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

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

Appellants,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE; JOE  
STOHR; and PACIFIC NORTHWEST AQUACULTURE, LLC,

Respondents, and

TAYLOR SHELLFISH COMPANY, INC.,

Respondent-Intervenor.

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**WDFW AND JOE STOHR'S RESPONSE BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. COUNTER STATEMENT OF THE ISSUES .....1

    1. Can the Department of Fish and Wildlife require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, when that hydraulic statute is not included in a short list of statutes that the legislature has said “constitute the *only* authorities of the department to regulate private sector cultured aquatic products and aquatic farmers”? .....1

    2. If the Department lacks authority to require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, does WAC 220-660-040(2)(1) violate the law when it states that no hydraulic permit is required for an aquatic farmer to install or maintain aquaculture facilities? .....2

III. COUNTER STATEMENT OF THE CASE .....2

    A. Early Hydraulic Law History .....2

    B. Passage of the Aquatic Farming Act.....4

    C. Applying the Aquatic Farm Act to the Department’s Aquaculture Authority .....6

    D. Agency Action at Issue .....7

IV. STANDARD OF REVIEW .....8

V. ARGUMENT .....9

    A. The Plain Language in RCW 77.115.010(2) Limits the Department’s Authority to Regulate Aquaculture. ....10

B.	The Restriction in RCW 77.12.047 Aligns with the Plain Language of 77.115.010(2).....	18
C.	The Broader Context of the Aquatic Farming Act Supports Applying the Plain Language of RCW 77.115.010(2) as It Is Written. ....	21
D.	Legislative Acquiescence Further Supports Applying the Plain Language of RCW 77.115.010(2) as It Is Written.....	24
E.	Appellants’ UDJA Claim Was Properly Dismissed .....	27
VI.	CONCLUSION .....	27

## TABLE OF AUTHORITIES

### Cases

<i>Cent. Puget Sound Reg'l Transit Auth. v. WR-SRE 120<sup>th</sup> N. LLC</i> 191 Wn.2d 223, 422 P.3d 891 (2018).....	9, 23
<i>Clam Shacks of America, Inc. v. Skagit Cty.</i> 45 Wn. App. 346, 725 P.2d 459 (1986) <i>aff'd</i> by 109 Wn.2d 91, 743 P.2d 265 (1987).....	15
<i>In Re Dependency of D.L.B.</i> 186 Wn.2d 103, 376 P.3d 1099 (2016) .....	17
<i>Five Corners Family Farmers v. State</i> 173 Wn.2d 296, 268 P.3d 892 (2011).....	26
<i>Flight Options, LLC v. Dep't of Revenue</i> 172 Wn.2d 487, 259 P.3d 234 (2011).....	18
<i>Fortgang v. Woodland Park Zoo</i> 187 Wn.2d 509, 387 P.3d 690 (2017) .....	25
<i>Frias v. Asset Foreclosure Servs., Inc.</i> 181 Wn.2d 412, 334 P.3d 529 (2014) .....	27
<i>Hallmark Mktg. Co., LLC v. Hegar</i> 488 S.W.3d 795 (Tex. 2016).....	11
<i>Lenander v. Dep't of Retirement Sys.</i> 186 Wn.2d 393, 377 P.3d 199 (2016) .....	10
<i>Ohio Security Ins. Co. v. Axis Ins. Co.</i> 190 Wn.2d 348, 413 P.3d 1028 (2018) .....	18
<i>Spokane Cty. v. Dep't of Fish &amp; Wildlife</i> 192 Wn.2d 453, 430 P.3d 655 (2018).....	8, 9, 22
<i>State v. Bacon</i> 190 Wn.2d 458, 415 P.3d 207 (2018) .....	16

<i>State v. Dennis</i> 191 Wn.2d 169, 421 P.3d 944 (2018) .....	16
<i>State v. Granath</i> 190 Wn.2d 548, 415 P.3d 1170 (2018) .....	17
<i>State v. Hodgson</i> 60 Wn. App. 12, 802 P.2d 129 (1990) .....	15
<i>State v. Larson</i> 184 Wn.2d 843, 365 P.3d 740 (2015) .....	16
<i>State v. Nelson</i> 195 Wn. App. 261, 381 P.3d 84 (2016) .....	16
<i>Union Station Assocs., LLC v. Puget Sound Energy, Inc.</i> 238 F. Supp. 2d 1218(W.D. Wash. 2002) .....	11
<i>Wash. Pub. Ports Ass'n v. Dep't of Revenue</i> 148 Wn.2d 637, 62 P.3d 462 (2003).....	8

**Statutes**

Laws of 1943, ch. 40, § 1 .....	3
Laws of 1983, 1st Ex. Sess., ch. 46, § 75.....	3
Laws of 1985, ch. 457.....	4, 5, 6, 14, 18, 22
Laws of 1985 (SB 3067) .....	21
Laws of 1993, Spec. Sess., ch. 2.....	3
Laws of 2000, ch. 150, § 2.....	5
Laws of 2007, ch. 216.....	7, 25
Laws of 2018, ch. 179, §6.....	5, 26

RCW 7.24.146 .....	27
RCW 15.85.010 .....	21
RCW 15.85.020 .....	12
RCW 34.05.570 (1)(a), (2)(c) .....	8, 9
RCW Title 77 .....	3
RCW 77.04.055(5).....	18
Former RCW 75.08.080, (1) (1985) .....	5, 6, 18
Former RCW 75.28.010.....	18
Former RCW 75.28.300.....	18
RCW 77.12.047, (1)(o), (3) .....	6, 8, 18, 19, 20, 21
RCW 77.55.021, (1), (9)(a).....	1, 2, 13, 19
RCW 77.115.010, (2).....	<i>passim</i>

**Regulations**

Former WAC 220-110, -010 (1983) .....	3, 20
WAC 220-660-010.....	19
WAC 220-660-040(2)(l) .....	1, 2, 8
Former WAC 232-14-010 (1983) .....	3

**Other Authorities**

Op. Att’y Gen. 1 (2007) .....	7
<i>Black’s Law Dictionary 1089 (6<sup>th</sup> Edition 1990)</i> .....	11

## I. INTRODUCTION

In 1985, the legislature passed a law stating the Department of Fisheries could rely only upon disease control rules and seven listed statutes to regulate aquatic farmers and private sector cultured aquatic products (“aquaculture products”). That language exists today at RCW 77.115.010(2), and binds the Department of Fish and Wildlife. The hydraulic code statutes are not among the listed statutes the Department can apply to aquatic farmers or aquaculture products. As a result of this omission, the Department lacks statutory authority to require aquaculture farmers to obtain hydraulic permits for their aquaculture operations. The Department enacted a rule in 2015 acknowledging this lack of jurisdiction. *See* WAC 220-660-040(2)(1). Appellants claim the rule is invalid, and they claim the Department should require a particular geoduck aquaculture farmer to obtain a hydraulic permit for a geoduck aquaculture farm in Zangle Cove, Thurston County. The trial court properly dismissed their claims, and the Department asks this Court to affirm.

## II. COUNTER STATEMENT OF THE ISSUES

1. Can the Department of Fish and Wildlife require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, when that hydraulic statute is not included in a short list of statutes that the legislature has said “constitute the *only* authorities of the department to regulate

private sector cultured aquatic products and aquatic farmers . . . .”?  
RCW 77.115.010(2) (emphasis added).

2. If the Department lacks authority to require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, does WAC 220-660-040(2)(1) violate the law when it states that no hydraulic permit is required for an aquatic farmer to install or maintain aquaculture facilities?

### **III. COUNTER STATEMENT OF THE CASