses. RCW 90.58.020; *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002). The SMA regulates both “uses” of shorelines as well as “developments” on them. *Clam Shacks of Am., Inc. v. Skagit Cy.*, 109 Wn.2d 91, 95-96, 743 P.2d 265 (1987).

RCW 90.58.140(1) provides that development on the shorelines shall not be undertaken unless consistent with the SMA, with SMA guidelines, and with local government master programs. Subsection (2) prohibits substantial development on the shorelines “without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.”

RCW 90.58.030(3)(d) defines “development” to mean:

a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level[.]

RCW 90.58.030(3)(e) defines “substantial development” as “any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state.” We accept your suggestion that we engage in the reasonable assumption that the cost and value of such activity will exceed the five thousand dollar threshold for “substantial” development in RCW 90.58.030(3)(e).

“Under the [SMA] no ‘substantial development’ exists if there is no ‘development’ within the meaning of RCW 90.58.030(3)(d), because for there to be a ‘substantial **[original page 7]** development’, there must first be a ‘development’”. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 812, 828 P.2d 549 (1992). Our analysis therefore focuses on whether geoduck farming is a development. [\[6\]](#)

Substantial development permits are administered by local government according to shoreline master programs. RCW 90.58.140(3). The process for development of the shoreline master program governing these permits is described in *Weyerhaeuser Co. v. King Cy.*, 91 Wn.2d 721, 729, 592 P.2d 1108 (1979):

The SMA requires each local government to develop a master program for the use and development of shorelines within its boundaries. RCW 90.58.080. The programs, once approved by the Department of Ecology, operate as controlling use regulations for the various shorelines of the state. RCW 90.58.100.

Analysis

We start by examining a recent case where the Court of Appeals held that a geoduck tube aquaculture operation required a substantial development permit. *Wash. Shell Fish*, 132 Wn. App. 239. [\[7\]](#) The Court analyzed the Pierce County shoreline master program definitions for substantial development, which are identical to SMA definitions. It held that geoduck aquaculture in that case involved “development” because it interfered with normal public use of the waters. *Id.* at 251-52, citing RCW 90.58.030(3)(d) (“any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level”).

We have found the Court of Appeals opinion answers your question only in the context of the facts of that case, and it fails to offer an analysis applicable to all geoduck tube aquaculture. To answer your questions, we conclude that geoduck tube aquaculture does not necessarily fall within the definition of development except where it interferes with normal public use of surface waters, as in *Washington Shell Fish*:

Several witnesses testified that WSF left rope in the water where WSF had planted geoducks, and this rope would become entangled with people or non-geoduck-harvest-related objects. WSF divers harvesting geoducks placed markers on the water’s surface that prevented public use of that area. The PVC planting pipe that WSF inserted into the shorelines were up to 12 inches long, **[original page 8]** with their top portions protruding vertically out of the sand. In addition, according to one witness, WSF used up to four boats at a time to store the geoducks that divers harvested, one of which was a barge large enough to drag a buoy; these WSF boats further constricted the water surface open to public use.

Wash. Shell Fish, 132 Wash. App. at 251. The opinion goes on to describe the particular site where wind surfers were affected by the project. The relevant factors appear to be the public use of the surface waters of the site and the

manner in which the geoduck project interfered with public use—floating ropes on the surface, markers on the water’s surface creating barriers to public use, and barges and boats that occupy the site to the exclusion of the public.

Although *Washington Shell Fish* shows how geoduck tube aquaculture can interfere with use of surface waters, nothing in the description of geoduck aquaculture necessitates such interference. The PVC pipes protrude only inches and have no more interference with use of the surface waters than bags of oysters, clam nets, or a small rock on the shoreline. The markers, floats, barges, and entanglements affecting the surface in *Washington Shell Fish* may not exist at every geoduck farm. The neighboring public park appears to trigger the interference with public use of the surface waters.

Therefore, although hypothetically a project may interfere with use of surface waters, we conclude that the SMA addresses permitting of actual “projects” and involves a concrete examination of whether the project interferes with normal public use of surface waters. The *Washington Shell Fish* case illustrates this approach by examining the facts of a particular project. Accordingly, we conclude that whether a particular geoduck farm interferes with normal public use of surface waters will depend on the facts, which should be determined by local government when deciding if a permit is required. See RCW 90.58.140(1).

We next examine the other statutory definitions of development. The *Washington Shell Fish* opinion does not address the argument that geoduck tube aquaculture is development because the harvest disrupts the substrate around the geoduck. *Wash. Shell Fish*, 132 Wash. App. at 252 n.12. We conclude that disruption of the substrate around a geoduck, considered in isolation, cannot be legally distinguished from general clam digging or raking. Any clam harvest disrupts the substrate around the buried clam. We find no indication that the SMA has ever treated clam harvesting, alone, as development. Moreover, it would lead to a burdensome and apparently unintended consequence where substantial development permits would be required for all significant clam beds, both commercial and recreational.

Next, we consider whether geoduck tube aquaculture involves dredging. In 1977, the Washington Supreme Court affirmed the Shoreline Hearings Board and held that clam harvesting using a dredge was a type of substantial development. *English Bay Enters., Ltd. v. Island Cy.*, 89 Wn.2d 16, 568 P.2d 783 (1977). The court rejected the harvester’s argument that the statutory definition of “development” did not explicitly include clam harvesting.

[T]he Board found, and we find here, that it is not the goal of the appellant’s activity which governs **but rather it is the method employed**. The appellant’s operation involves the removal of earth from the bottom of the bay. In the plain and ordinary sense of the term, this procedure is “dredging.” The Board found **[original page 9]** that this activity constitutes dredging; the interpretation of the Board is to be given great weight. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash.2d 441, 536 P.2d 157 (1975).

Id. at 20 (emphasis added).

The dredging in *English Bay* is significantly different. A hydraulic dredge machine removed the top twelve inches of beach, leaving a trench while dislodging clams. *Id.* at 18. The *English Bay* case thus involved a dredging machine, which is necessary to dictionary definitions of dredging, but absent in geoduck farming. See Merriam-Webster Online Dictionary, Dredging, “**1 a:** to dig, gather, or pull out with or as if with a dredge -- often used with **up b:** to deepen (as a waterway) with a dredging machine”. The water jet used to loosen the substrate around an individual geoduck is not a dredging machine, even if water jets might be used for dredging channels in other places. Here, the water jet simply loosens a geoduck.

Constructing Structures

Geoduck tubes do not fall within the ordinary meaning of the word “structures” referred to in the definition of development. WAC 173-27-030(15) defines structure as “a permanent or temporary edifice or building, or any piece

of work artificially built or composed of parts joined together in some definite manner.” This does not suggest that a structure could comprise of PVC tubes on a beach. The tubes are not “edifices or buildings” taken separately, they do not form an “edifice or building” taken together, nor are the tubes “parts joined together in a definite manner.” Our conclusion is reinforced by *Cowiche Canyon Conservancy*, above, where the Court rejected an argument that removal of railroad trestles was a development, because it modified a structure. The Court there held that removal resulted in no structures, applying the common meaning of the term.

Drilling, Filling, And Removal Of Materials

The term “drilling” is commonly defined in terms of creating a hole. See Merriam-Webster OnLine Dictionary, Drill, “**2a** (1): to bore or drive a hole in (2): to make by piercing action <drill a hole>”. While tubes could be creatively described as being “drilled into” the substrate, no hole is created. The tube is a temporary barrier protecting the juvenile clam.

Similarly, while sand, silt, and gravel is disturbed, geoduck aquaculture does not involve filling of tidelands. In contrast, *Dep’t of Fisheries v. Mason Cy.*, SHB No. 88-26, 1989 WL 106061 (Wash. Shore. Hrgs. Bd. Aug. 15, 1989), the Shoreline Hearings Board considered a proposal to apply several inches of gravel over large areas of tidelands to create an artificial bed for clam production. That filling required a substantial development permit.

Finally, if sediment is disrupted during harvest, only a minimal amount of sediment is actually removed with the clam. This minimal amount of materials removed does not comport with a reasonable interpretation of the statutory language concerning “removal of materials.” See *Black’s Law Dictionary* 464 (8th ed. 2004), “*de minimis non curat lex*” (the law does not concern itself with trifles).

[original page 10] Placing Obstructions

The statutory definition refers to “placing obstructions” as “development.” Assuming that this refers to blocking or clogging passage on the water, we conclude that it is conceivable that a project might involve tubes, nets, or other materials that obstruct passage. Arguably, the tubes could obstruct a walker, but that would be relevant only if placed on tidelands used by the public. This term should be applied based on the particular project, as in *Washington Shell Fish*. Local government, as the primary administrator of the substantial development permit system, would determine whether a particular project involves placing obstructions. See RCW 90.58.140(3); *Samuel’s Furniture*, 147 Wn.2d at 455.^[8]

The Farming Practices Exception

Several comment letters have raised the farming practices exception from the substantial development permit in RCW 90.58.030(3)(e)(iv). This subsection exempts:

Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels.

Every term in the exception describes upland farming; no term reflects aquaculture. See also WAC 173-27-040(2)(e) (adopting statute into regulation without any clarification or interpretation of aquaculture practices). Moreover, the Department of Ecology guidelines on shoreline uses distinguish between aquaculture and agriculture. See WAC 173-26-241(3)(a), (b). We found no history to suggest that RCW 90.58.030(3)(e)(iv) was adopted to address aquaculture activities or that it has been applied to aquaculture.^[9] Accordingly, we conclude that this exception does not apply to geoduck tube aquaculture.

To summarize, we conclude that geoduck aquaculture requires a substantial development permit if conducted as described by *Washington Shell Fish*. We do not conclude that geoduck **[original page 11]** aquaculture inherently involves interference with normal public use of the surface waters in all locations. We also conclude that it does not involve dredging, construction, or other types of development described by RCW 90.58.030(3)(d). Therefore, the substantial development permit requirement is not necessarily required for intertidal geoduck farming.

As described in the next section, our conclusion does not imply that the SMA lacks authority for local government to manage geoduck aquaculture use of the shoreline. The SMA authorizes conditional use permits to manage shoreline uses.

3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?

If there is a geoduck farm that meets the definition of substantial development, then both state and local government have a variety of options. First, government may simply pursue informal measures, like asking the geoduck farmer to obtain a permit. Second, RCW 90.58.210 authorizes Ecology and local government to issue penalties, orders requiring permits, and orders requiring corrective action.^[10]

We also note that government may consider using “conditional use permits” to regulate geoduck aquaculture. The *Clam Shacks* case, cited above, illustrates this SMA regulatory power. In that case, a shellfish harvester using a “hydraulic rake” claimed that if his harvests did not involve substantial development, then no SMA permit could be required to regulate it as a use of the shoreline. The Washington Supreme Court unanimously rejected the argument. The SMA includes express directions and power to regulate and manage “uses” of the shoreline. Local government may, therefore, require a conditional use permit to manage that hydraulic rake clam harvest. The opinion contains the following discussion:

Clam Shacks argues that the language of the statute and its application of the permit process only to substantial developments limits the SMA to developments as defined. Thus, Clam Shacks concludes there can be no use control, regardless of the master program, unless the activity involved constitutes a development. We disagree. Such construction would frustrate the declared policy of the SMA.

Clam Shacks v. Skagit Cy., 109 Wn.2d at 95.

It is likely that shoreline master programs have not considered using conditional use permits to regulate geoduck aquaculture and, therefore, that option is not immediately applicable in all jurisdictions. However, all local master programs are being reviewed and updated during the upcoming decade. See RCW 90.58.080. Ecology’s guidelines for updating master programs **[original page 12]** provide that aquaculture of this type is a favored use of the shoreline environment that should be accommodated by shoreline master programs. WAC 173-26-241(3)(b).^[11] Therefore, this option is prospectively available as a means for managing existing and future operations.

We trust that the foregoing analysis will be helpful to you.

Sincerely,

Attorney General

ROB

MCKENNA

JAY
Deputy Solicitor General

DOUGLAS

GECK

[1] Intertidal here simply refers to tidelands that are periodically covered and uncovered by the daily high and low tides. It is not necessary to distinguish types of tidelands and bedlands to address the questions.

[2] Em bedded and immobile shellfish are part of the real property, under Washington law, belonging to the landowner. *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000). The proprietary aspect of shellfish is illustrated by statutes such as RCW 79.135.130, which requires payment of fair market value for existing shellfish on state aquatic lands before leasing to a shellfish farmer. Other state laws allow shellfish to be taken without regard to the state's proprietary interest. For example, shellfish on certain parks and public lands are available for recreational harvest under licenses and rules of the WDFW and other state agencies.

Shellfish may also be subject to a "right of taking fish at all usual and accustomed grounds and stations" created by federal treaties with various Indian Tribes in Washington. Because federal law creates the treaties and preempts contrary state laws, the right of taking shellfish under the treaty can be applied notwithstanding state property law. See *United States v. State of Washington*, 157 F.3d 630, 646-47 (9th Cir. 1998).

[3] In *Hodgson*, a criminal defendant contended that geoduck clams he harvested from DNR-managed bedlands were private sector cultured aquatic products. The court took judicial notice that geoduck clams take five years to mature and rejected the defendant's argument because the harvester's connection with the public geoduck beds was transitory, and wild geoduck clams were not under the active supervision and management of a private aquatic farmer at the time of planting. *State v. Hodgson*, 60 Wn. App. at 17-18. In contrast to *Hodgson*, your question deals with an aquatic farmer who actively supervises and manages the geoduck clam bed at the time of planting.

[4] Thus, a person who constructs a boat ramp, dock, or other construction work at an aquatic farm would require an HPA permit, because the permit regulates construction; it does not regulate aquaculture products.

[5] Whether lenity applies here depends on whether a application of HPA laws to a geoduck planter would be criminal. An ordinance is penal or criminal in nature when "a violation of its provisions can be punished by imprisonment and/or a fine." *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297 (1987). An ordinance is remedial, rather than criminal, "when it provides for the remission of penalties and affords a remedy for the enforcement of rights and *redress of injuries*." *Von Thiele*, 47 Wn. App. at 562. Civil and criminal penalties may coexist without "converting the civil penalty scheme into a criminal or penal proceeding." *Von Thiele*, 47 Wn. App. at 561.

We interpret the HPA laws using lenity because of the primacy of the criminal sanctions; the HPA code includes minimal civil remedial powers. For example, the HPA laws include no provisions for civil orders to stop work or to take corrective actions. See RCW 90.58.210(3) (Shoreline Management Act authorizes civil penalty, stop work orders, and corrective action orders). While the HPA laws include a narrow civil penalty provision, RCW 77.55.291, the requirement of an HPA is enforced with a criminal sanction under case law. *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 602 P.2d 1172 (1979).

[6] In addition to substantial development permits, the SMA contemplates conditional use permits and variance permits. These latter types of permits are issued by local government but require the approval of the Department of Ecology to be valid. RCW 90.58.140(10); *Samuel's Furniture*, 147 Wn.2d at 455, n.13. We discuss the option of using conditional use permitting in response to the third question.

[7] The *Washington Shell Fish* case arose after the county leased 47 acres of county park tidelands for a nominal fee and the lessee proceeded to remove approximately 2.7 million dollars worth of geoducks. *Wash. Shell Fish*, 132 Wash. App. at 253. The county then raised the issue of a substantial development permit and also

challenged the validity of its lease. See *Pierce Cy. v. Wash. Shell Fish, Inc.*, No. 31380-4-II, 2005 WL 536097 (Wash. Ct. App. Mar. 8, 2005) (unpublished).

[8] Washington common law also shows that the private property interest in a shellfish farm allows the farmer to restrain the general public from interfering with the farm. See *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 P. 922 (1908) (lessee of state aquatic lands devoted to shellfish operation can bring trespass action against others who enter the lands and take clams). Thus, even if the PVC tubes might hypothetically affect a person crossing a shellfish farm, it is not a cognizable obstruction of the public, because the person is there at the farmer's express or implied permission.

[9] We note that the findings section of the Aquaculture Marketing Act, RCW 15.85.010, describes a general goal that aquaculture "should be considered" a branch of the agricultural industry for purposes of laws that advance and promote the agricultural industry. "When the legislature employs the words 'the legislature finds,' as it did in RCW 80.36.510, it sets forth policy statements that do not give rise to enforceable rights and duties. See *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wash.2d 135, 139, 588 P.2d 185 (1978)." *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004). The Aquaculture Marketing Act, therefore, does not amend RCW 90.58.030(3)(e)(iv) to change the intent to address farming as described by the words in that subsection. We conclude that for marketing purposes, the Legislature intended to include aquaculture with agriculture but did not intend to erase all distinctions for purposes of environmental regulation or other laws not related to marketing.

[10] We interpret your third question as addressing unpermitted projects where no local decision expressly determined that no substantial development permit is required. If local government previously decided that a project is not a substantial development and did so with a final written local decision, then that decision may be final and unappealable because of appeal deadlines in the Land Use Petition Act. See *Samuel's Furniture*, 147 Wn.2d at 463 (local government decision that project was not in the shoreline became a final decision that no SMA permit is required because it was not appealed under the Land Use Petition Act, RCW 36.70C).

[11] Local government regulation of aquaculture in the shoreline must be consistent with the policies of the SMA, which promote appropriate aquaculture uses. See AGO 1988 No. 24 (opining that local government regulation of aquaculture in the shoreline must be done consistent with the SMA). As explained in this 1988 Attorney General's Opinion, the Planning Enabling Act, RCW 36.70, and local police powers cannot be used to impose greater restrictions on aquaculture than allowed under the shoreline master program.

EXHIBIT 6

CERTIFICATION OF ENROLLMENT

SECOND ENGROSSED SUBSTITUTE SENATE BILL 6406

Chapter 1, Laws of 2012

(partial veto)

62nd Legislature
2012 1st Special Session

NATURAL RESOURCE MANAGEMENT

EFFECTIVE DATE: 07/10/12

Passed by the Senate April 10, 2012
YEAS 34 NAYS 13

BRAD OWEN

President of the Senate

Passed by the House April 10, 2012
YEAS 75 NAYS 23

FRANK CHOPP

Speaker of the House of Representatives

Approved May 2, 2012, 1:36 p.m., with
the exception of Sections 305 and 306
which are vetoed.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SECOND ENGROSSED SUBSTITUTE SENATE BILL 6406** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 2, 2012

**Secretary of State
State of Washington**

SECOND ENGROSSED SUBSTITUTE SENATE BILL 6406

AS AMENDED BY THE HOUSE

Passed Legislature - 2012 1st Special Session

State of Washington 62nd Legislature 2012 1st Special Session

By Senate Energy, Natural Resources & Marine Waters (originally sponsored by Senators Hargrove, Hobbs, Delvin, Hatfield, Tom, Stevens, Regala, Morton, Ranker, and Shin)

READ FIRST TIME 02/03/12.

1 AN ACT Relating to modifying programs that provide for the
2 protection of the state's natural resources; amending RCW 77.55.021,
3 77.55.151, 77.55.231, 76.09.040, 76.09.050, 76.09.150, 76.09.065,
4 76.09.470, 76.09.030, 43.21C.031, 43.21C.229, 82.02.020, 36.70A.490,
5 36.70A.500, 43.21C.110, 43.21C.095, and 90.48.260; reenacting and
6 amending RCW 77.55.011, 76.09.060, and 76.09.020; adding new sections
7 to chapter 77.55 RCW; adding a new section to chapter 76.09 RCW; adding
8 a new section to chapter 43.30 RCW; adding new sections to chapter
9 43.21C RCW; creating new sections; prescribing penalties; providing a
10 contingent effective date; and providing expiration dates.

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

12 NEW SECTION. **Sec. 1.** The legislature finds that significant
13 opportunities exist to modify programs that provide for management and
14 protection of the state's natural resources, including the state's
15 forests, fish, and wildlife, in order to streamline regulatory
16 processes and achieve program efficiencies while at the same time
17 increasing the sustainability of program funding and maintaining
18 current levels of natural resource protection. The legislature intends
19 to update provisions relating to natural resource management and

1 regulatory programs including the hydraulic project approval program,
2 forest practices act, and state environmental policy act, in order to
3 achieve these opportunities.

4 **PART ONE**

5 **Hydraulic Project Approvals**

6 **Sec. 101.** RCW 77.55.011 and 2010 c 210 s 26 are each reenacted and
7 amended to read as follows:

8 The definitions in this section apply throughout this chapter
9 unless the context clearly requires otherwise.

10 (1) "Bed" means the land below the ordinary high water lines of
11 state waters. This definition does not include irrigation ditches,
12 canals, storm water runoff devices, or other artificial watercourses
13 except where they exist in a natural watercourse that has been altered
14 artificially.

15 (2) "Board" means the pollution control hearings board created in
16 chapter 43.21B RCW.

17 (3) "Commission" means the state fish and wildlife commission.

18 (4) "Date of receipt" has the same meaning as defined in RCW
19 43.21B.001.

20 (5) "Department" means the department of fish and wildlife.

21 (6) "Director" means the director of the department of fish and
22 wildlife.

23 (7) "Emergency" means an immediate threat to life, the public,
24 property, or of environmental degradation.

25 (8) "Hydraulic project" means the construction or performance of
26 work that will use, divert, obstruct, or change the natural flow or bed
27 of any of the salt or freshwaters of the state.

28 (9) "Imminent danger" means a threat by weather, water flow, or
29 other natural conditions that is likely to occur within sixty days of
30 a request for a permit application.

31 (10) "Marina" means a public or private facility providing boat
32 moorage space, fuel, or commercial services. Commercial services
33 include but are not limited to overnight or live-aboard boating
34 accommodations.

35 (11) "Marine terminal" means a public or private commercial wharf

1 located in the navigable water of the state and used, or intended to be
2 used, as a port or facility for the storing, handling, transferring, or
3 transporting of goods to and from vessels.

4 (12) "Ordinary high water line" means the mark on the shores of all
5 water that will be found by examining the bed and banks and
6 ascertaining where the presence and action of waters are so common and
7 usual, and so long continued in ordinary years as to mark upon the soil
8 or vegetation a character distinct from the abutting upland. Provided,
9 that in any area where the ordinary high water line cannot be found,
10 the ordinary high water line adjoining saltwater is the line of mean
11 higher high water and the ordinary high water line adjoining freshwater
12 is the elevation of the mean annual flood.

13 (13) "Permit" means a hydraulic project approval permit issued
14 under this chapter.

15 (14) "Sandbars" includes, but is not limited to, sand, gravel,
16 rock, silt, and sediments.

17 (15) "Small scale prospecting and mining" means the use of only the
18 following methods: Pans; nonmotorized sluice boxes; concentrators; and
19 minirocker boxes for the discovery and recovery of minerals.

20 (16) "Spartina," "purple loosestrife," and "aquatic noxious weeds"
21 have the same meanings as defined in RCW 17.26.020.

22 (17) "Streambank stabilization" means those projects that prevent
23 or limit erosion, slippage, and mass wasting. These projects include,
24 but are not limited to, bank resloping, log and debris relocation or
25 removal, planting of woody vegetation, bank protection using rock or
26 woody material or placement of jetties or groins, gravel removal, or
27 erosion control.

28 (18) "Tide gate" means a one-way check valve that prevents the
29 backflow of tidal water.

30 (19) "Waters of the state" and "state waters" means all salt and
31 freshwaters waterward of the ordinary high water line and within the
32 territorial boundary of the state.

33 (20) "Emergency permit" means a verbal hydraulic project approval
34 or the written follow-up to the verbal approval issued to a person
35 under RCW 77.55.021(12).

36 (21) "Expedited permit" means a hydraulic project approval issued
37 to a person under RCW 77.55.021 (14) and (16).

1 (22) "Forest practices hydraulic project" means a hydraulic project
2 that requires a forest practices application or notification under
3 chapter 76.09 RCW.

4 (23) "Multiple site permit" means a hydraulic project approval
5 issued to a person under RCW 77.55.021 for hydraulic projects occurring
6 at more than one specific location and which includes site-specific
7 requirements.

8 (24) "Pamphlet hydraulic project" means a hydraulic project for the
9 removal or control of aquatic noxious weeds conducted under the aquatic
10 plants and fish pamphlet authorized by RCW 77.55.081, or for mineral
11 prospecting and mining conducted under the gold and fish pamphlet
12 authorized by RCW 77.55.091.

13 (25) "Permit modification" means a hydraulic project approval
14 issued to a person under RCW 77.55.021 that extends, renews, or changes
15 the conditions of a previously issued hydraulic project approval.

16 **Sec. 102.** RCW 77.55.021 and 2010 c 210 s 27 are each amended to
17 read as follows:

18 (1) Except as provided in RCW 77.55.031, 77.55.051, ~~((and))~~
19 77.55.041, and section 201 of this act, in the event that any person or
20 government agency desires to undertake a hydraulic project, the person
21 or government agency shall, before commencing work thereon, secure the
22 approval of the department in the form of a permit as to the adequacy
23 of the means proposed for the protection of fish life.

24 (2) A complete written application for a permit may be submitted in
25 person or by registered mail and must contain the following:

26 (a) General plans for the overall project;

27 (b) Complete plans and specifications of the proposed construction
28 or work within the mean higher high water line in saltwater or within
29 the ordinary high water line in freshwater;

30 (c) Complete plans and specifications for the proper protection of
31 fish life; ~~((and))~~

32 (d) Notice of compliance with any applicable requirements of the
33 state environmental policy act, unless otherwise provided for in this
34 chapter; and

35 (e) Payment of all applicable application fees charged by the
36 department under section 103 of this act.

1 (3) The department may establish direct billing accounts or other
2 funds transfer methods with permit applicants to satisfy the fee
3 payment requirements of section 103 of this act.

4 (4) The department may accept complete, written applications as
5 provided in this section for multiple site permits and may issue these
6 permits. For multiple site permits, each specific location must be
7 identified.

8 (5) With the exception of emergency permits as provided in
9 subsection (12) of this section, applications for permits must be
10 submitted to the department's headquarters office in Olympia. Requests
11 for emergency permits as provided in subsection (12) of this section
12 may be made to the permitting biologist assigned to the location in
13 which the emergency occurs, to the department's regional office in
14 which the emergency occurs, or to the department's headquarters office.

15 (6) Except as provided for emergency permits in subsection (12) of
16 this section, the department may not proceed with permit review until
17 all fees are paid in full as required in section 103 of this act.

18 (7)(a) Protection of fish life is the only ground upon which
19 approval of a permit may be denied or conditioned. Approval of a
20 permit may not be unreasonably withheld or unreasonably conditioned.

21 (b) Except as provided in this subsection and subsections (~~((8),~~
22 ~~(10), and~~) (12) through (14) and (16) of this section, the department
23 has forty-five calendar days upon receipt of a complete application to
24 grant or deny approval of a permit. The forty-five day requirement is
25 suspended if:

26 (i) After ten working days of receipt of the application, the
27 applicant remains unavailable or unable to arrange for a timely field
28 evaluation of the proposed project;

29 (ii) The site is physically inaccessible for inspection;

30 (iii) The applicant requests a delay; or

31 (iv) The department is issuing a permit for a storm water discharge
32 and is complying with the requirements of RCW 77.55.161(3)(b).

33 (~~((b))~~) (c) Immediately upon determination that the forty-five day
34 period is suspended under (b) of this subsection, the department shall
35 notify the applicant in writing of the reasons for the delay.

36 (~~((e))~~) (d) The period of forty-five calendar days may be extended
37 if the permit is part of a multiagency permit streamlining effort and

1 all participating permitting agencies and the permit applicant agree to
2 an extended timeline longer than forty-five calendar days.

3 ~~((+4))~~ (8) If the department denies approval of a permit, the
4 department shall provide the applicant a written statement of the
5 specific reasons why and how the proposed project would adversely
6 affect fish life.

7 (a) Except as provided in (b) of this subsection, issuance, denial,
8 conditioning, or modification of a permit shall be appealable to the
9 board within thirty days from the date of receipt of the decision as
10 provided in RCW 43.21B.230.

11 (b) Issuance, denial, conditioning, or modification of a permit may
12 be informally appealed to the department within thirty days from the
13 date of receipt of the decision. Requests for informal appeals must be
14 filed in the form and manner prescribed by the department by rule. A
15 permit decision that has been informally appealed to the department is
16 appealable to the board within thirty days from the date of receipt of
17 the department's decision on the informal appeal.

18 ~~((+5))~~ (9)(a) The permittee must demonstrate substantial progress
19 on construction of that portion of the project relating to the permit
20 within two years of the date of issuance.

21 (b) Approval of a permit is valid for ~~((a period of))~~ up to five
22 years from the date of issuance, except as provided in (c) of this
23 subsection and in RCW 77.55.151.

24 (c) A permit remains in effect without need for periodic renewal
25 for hydraulic projects that divert water for agricultural irrigation or
26 stock watering purposes and that involve seasonal construction or other
27 work. A permit for streambank stabilization projects to protect farm
28 and agricultural land as defined in RCW 84.34.020 remains in effect
29 without need for periodic renewal if the problem causing the need for
30 the streambank stabilization occurs on an annual or more frequent
31 basis. The permittee must notify the appropriate agency before
32 commencing the construction or other work within the area covered by
33 the permit.

34 ~~((+6))~~ (10) The department may, after consultation with the
35 permittee, modify a permit due to changed conditions. A modification
36 under this subsection is not subject to the fees provided under section
37 103 of this act. The modification is appealable as provided in
38 subsection ~~((+4))~~ (8) of this section. For a hydraulic project~~((s))~~

1 that diverts water for agricultural irrigation or stock watering
2 purposes, ~~((or))~~ when the hydraulic project or other work is associated
3 with streambank stabilization to protect farm and agricultural land as
4 defined in RCW 84.34.020, the burden is on the department to show that
5 changed conditions warrant the modification in order to protect fish
6 life.

7 ~~((+7))~~ (11) A permittee may request modification of a permit due
8 to changed conditions. The request must be processed within forty-five
9 calendar days of receipt of the written request and payment of
10 applicable fees under section 103 of this act. A decision by the
11 department is appealable as provided in subsection ~~((+4))~~ (8) of this
12 section. For a hydraulic project ~~((s))~~ that diverts water for
13 agricultural irrigation or stock watering purposes, ~~((or))~~ when the
14 hydraulic project or other work is associated with streambank
15 stabilization to protect farm and agricultural land as defined in RCW
16 84.34.020, the burden is on the permittee to show that changed
17 conditions warrant the requested modification and that such a
18 modification will not impair fish life.

19 ~~((+8))~~ (12)(a) The department, the county legislative authority,
20 or the governor may declare and continue an emergency. If the county
21 legislative authority declares an emergency under this subsection, it
22 shall immediately notify the department. A declared state of emergency
23 by the governor under RCW 43.06.010 shall constitute a declaration
24 under this subsection.

25 (b) The department, through its authorized representatives, shall
26 issue immediately, upon request, ~~((oral))~~ verbal approval for a stream
27 crossing, or work to remove any obstructions, repair existing
28 structures, restore streambanks, protect fish life, or protect property
29 threatened by the stream or a change in the stream flow without the
30 necessity of obtaining a written permit prior to commencing work.
31 Conditions of the emergency ~~((oral))~~ verbal permit must be
32 ~~((established by the department and))~~ reduced to writing within thirty
33 days and complied with as provided for in this chapter.

34 (c) The department may not require the provisions of the state
35 environmental policy act, chapter 43.21C RCW, to be met as a condition
36 of issuing a permit under this subsection.

37 ~~((+9))~~ (d) The department may not charge a person requesting an

1 emergency permit any of the fees authorized by section 103 of this act
2 until after the emergency permit is issued and reduced to writing.

3 (13) All state and local agencies with authority under this chapter
4 to issue permits or other authorizations in connection with emergency
5 water withdrawals and facilities authorized under RCW 43.83B.410 shall
6 expedite the processing of such permits or authorizations in keeping
7 with the emergency nature of such requests and shall provide a decision
8 to the applicant within fifteen calendar days of the date of
9 application.

10 ~~((+10+))~~ (14) The department or the county legislative authority
11 may determine an imminent danger exists. The county legislative
12 authority shall notify the department, in writing, if it determines
13 that an imminent danger exists. In cases of imminent danger, the
14 department shall issue an expedited written permit, upon request, for
15 work to remove any obstructions, repair existing structures, restore
16 banks, protect fish resources, or protect property. Expedited permit
17 requests require a complete written application as provided in
18 subsection (2) of this section and must be issued within fifteen
19 calendar days of the receipt of a complete written application.
20 Approval of an expedited permit is valid for up to sixty days from the
21 date of issuance. The department may not require the provisions of the
22 state environmental policy act, chapter 43.21C RCW, to be met as a
23 condition of issuing a permit under this subsection.

24 ~~((+11+))~~ (15)(a) For any property, except for property located on
25 a marine shoreline, that has experienced at least two consecutive years
26 of flooding or erosion that has damaged or has threatened to damage a
27 major structure, water supply system, septic system, or access to any
28 road or highway, the county legislative authority may determine that a
29 chronic danger exists. The county legislative authority shall notify
30 the department, in writing, when it determines that a chronic danger
31 exists. In cases of chronic danger, the department shall issue a
32 permit, upon request, for work necessary to abate the chronic danger by
33 removing any obstructions, repairing existing structures, restoring
34 banks, restoring road or highway access, protecting fish resources, or
35 protecting property. Permit requests must be made and processed in
36 accordance with subsections (2) and ~~((+3+))~~ (7) of this section.

37 (b) Any projects proposed to address a chronic danger identified
38 under (a) of this subsection that satisfies the project description

1 identified in RCW 77.55.181(1)(a)(ii) are not subject to the provisions
2 of the state environmental policy act, chapter 43.21C RCW. However,
3 the project is subject to the review process established in RCW
4 77.55.181(3) as if it were a fish habitat improvement project.

5 ~~((12))~~ (16) The department may issue an expedited written permit
6 in those instances where normal permit processing would result in
7 significant hardship for the applicant or unacceptable damage to the
8 environment. Expedited permit requests require a complete written
9 application as provided in subsection (2) of this section and must be
10 issued within fifteen calendar days of the receipt of a complete
11 written application. Approval of an expedited permit is valid for up
12 to sixty days from the date of issuance. The department may not
13 require the provisions of the state environmental policy act, chapter
14 43.21C RCW, to be met as a condition of issuing a permit under this
15 subsection.

16 NEW SECTION. **Sec. 103.** A new section is added to chapter 77.55
17 RCW to read as follows:

18 (1) The department shall charge an application fee of one hundred
19 fifty dollars for a hydraulic project permit or permit modification
20 issued under RCW 77.55.021 where the project is located at or below the
21 ordinary high water line. The application fee established under this
22 subsection may not be charged after June 30, 2017.

23 (2) The following hydraulic projects are exempt from all fees
24 listed under this section:

25 (a) Hydraulic projects approved under applicant-funded contracts
26 with the department that pay for the costs of processing those
27 projects;

28 (b) If sections 201 through 203 of this act are enacted into law by
29 June 30, 2012, forest practices hydraulic projects;

30 (c) Pamphlet hydraulic projects;

31 (d) Mineral prospecting and mining activities; and

32 (e) Hydraulic projects occurring on farm and agricultural land, as
33 that term is defined in RCW 84.34.020.

34 (3) All fees collected under this section must be deposited in the
35 hydraulic project approval account created in section 104 of this act.

36 (4) The fee provisions contained in this section are prospective

1 only. The department of fish and wildlife may not charge fees for
2 hydraulic project permits issued under this title prior to the
3 effective date of this section.

4 (5) This section expires June 30, 2017.

5 NEW SECTION. Sec. 104. A new section is added to chapter 77.55
6 RCW to read as follows:

7 (1) The hydraulic project approval account is created in the state
8 treasury. All receipts from application fees for hydraulic project
9 approval applications collected under section 103 of this act must be
10 deposited into the account.

11 (2) Except for unanticipated receipts under RCW 43.79.260 through
12 43.79.282, moneys in the hydraulic project approval account may be
13 spent only after appropriation.

14 (3) Expenditures from the hydraulic project approval account may be
15 used only to fund department activities relating to implementing and
16 operating the hydraulic project approval program.

17 **Sec. 105.** RCW 77.55.151 and 2005 c 146 s 502 are each amended to
18 read as follows:

19 ~~(1) ((For a marina or marine terminal in existence on June 6, 1996,~~
20 ~~or a marina or marine terminal that has received a permit for its~~
21 ~~initial construction, a renewable, five-year permit shall be issued,~~
22 ~~upon request, for regular maintenance activities of the marina or~~
23 ~~marine terminal.~~

24 ~~(2) Upon construction of a new marina or marine terminal that has~~
25 ~~received a permit, a renewable, five-year permit shall be issued, upon~~
26 ~~request, for regular maintenance activities of the marina or marine~~
27 ~~terminal.~~

28 ~~(3) For the purposes of this section, regular maintenance~~
29 ~~activities are only those activities necessary to restore the marina or~~
30 ~~marine terminal to the conditions approved in the initial permit.~~
31 ~~These activities may include, but are not limited to, dredging, piling~~
32 ~~replacement, and float replacement.~~

33 (4)) Upon application under RCW 77.55.021, the department shall
34 issue a renewable, five-year permit to a marina or marine terminal for
35 its regular maintenance activities identified in the application.

1 (2) For the purposes of this section, regular maintenance
2 activities may include, but are not limited to:

3 (a) Maintenance or repair of a boat ramp, launch, or float within
4 the existing footprint;

5 (b) Maintenance or repair of an existing overwater structure within
6 the existing footprint;

7 (c) Maintenance or repair of boat lifts or railway launches;

8 (d) Maintenance or repair of pilings, including the replacement of
9 bumper pilings;

10 (e) Dredging of less than fifty cubic yards;

11 (f) Maintenance or repair of shoreline armoring or bank protection;

12 (g) Maintenance or repair of wetland, riparian, or estuarine
13 habitat; and

14 (h) Maintenance or repair of an existing outfall.

15 (3) The five-year permit must include a requirement that a
16 fourteen-day notice be given to the department before regular
17 maintenance activities begin.

18 (4) A permit under this section is subject to the application fee
19 provided in section 103 of this act.

20 **Sec. 106.** RCW 77.55.231 and 2005 c 146 s 601 are each amended to
21 read as follows:

22 (1) Conditions imposed upon a permit must be reasonably related to
23 the project. The permit conditions must ensure that the project
24 provides proper protection for fish life, but the department may not
25 impose conditions that attempt to optimize conditions for fish life
26 that are out of proportion to the impact of the proposed project.

27 (2) The permit must contain provisions allowing for minor
28 modifications to the plans and specifications without requiring
29 reissuance of the permit.

30 (3) The permit must contain provisions that allow for minor
31 modifications to the required work timing without requiring the
32 reissuance of the permit. "Minor modifications to the required work
33 timing" means a minor deviation from the timing window set forth in the
34 permit when there are no spawning or incubating fish present within the
35 vicinity of the project.

1 consistent with section 202 of this act. The concurrence review
2 process must allow the department up to thirty days to review forest
3 practices hydraulic projects meeting the criteria under section 202(2)
4 (a) and (b) of this act for consistency with fish protection standards.

5 (4) The department shall notify the department of natural resources
6 prior to beginning a rule-making process that may affect activities
7 regulated under chapter 76.09 RCW.

8 (5) The department shall act consistent with appendix M of the
9 forest and fish report, as the term "forests and fish report" is
10 defined in RCW 76.09.020, when modifying fish protection rules that may
11 affect activities regulated under chapter 76.09 RCW.

12 (6) The department may review and provide comments on any forest
13 practices application. The department shall review, and either verify
14 that the review has occurred or comment on, forest practices
15 applications that include a forest practices hydraulic project
16 involving fish bearing waters or shorelines of the state, as that term
17 is defined in RCW 90.58.030. Prior to commenting and whenever
18 reasonably practicable, the department shall communicate with the
19 applicant regarding the substance of the project.

20 (7) The department shall participate in effectiveness monitoring
21 for forest practices hydraulic projects through its role in the review
22 processes provided under WAC 222-08-160 as it existed on the effective
23 date of this section.

24 NEW SECTION. **Sec. 202.** A new section is added to chapter 76.09
25 RCW to read as follows:

26 (1) The department may request information and technical assistance
27 from the department of fish and wildlife regarding any forest practices
28 hydraulic project regulated under this chapter.

29 (2) A concurrence review process is established for certain forest
30 practices hydraulic projects, as follow:

31 (a) After receiving an application under RCW 76.09.050 that
32 includes a forest practices hydraulic project involving one or more
33 water crossing structures meeting the criteria of (b) of this
34 subsection, the department shall provide all necessary information
35 provided by the applicant to the department of fish and wildlife for
36 concurrence review consistent with section 201(3) of this act. The

EXHIBIT 7

SENATE BILL 6406

State of Washington

62nd Legislature

2012 Regular Session

By Senators Hargrove, Hobbs, Delvin, Hatfield, Tom, Stevens, Regala, Morton, Ranker, and Shin

Read first time 01/20/12. Referred to Committee on Energy, Natural Resources & Marine Waters.

1 AN ACT Relating to modifying programs that provide for the
2 protection of the state's natural resources; amending RCW 77.55.021,
3 77.15.300, 77.55.151, 77.55.231, 76.09.040, 76.09.050, 76.09.150,
4 76.09.065, 76.09.460, 76.09.470, 76.09.030, 43.21C.170, 43.21C.110,
5 43.21C.229, 43.21C.031, 36.70A.280, 43.21C.010, 43.21C.030, 43.21C.033,
6 43.21C.036, 43.21C.0382, 43.21C.0383, 43.21C.0384, 43.21C.060,
7 43.21C.120, 43.21C.130, 43.21C.135, 43.21C.240, and 43.21C.300;
8 reenacting and amending RCW 77.55.011, 76.09.060, and 76.09.020; adding
9 new sections to chapter 77.55 RCW; adding a new section to chapter
10 76.09 RCW; adding a new section to chapter 43.30 RCW; adding new
11 sections to chapter 43.21C RCW; adding a new section to chapter 36.70B
12 RCW; creating new sections; decodifying RCW 43.21C.910, 43.21C.911,
13 43.21C.912, 43.21C.913, and 43.21C.914; repealing RCW 77.55.291,
14 36.70B.110, 43.21C.175, 43.21C.160, and 43.21C.040; prescribing
15 penalties; providing contingent effective dates; and providing
16 expiration dates.

17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

18 NEW SECTION. **Sec. 1.** The legislature finds that significant
19 opportunities exist to modify programs that provide for management and

1 NEW SECTION. **Sec. 103.** A new section is added to chapter 77.55
2 RCW to read as follows:

3 (1) Except as otherwise provided in this section, the department
4 shall charge a submittal fee and a processing fee, established by the
5 department consistent with this section, for all hydraulic project
6 permits issued under RCW 77.55.021, to recover a portion of the costs
7 for processing and issuing decisions on permit notifications and
8 applications, administering fee collections, and compliance and
9 effectiveness monitoring and enforcement of projects requiring a
10 permit.

11 (2) When assessing fees for permits under this section, the
12 department must categorize the following hydraulic projects as low
13 complexity:

- 14 (a) Anchoring or mooring buoys and navigation aids;
- 15 (b) Water crossing structures in nonfish bearing waters
16 (maintenance or repair);
- 17 (c) Bridge repair or maintenance above the ordinary high water line
18 (cleaning, painting, or redecking);
- 19 (d) Conduit crossing using boring;
- 20 (e) Boat ramps or launches within the existing footprint
21 (maintenance, repair, or replacement);
- 22 (f) Temporary or permanent stream gauges or scientific instruments;
- 23 (g) Boom (installation or maintenance);
- 24 (h) Existing overwater structure within the existing footprint, not
25 including marinas or marine terminals (maintenance or repair);
- 26 (i) Beaver dam work;
- 27 (j) Riparian habitat (maintenance or repair);
- 28 (k) Existing outfall (maintenance or repair);
- 29 (l) Aquaculture (maintenance or repair);
- 30 (m) Habitat freshwater beach creation (maintenance or repair);
- 31 (n) Shoreline armoring or bank protection (maintenance or repair);
- 32 (o) Breeding substrate (maintenance or repair);
- 33 (p) Large woody material (maintenance or repair);
- 34 (q) Wetland and estuarine habitat work (maintenance or repair);
- 35 (r) Dredging of less than fifty cubic yards (maintenance or
36 repair);
- 37 (s) Boat lifts or railway launches (maintenance or repair);
- 38 (t) Existing pilings (maintenance or repair);

- 1 (u) Pump water diversions and fish screens (maintenance or repair);
2 (v) Gravity water diversions and fish screens (maintenance or
3 repair);
4 (w) Tidegates (maintenance or repair); and
5 (x) Temporary water crossing structures installed and removed
6 within one season in fish-bearing waters.
- 7 (3) When assessing fees for permits under this section, the
8 department must categorize the following hydraulic projects as medium
9 complexity:
- 10 (a) Water crossing structures in fish-bearing waters (maintenance
11 or repair);
12 (b) Aquaculture;
13 (c) Habitat freshwater beach creation (new, replacement, or
14 removal);
15 (d) Shoreline armoring or bank protection of less than one hundred
16 feet in length (new, replacement, or removal);
17 (e) Jetties, dikes, or levees (maintenance or repair);
18 (f) Breeding substrate (new, replacement, or removal);
19 (g) Large woody material (removal, placement, or repositioning);
20 (h) Off channel, side channel, or in channel enhancement or
21 restoration work (maintenance or repair);
22 (i) Riparian habitat work (new, replacement, or removal);
23 (j) Bed modification excluding enhancement (maintenance or repair);
24 (k) Channel realignment in fish-bearing waters (maintenance or
25 repair);
26 (l) Conduit and cable work using trenching (new, replacement, or
27 removal);
28 (m) Dredging of less than fifty cubic yards (new);
29 (n) Fish passage barrier removal with replacement or retrofit using
30 methods such as baffles or log controls for passage through or over a
31 structure;
32 (o) Fish passage not associated with a water crossing structure
33 such as to bypass a natural barrier or a dam;
34 (p) Boat lifts and railway launches (new, replacement, and
35 removal);
36 (q) Boat ramps or launches outside of the footprint of any existing
37 (new, replacement, or removal);
38 (r) Work on pilings (new, replacement, or removal);

- 1 (s) Pump water diversions or fish screens (new, replacement, or
2 removal);
- 3 (t) Gravity water diversions or fish screens (new, replacement, or
4 removal);
- 5 (u) Outfalls (new, replacement, or removal);
- 6 (v) Tidegates (new, replacement, or removal);
- 7 (w) Mechanical aquatic plant control that is not a pamphlet
8 hydraulic project;
- 9 (x) Overwater structure outside of the footprint of any existing
10 structure, not including marinas or marine terminals (new or
11 replacement);
- 12 (y) Marinas or marine terminals (maintenance or repair);
- 13 (z) Dams not under jurisdiction of the federal energy regulatory
14 commission (maintenance or repair);
- 15 (aa) New water crossing structures in nonfish-bearing waters (new,
16 replacement, or removal); and
- 17 (bb) Temporary water crossing structures present for multiple
18 seasons in fish-bearing waters.
- 19 (4) When assessing fees for permits under this section, the
20 department must categorize the following hydraulic projects as high
21 complexity:
- 22 (a) Water crossing structures in fish-bearing waters (new,
23 replacement, removal, or modification);
- 24 (b) Shoreline armoring or bank protection of greater than one
25 hundred feet in length (new, replacement, or removal);
- 26 (c) Jetties, dikes, or levees (new, replacement, or removal);
- 27 (d) Off channel, side channel, or in channel enhancement or
28 restoration work (new, replacement, or removal);
- 29 (e) Wetland or estuarine habitat work (new, replacement, or
30 removal);
- 31 (f) Bed modification excluding enhancement (new, replacement, or
32 removal);
- 33 (g) Channel realignment in fish-bearing waters (new, replacement,
34 or removal);
- 35 (h) Dredging of more than fifty cubic yards (new, replacement,
36 removal, or maintenance);
- 37 (i) Fish passage barrier removal with replacement or retrofit using

1 methods such as baffles or log controls for passage through or over a
2 structure (new, replacement, or removal);

3 (j) Fish passage not associated with a water crossing structure
4 such as to bypass a natural barrier or a dam (new, replacement, or
5 removal);

6 (k) Marinas or marine terminals (new, replacement, or removal);

7 (l) Dams not under jurisdiction of the federal energy regulatory
8 commission (new, replacement, or removal);

9 (m) New project types not identified as low or medium complexity;
10 and

11 (n) Perpetual agriculture hydraulic projects.

12 (5) If the department receives applications for project types not
13 identified in subsections (2) through (4) of this section, it shall
14 categorize them as low, medium, or high complexity and charge fees
15 based on those categories consistent with the most similar project
16 types identified in subsections (2) through (4) of this section.

17 (6) (a) The department shall charge the following submittal fees:

18 (i) Fifty dollars for single site low complexity hydraulic project
19 permits and multiple site low complexity hydraulic project permits;

20 (ii) Seventy-five dollars for single site medium complexity
21 hydraulic project permits and multiple site medium complexity hydraulic
22 project permits; and

23 (iii) One hundred twenty-five dollars for single site high
24 complexity hydraulic project permits, multiple site high complexity
25 hydraulic project permits, and general permits.

26 (b) The department may not charge a submittal fee for permit
27 modifications.

28 (7) Unless the department establishes a lower fee consistent with
29 this section, a hydraulic project permit application must be assessed
30 one of the following processing fees:

31 (a) Seventy-five dollars for a single site low complexity hydraulic
32 project;

33 (b) One hundred seventy-five dollars for a single site medium
34 complexity hydraulic project;

35 (c) Five hundred seventy-five dollars for a single site high
36 complexity hydraulic project;

37 (d) For a multiple site permit, the applicable permit processing
38 fee assessed under this subsection for one of the hydraulic project

1 sites identified in the permit application, and twenty percent of the
2 applicable permit processing fee assessed under this subsection for
3 each additional site; and

4 (e) Four thousand eight hundred seventy-five dollars for a general
5 permit authorizing up to three types of hydraulic projects, and twenty
6 percent of the applicable permit processing fee assessed under this
7 subsection for each additional type of hydraulic project.

8 (8) In cases where hydraulic projects include work that falls into
9 more than one of the permit categories outlined in this section, the
10 fee charged must be based on the most complex component of the project.

11 (9) Unless the department establishes a lower fee consistent with
12 this section, all permit modifications must be assessed a seventy-five
13 dollar processing fee, except for those modified under RCW
14 77.55.021(10).

15 (10) The following hydraulic projects are exempt from all fees
16 listed under this section:

17 (a) Approved fish habitat enhancement projects authorized under RCW
18 77.55.181;

19 (b) Hydraulic projects approved under applicant-funded contracts
20 with the department that pay for the costs of processing those
21 projects;

22 (c) Projects approved under the cost-sharing program for fish
23 passage barriers authorized under RCW 76.13.150;

24 (d) If sections 201 through 203 of this act are enacted into law by
25 June 30, 2012, forest practices hydraulic projects;

26 (e) Pamphlet hydraulic projects; and

27 (f) Mineral prospecting and mining activities.

28 (11) The fees assessed in this section must be based on the scale
29 and complexity of the project and the relative effort required for
30 department staff to review the application, conduct site visits, and
31 consult with applicants as necessary. As such, at its discretion, the
32 department may reduce the fees charged to a person under this section
33 when the work required by the department to receive and process that
34 person's application or modify a permit is substantially less than
35 typically required. Decisions made by the department under this
36 subsection are not subject to appeal under RCW 77.55.021(8).

37 (12) The department shall refund fifty percent of the permit

1 processing fee to any person that properly applies for any permit or
2 permit modification under RCW 77.55.021 if the department:

3 (a) Fails to process the application or request within the
4 timelines required by RCW 77.55.021; or

5 (b) Denies the permit because the proposed project would adversely
6 affect fish life.

7 (13) The department shall refund one hundred percent of all fees
8 if:

9 (a) No permit is required for the proposed work; or

10 (b) The hydraulic project is exempted from substantial development
11 permit requirements under RCW 90.58.147 and the project proponent
12 provides to the department a copy of the letter documenting exemption
13 approval by the local government.

14 (14) On September 30th of each year, the department shall calculate
15 adjusted fees by the rate of inflation. The adjusted fees must be
16 calculated to the nearest dollar using the consumer price index for the
17 twelve months prior to each September 1st as calculated by the United
18 States department of labor. Each adjusted fee calculated under this
19 section takes effect on the following January 1st.

20 (15) All fees collected under this section must be deposited in the
21 hydraulic project approval account created in section 106 of this act.

22 NEW SECTION. **Sec. 104.** A new section is added to chapter 77.55
23 RCW to read as follows:

24 To ensure that all hydraulic project approvals provide for the
25 protection of fish life, by January 1, 2013, the department shall
26 develop and implement a program to monitor the effectiveness of the
27 approvals it grants under this chapter. For the purposes of this
28 chapter, effectiveness monitoring must evaluate if project standards
29 are adequate to protect overall fish life. If the department
30 identifies approvals that do not meet standards and provide for
31 protection of fish life, the department shall use adaptive management
32 principles to ensure protection under this chapter.

33 NEW SECTION. **Sec. 105.** (1) By December 31, 2014, the department
34 of fish and wildlife shall provide a report to the legislature that
35 includes: (a) A summary of the impact of fee collection under this act
36 on the department of fish and wildlife's hydraulic project approval

EXHIBIT 8

FINAL BILL REPORT

SB 3067

PARTIAL VETO

C 457 L 85

BY Senators Hansen, Gaspard, Bottiger, Barr, Benitz, Vognild, Sellar, Goltz, Bailey and Newhouse

Modifying provisions relating to aquatic farming.

Senate Committee on Agriculture

House Committee on Agriculture

SYNOPSIS AS ENACTED

BACKGROUND:

The State of Washington is a major center for aquatic farming in the United States. Procedures for rearing trout, salmon, oysters, clams, mussels and several types of marine plants in contained environments are well established in the state. Research and development on the cultivation of shrimp, scallops, abalone, crab, and crayfish point to the future potential for aquatic farming of other plant and animal types in the state.

Aquatic farmers believe that growth of their industry is hindered by over-regulation by a variety of state agencies. The federal National Aquaculture Act recognizes aquaculture as an agricultural industry. Aquatic farmers feel that aquaculture should be under the control of the Department of Agriculture. The Department of Agriculture could not only provide the efficiency of an umbrella agency regulating the industry but would also grant aquatic farmers access to those resources that are received by agricultural producers.

SUMMARY:

Private sector cultured (PSC) aquatic products are treated as agricultural commodities under various state laws. The Department of Agriculture is designated as the principal agency for providing state marketing support services for the private sector aquaculture industry. The Directors of Fisheries and Agriculture are required to establish jointly a disease inspection and control program to protect the aquaculture industry and wildstock fisheries from a loss of productivity. The program shall be administered by the Department of Fisheries. PSC aquatic products

are exempted from regulation under various statutes administered by the Departments of Fisheries and Game. Ocean ranching by private parties is prohibited.

DISEASE CONTROL. The disease inspection and control program developed and adopted jointly by the Directors of Fisheries and Agriculture may include elements such as those for establishing importation and transfer requirements and certifying stocks as well as those for the destruction or quarantine of diseased cultured aquatic products. The Director of Fisheries may enter into contracts or interagency agreements for diagnostic field services. The Director shall consult with certain other agencies to assure the protection of state, federal and tribal resources and to protect PSC aquatic products from disease that could originate from the waters or facilities managed by those entities.

In administering the disease control program, the Director of Fisheries shall use the services of a veterinary pathologist and shall not place constraints on the aquaculture industry that are more rigorous than those placed on the Department of Fisheries, Department of Game, or other fish-rearing entities. The jointly adopted rules shall specify the emergency enforcement actions that may be taken by the Department of Fisheries without first providing the affected party with an opportunity for a hearing. If a hearing is requested, no enforcement action may be taken before the conclusion of the hearing. These restrictions shall not preclude the Department of Fisheries from requesting the initiation of criminal proceedings for violations. In a civil action resulting from the Department's ordering and obtaining the destruction of PSC aquatic products, the court may award an aquatic farmer damages not exceeding three times the actual damages sustained in certain instances. The Director of Fisheries shall establish a roster of qualified biologists having a specialty in the diagnosis or treatment of diseases of fish or shellfish.

USER FEES. The Directors of Agriculture and Fisheries shall jointly adopt a schedule of user fees for the disease inspection and control program. The program shall be entirely funded by revenues from such fees by the beginning of the 1987-89 biennium. An Aquaculture Disease Control Account is created which is subject to appropriation. Proceeds of the user fees shall be deposited in the account and used solely for the disease inspection and control program. The Department is to report to the Legislature on the expenditure of funds needed to implement the disease program. The report shall be delivered by January 1, 1987.

REGISTRATION AND PENALTIES. All private sector aquatic farmers shall register with the Department of Fisheries and provide production statistical data. The State Veterinarian and Department of Game shall be provided with registration and statistical data by the Department. Violations of the disease inspection and control rules and this registration requirement are misdemeanors.

OCEAN RANCHING. It is a gross misdemeanor for any person, other than certain governmental units (including federally recognized Indian tribes) and their agencies, to release salmon or steelhead

trout into the public waters of the state and subsequently to recapture and commercially harvest such salmon or trout.

ADVISORY COUNCIL. The Aquaculture Advisory Council is created. The Council is composed of six voting members appointed by the Governor, four voting ex officio members, and one non-voting ex officio member. The Council shall advise the Departments of Agriculture, Fisheries and Game on all aspects of aquatic farming. The Council shall expire on June 30, 1991.

IDENTIFICATION. The Director of Agriculture may adopt rules requiring certain PSC aquatic products that are transported or possessed on lands other than aquatic lands to be in labeled containers or accompanied by identifying documentation in certain instances. The Director shall adopt such rules as are necessary to permit the Departments of Fisheries and Game to administer effectively the food fish and shellfish and the game and game fish statutes.

AGRICULTURAL COMMODITIES. The Department of Agriculture shall develop a program for assisting the state's aquaculture industry to market and promote the use of its products. PSC aquatic products are expressly added to the list of agricultural commodities for which commodity boards or commissions and marketing agreements may be established under the state's agricultural enabling acts. They are also added to the agricultural commodities over which the Director of Agriculture has general authorities.

EXEMPTION FROM FISHERIES AND GAME PROGRAMS. PSC aquatic products are expressly exempted from: the general authority of the Director of Fisheries to adopt rules implementing the food fish and shellfish statutes; and from certain licensure and permit requirements established under those statutes. No license or permit is required under those statutes for the production or harvesting of PSC aquatic products nor for the delivery, processing, or wholesaling of such products when adequately identified under rules of the Department of Agriculture. A mechanical harvester license is not required for harvesting clams from a clam farm if the requirements of the Hydraulic Project Approval statute are fulfilled.

PSC aquatic products are not game fish for the purposes of the game and game fish statutes and game farm licenses are not required for their production. PSC aquatic products adequately identified under rules of the Department of Agriculture are exempted from game code requirements that certain wildlife be tagged or labeled.

TRUCK AND TRAILER LICENSES. A reduced rate provided by law for licensing trucks and trailers used to transport agricultural products or machinery in certain instances is also applied to those used for transporting PSC aquatic products.

OTHER. Repealed are statutes authorizing the issuance of aquaculture permits by the Department of Fisheries and requiring oyster or clam farm licenses. The Department of Fisheries shall survey the boundaries of the state's Puget Sound oyster reserves

and report to the Legislature regarding the optimum use of the reserves.

VOTES ON FINAL PASSAGE:

Senate	38	9	
House	85	13	(House amended)
Senate	45	2	(Senate concurred)

EFFECTIVE: July 28, 1985

PARTIAL VETO SUMMARY:

The Governor vetoed the Aquaculture Advisory Council created by section 6, the possible treble damages a court could award an aquatic farmer where the Department has acted unreasonably found in section 8(7), and the survey of the boundaries of the state's Puget Sound oyster reserved called for in section 26(2). (See VETO MESSAGE)

EXHIBIT 9



Washington State (/)
Office of the Attorney General
Attorney General Bob Ferguson

(/)

Home (/) | AGO Opinion (/ago-opinions) | **Regulatory Authority Under The Hydraulic Project Approval Process Related To Activities Above The Ordinary High Water Line**

REGULATORY AUTHORITY UNDER THE HYDRAULIC PROJECT APPROVAL PROCESS RELATED TO ACTIVITIES ABOVE THE ORDINARY HIGH WATER LINE



(<https://www.atg.wa.gov>)

AGO 2016 No. 6 - Jun 3 2016

Attorney General Bob Ferguson

DEPARTMENT OF FISH AND WILDLIFE—PERMIT—WATER—RIVER—TIDELANDS—Regulatory Authority Under The Hydraulic Project Approval Process Related To Activities Above The Ordinary High Water Line

The regulatory authority of the Department of Fish and Wildlife to require hydraulic project approval is not limited to activities conducted at or below the ordinary high water line. It includes authority over work “that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” Fixing a precise limit to the Department’s authority above the ordinary high water line is impossible in the abstract; whether a particular project is subject to hydraulic project approval will depend on the facts in the given situation.

June 3, 2016

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Dear Dr. Unsworth:

By letter previously acknowledged, you requested our opinion on two questions we paraphrase as follows:

1. Does RCW 77.55 limit the regulatory authority of the Washington Department of Fish and Wildlife (WDFW) under the Hydraulic Project Approval (HPA) process to activities conducted at or below the ordinary high water line?
2. If the answer to the first question is no, then what conditions must be present to justify WDFW’s exercise of HPA authority on activities conducted above the ordinary high water line?

BRIEF ANSWERS

No. RCW 77.55’s plain language does not limit WDFW’s HPA authority solely to activities at or below the ordinary high water line.

With some statutory exceptions, WDFW is justified in exercising HPA authority on any activity that meets RCW 77.55.011(11)’s definition of a “hydraulic project,” regardless of

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whether the activity is above or below ordinary high water lines. The activity must be construction or performance of work that *affects* state waters below the ordinary high water line by using, diverting, obstructing, or changing the *natural flow* or *bed* of the state water. This authority clearly extends to hydraulic projects landward of the ordinary high water line, though exactly how far beyond the ordinary high water line the authority extends will depend on the facts of any given circumstance.

BACKGROUND

Your questions concern RCW 77.55, which sets forth WDFW's regulatory authority over "hydraulic projects," a term that refers to certain construction and work affecting state waters. RCW 77.55.021(1) states:

Except as provided in RCW 77.55.031, 77.55.051, 77.55.041, and 77.55.361, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

The specified statutory exceptions are driving across an established ford (RCW 77.55.031); removing or controlling certain invasive plants (RCW 77.55.051); removing derelict fish, crab, and shellfish gear (RCW 77.55.041); and permitting under the forest practices act (RCW 77.55.361).

RCW 77.55.011 defines three terms used in RCW 77.55.021(1):

- "Department" is WDFW. RCW 77.55.011(5).
- "Permit" is "a hydraulic project approval permit issued under [RCW 77.55]." RCW 77.55.011(18). Such permits are commonly referred to as "HPA permits."
- "'Hydraulic project' means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." RCW 77.55.011(11).

RCW 77.55 does not define "hydraulic" as a term independent of "project." Nor does it define "flow," natural or otherwise. RCW 77.55.011, however, does define two terms used in the meaning of "hydraulic project":

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- "'Waters of the state'[1] and 'state waters' means all salt and freshwaters waterward of the ordinary high water line and within the territorial boundary of the state." RCW 77.55.011(25).
- "'Bed' means the land below the ordinary high water lines of state waters" excluding all artificial watercourses but for those located where a natural watercourse previously existed. RCW 77.55.011(1).

RCW 77.55.011 further defines "ordinary high water line," used in both the definitions of "state waters" and "bed":

- An "ordinary high water line" is "the mark on the shores of all water that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in ordinary years as to mark upon the soil or vegetation a character distinct from the abutting upland. Provided, that in any area where the ordinary high water line cannot be found, the ordinary high water line adjoining saltwater is the line of mean higher high water and the ordinary high water line adjoining freshwater is the elevation of the mean annual flood." RCW 77.55.011(16).

The statute also describes a process for obtaining WDFW's approval before starting a hydraulic project. Specifically, RCW 77.55.021(2) requires proponents of a hydraulic project to submit an application. Among other things, the application must include "[g]eneral plans for the overall project," "[c]omplete plans and specifications of the proposed construction or work within the mean higher high water line in saltwater or within the ordinary high water line in freshwater," and "[c]omplete plans and specifications for the proper protection of fish life[.]" RCW 77.55.021(2)(a)-(c).

Finally, RCW 77.55.021(1) describes the purpose of WDFW's review of an application as the evaluation of "the adequacy of the means proposed for the protection of fish life." RCW 77.55.021(7)(a) further provides that "[p]rotection of fish life is the only ground upon which approval of a permit may be denied or conditioned." Under RCW 77.55.231(1), any conditions imposed by WDFW on an HPA permit "must be reasonably related to the project."

With this statutory background in mind, we turn to the analysis of the activities subject to an HPA permit.

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ANALYSIS

1. Does RCW 77.55 limit the regulatory authority of the Washington Department of Fish and Wildlife (WDFW) under the Hydraulic Project Approval (HPA) process to activities conducted at or below the ordinary high water line?

RCW 77.55.021(1) establishes WDFW's HPA permitting authority. The statute imposes the obligation to obtain an HPA permit on persons or government agencies wanting to undertake a hydraulic project. Thus, the definition of "hydraulic project," as RCW 77.55 uses that term, is key to determining the extent of WDFW's HPA authority. If a statute defines a term, that definition is the basis of interpreting the statute. *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). If a term is undefined, we look to its plain meaning. *Id.* If a statute's meaning is unambiguous, statutory construction ends with the plain-meaning analysis. *See Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435-36, 359 P.3d 753 (2015). If, however, a statute retains more than one reasonable meaning, other matters such as legislative history are considered. *Id.*

RCW 77.55.011(11) defines a "hydraulic project" as "the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." Nothing in the plain language of this definition requires that the work take place below the ordinary high water line to qualify as a hydraulic project. Under the basic rules of grammar, the main object in the definition—construction or performance of work—is modified *not* by its location *in* state waters, but by *its effect* on state waters. Moreover, some types of work done above the ordinary high water line clearly can divert, obstruct, or change the "natural flow or bed" of state waters. For example, bulldozing a steep bank directly above a river could change the river bed and divert, obstruct, or change the river flow if the work is undertaken without proper protections and significant waste material falls into the river. Similarly, placement of structures in a floodway above the ordinary high water line can redirect flood flows causing catastrophic change to fish habitat in river beds. To give a final example, a structure above the ordinary high water line can change tidal beds (destroying forage fish habitat) by diverting wave action at extreme high tide, causing scour erosion and blocking the sloughing of sands that nourish beaches.

Despite this plain language, commenters have offered three main arguments as to why they believe that HPA authority ends at the ordinary high water line. We explain in turn why we reject each one.

First, some have argued that WDFW's HPA authority is limited to work performed below the ordinary high water line because the statute defines "bed" as "the land below the ordinary high water lines of state waters." RCW 77.55.011(1). But the statute does not define hydraulic projects as work performed *on* the bed of state waters, but rather as "work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." RCW 77.55.011(11). As noted previously, work above the ordinary high water line can

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obstruct or change the bed of state waters. And in any case, the statute also covers "work that will use, divert, obstruct, or change the natural flow" of state waters. RCW 77.55.011(11) (emphasis added).

Second, some have argued that the first three verbs in the definition of "hydraulic project"—"use, divert, [and] obstruct"—make sense only if the regulated activity itself is taking place *in* the water. As we note above, however, upland activities can divert or obstruct the flow and beds of water bodies. In any event, we cannot ignore the final verb—"change"—just because it is arguably broader than the other three. While courts attempt to give meaning to every word in a statute (*McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004)), there is no rule of statutory construction that every word in a statute must be relevant to *every* application of the statute.

Third, some have argued that a project must take place below the ordinary high water line to be a "hydraulic project," because the dictionary meaning of "hydraulic" is "of or relating to water." *Webster's Third New International Dictionary* 1107 (2002). This reasoning is mistaken because RCW 77.55.011(11) provides a statutory definition of a "hydraulic project." Therefore, we rely on the statutory definition. *Hoffman*, 154 Wn.2d at 741. In the context of this statute, "hydraulic project" is a term of art, the meaning of which would be lost if we simply characterized a project as a hydraulic project because it is in or uses the water.

The statutory context as a whole confirms our plain language interpretation. *See, e.g., Diaz v. State*, 175 Wn.2d 457, 466, 285 P.3d 873 (2012) (Statutes relating to the same subject are interpreted in light of each other, "considering all statutes on the same subject, taking into account all that the legislature has said on the subject, and attempting to create a unified whole." (citing *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001))). Several provisions in RCW 77.55 refer to the ordinary high water line in ways that would be unnecessary if WDFW had no authority beyond that point. *See, e.g., McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004) ("The legislature is presumed not to include unnecessary language when it enacts legislation."). For example, RCW 77.55.161(3)(c) prohibits WDFW from requiring changes to

storm water outfalls above the ordinary high water line, which would be unnecessary if WDFW had no authority above the ordinary high water line. Similarly, RCW 77.55.321(1) allows WDFW to charge an application fee only where the project is located at or below the ordinary high water line, a limitation that would be unnecessary if WDFW had no authority to issue permits for projects above the ordinary high water line.

Finally, RCW 77.55 references projects that could occur, at least in part, above the line of ordinary high water and are subject to an HPA permit. For example, “stream bank stabilization” is subject to permits under RCW 77.55.021(9)-(15). RCW 77.55.011(23) defines “stream bank stabilization” as projects that include “bank resloping,” “planting of woody vegetation,” and “bank protection,” which would necessarily include the area above the ordinary high water line. Other examples are dikes in RCW 77.55.131, bulkheads in RCW 77.55.141, and shoreline armoring, riparian habitat, and boat ramps in connection with marinas under RCW 77.55.151.

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For these reasons, we conclude that RCW 77.55’s plain language does not limit WDFW’s HPA authority solely to activities at or below the ordinary high water line. Because the statute is unambiguous, other means of statutory construction are unnecessary. Nonetheless, because some commenters have raised alternative—albeit incorrect—interpretations of the statute and its legislative history, we address means of statutory construction necessary only if a statute is ambiguous.

Where a statute is ambiguous, courts defer to reasonable interpretations offered by the agency charged with implementing the statute. *See, e.g., Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015) (“[W]e give the agency’s interpretation of the law great weight where the statute is within the agency’s special expertise.”). For decades, WDFW has construed its authority over hydraulic projects as extending to work above the ordinary high water line. For example, in *In re Denial of an Hydraulic Project Approval to Young*,[2] a 1997 administrative case concerning a replacement bulkhead built inland from an existing bulkhead, the administrative law judge concluded “[c]learly a project which is located within the ordinary high water mark would fall within the jurisdiction of the department. This is not the exclusive criteria, however, to determine whether an HPA is required.” Initial Order at 8. “[T]he pivotal question is . . . whether the construction of the bulkhead did use, divert, obstruct or change the natural flow or bed of the lake.” *Id.* WDFW’s director formally adopted the conclusions as his own. Modifying Order at 1; *see also* Letter from Gary Locke, Governor, State of Washington, to Ivan Urnovitz & Vernon Young, Northwest Mining Ass’n (Sept. 6, 2000) (attached).

WDFW’s prior decisions also underscore the potentially absurd result that could ensue if HPA authority ended abruptly at the ordinary high water mark. We should avoid a reading of a statute resulting in absurd or strained consequences subverting legislative intent. *See Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 14-15, 248 P.3d 504 (2011). That the legislature intended the HPA review to protect fish life is clear from RCW 77.55.231, which identifies the purpose of the review as evaluation of whether the means to protect fish life are adequate. Further, RCW 77.55.021(7)(a) limits the reasons for denial or conditioning an HPA permit to protection of fish life. If the facts of a case show that a project above the ordinary high water line impacts fish life—as in the case of *In re Denial of an Hydraulic Project Approval to Young*—WDFW would be unable to protect fish life merely because the project is just above the ordinary high water mark. *See* Initial Order at 3 (the WDFW biologist agrees the high water mark is waterward of the existing bulkhead), 5, 10 (a concrete bulkhead has a detrimental effect on fish life though above the ordinary high water line). This would be an absurd consequence subverting legislative intent. Thus, the better reading is that HPA review is not limited to projects solely below the ordinary high water line.

We look finally at RCW 77.55’s legislative history to determine legislative intent. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 527, 243 P.3d 1283 (2010). We find nothing in

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the legislative history of RCW 77.55 to reach a conclusion different from that we reached through plain meaning analysis.

The state first enacted a statutory obligation for hydraulic project approval in 1943. Laws of 1943, ch. 40. The requirement for a permit applied to a person, firm, corporation, or government agency desiring to

construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds[.]

Laws of 1943, ch. 40, § 1.

In 1949, the legislature retained the 1943 act when enacting a comprehensive fisheries code. Laws of 1949, ch. 112. With a few exceptions, the substance of this provision remained unchanged from 1943 to 1983. Laws of 1949, ch. 112, § 48. One exception was a change in 1967 whereby “any form of hydraulic project or other *project*” (Laws of 1955, ch. 12, 75.20.100 (emphasis added)) became “any form of hydraulic project or other *work*” (Laws of 1967, ch. 48, § 1 (emphasis added)). Another change in 1975 added the definition for “bed” as meaning “that portion of a river or stream and the shorelands within the ordinary high water lines.” Laws of 1975, 1st Ex. Sess., ch. 29, § 1.

In 1983, the legislature overhauled the fisheries code, including the provisions concerning hydraulic project approval. Laws of 1983, 1st Ex. Sess., ch. 46. The provision currently codified as RCW 77.55.021(1) received only the addition of “salt or fresh” to describe the “waters of the state.” Laws of 1983, 1st Ex. Sess., ch. 46, § 75.

In 1986, the legislature made additional changes. Laws of 1986, ch. 173. With the changes, the obligation to obtain a permit applied to any person or government agency desiring to

construct any form of hydraulic project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state[.]

Laws of 1986, ch. 173, § 1.

An attachment to your request letter noted that the legislature entertained two bills in the 1990s that would have statutorily limited WDFW’s hydraulic project approval to work at or below the ordinary high water line. The first was Senate Bill 5085 in 1993, which the legislature did not pass. The second was Senate Bill 5632 in 1995, which did pass (as E2SSB 5632) but without the provision that would have limited WDFW’s hydraulic project approval to work at or below the ordinary high water line. The courts “are loathe to ascribe any meaning to the Legislature’s failure to pass a bill into law.” *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694

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(1996). Therefore, we do not believe the fact that the provisions did not pass is informative about the extent of WDFW’s HPA authority. We nonetheless note that the passage of the 1995 bill without the express language indicates that the legislature considered changing, but did not, the longstanding statutory language.

The next significant reenactment occurred in 2005. Laws of 2005, ch. 146. The legislation repealed the prior version of the provision currently codified as RCW 77.55.021(1), replacing it with the current version. Laws of 2005, ch. 146, § 201. The new definition of “hydraulic project” was the same as currently codified at RCW 77.55.011(11), described above. Laws of 2005, ch. 146, § 101. The new definitions section provided by the 2005 legislation also added definitions for “waters of the state,” “state waters,” “bed,” and “ordinary high water line.”

The legislative history regardless of whether identified as a “hydraulic project or . . . other work” or a “hydraulic project” under the new statutory definition, the obligation to obtain an HPA permit has been for any work affecting the flow or bed of state waters regardless of the activity’s locatiy of RCW 77.55 shows consistency of language throughout the 73 years since its first enactment. The legislature did not alter or modify the language at any point in a manner that would signal an intention different from the plain meaning of the current version. Ron relative to the ordinary high water line. Whether under plain meaning analysis or other means of statutory construction, RCW 77.55 does not limit WDFW’s authority to activities at or below the ordinary high water line. We turn now to your second question.

2.If the answer to the first question is no, then what conditions must be present to justify WDFW’s exercise of HPA authority on activities conducted above the ordinary high water line?

For WDFW’s HPA authority to extend to any activity, regardless of whether it is above or below the ordinary high water line, the following conditions must be present:

- The activity must be *construction or performance of work*; and
- The activity must either:
 - (1) Use, divert, obstruct, or change the *natural flow* of the state water or
 - (2) Use, divert, obstruct, or change the *bed* of the state water.

RCW 77.55.011(11) (definition of “hydraulic project”).[3]

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Some commenters claim that the lack of a boundary to HPA authority leads to an absurd result. In their view, if WDFW’s HPA authority is not limited to the ordinary high water line, there is no limit to the extent of WDFW’s authority because all work within a floodplain or watershed affecting runoff has the potential (theoretically) to “change” the natural flow. We see two flaws in this concern.

First, WDFW has not historically interpreted its authority so broadly, instead requiring permits only for activities that meet the definition of “hydraulic project” and are in or near state waters. *See, e.g.*, <http://wdfw.wa.gov/licensing/hpa> (<http://wdfw.wa.gov/licensing/hpa>) (last visited May 31, 2016) (HPA website) (“Since 1943, anyone planning certain construction projects or activities in or near state waters has been

required to obtain . . . an HPA.”); Unsworth Opinion Request Letter at 1 (explaining that “WDFW has required project proponents to apply for an HPA for . . . those projects that will be located landward of the [ordinary high water line] and immediately adjacent to waters of the state”).

Second, a project is less likely to meet the statutory criteria of a “hydraulic project” the farther it is from a water body. This is so for at least three reasons:

- (1) Impacts generally diminish over distance, so a project is less likely to “use, divert, obstruct, or change the natural flow or bed of” a water body the farther the project is from the water. RCW 77.55.011(11).
- (2) For the same reason, a project far from the water is also less likely to affect fish life, which is the concern motivating HPA review; protection of fish life is the sole basis on which WDFW can condition or deny a permit. See RCW 77.55.231, .021(7)(a).
- (3) The statutory examples of work above the ordinary high water line that WDFW explicitly regulates are generally very near a water body. See, e.g., RCW 77.55.021(9)-(15) (“stream bank stabilization”); RCW 77.55.131 (dikes); RCW 77.55.141 (bulkheads); RCW 77.55.151 (marinas and boat ramps); see also, e.g., *In re Bankruptcy Petition of Wieber*, 182 Wn.2d 919, 926, 347 P.3d 41 (2015) (looking to a statutory scheme as a whole in order to determine the reach of a statute).

Thus, it would be very difficult for WDFW to assert authority over a project far removed from state waters.

Such limits to WDFW’s authority, however, give no basis to draw an arbitrary line beyond which WDFW lacks authority. Whether a given type of project is too far from a waterway to be subject to HPA review depends on the facts of the particular situation. The question of whether a particular project can change the bed or flow to the extent of affecting fish life involves technical expertise. A court accords an agency’s interpretation of law great weight

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where the statute is within the agency’s special expertise. *Cornelius*, 182 Wn.2d at 585. WDFW has such expertise: it is the agency charged with enforcement of an HPA permit; its review is limited to protection of fish life; and the conditions WDFW imposes on the permit must be reasonably related to the project. RCW 77.55.021(1), .021(7)(a), .231. Accordingly, we believe that courts would be somewhat deferential to WDFW’s conclusions as to whether a particular project or type of project meets the statutory standard for requiring an HPA permit. We note that WDFW has provided notice in WAC 220-660 about certain work that is subject to an HPA requirement.[4]

In summary, we conclude that WDFW’s HPA authority is not limited to activities at or below the ordinary high water line. WDFW is justified in exercising HPA authority on any activity that complies with the statutory definition of a “hydraulic project,” regardless of whether the activity is above or below ordinary high water lines. While drawing a fixed upland boundary to WDFW’s HPA authority is impossible, that authority clearly diminishes the farther a project is from the water.

We trust that the foregoing will be useful to you.

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attachments (https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/AGO_Opinions/AGO2016No06Attachment.pdf)

[1] Though the definition of hydraulic project uses “salt or freshwaters of the state” instead of “waters of the state,” the reference to “salt and freshwaters” in the definition of “waters of the state” indicates its applicability to the term used in the definition of hydraulic project.

[2] *In re Denial of an Hydraulic Project Approval to Young, No. AH-97-106 (Wash. Dep't of Fish and Wildlife Apr. 30, 1997) (Initial Order) (attached). Also attached as part of this document is the September 11, 1997, Decision Modifying Initial Order (Modifying Order).*

[3] *RCW 77.55.021(1) exempts four activities that meet the definition of a hydraulic project from the necessity of obtaining an HPA permit. Generally, each of the four activities—driving across an established ford; removing or controlling certain invasive plants; removing derelict fish, crab, and shellfish gear; and permitting under the forest practices act—must comply with certain separate statutory requirements in order to qualify for the exemption. See RCW 77.55.021(1), .031, .051, .041, .361.*

[4] *Whether deference to WDFW's expertise is appropriate in any particular case would depend on the circumstances. Deference to WDFW's interpretation of this statute would be particularly strong where it acts by rule to address particular categories of work. See, e.g., WAC 220-660-190 (addressing water crossing structures), -270 (utility crossings in freshwater). Adopted rules are presumed valid (RCW 34.05.570(1)) and, in this context, those rules both provide notice to the regulated public that the project requires an HPA permit and memorialize the agency's technical expertise in applying the HPA statute to the particular subject.*

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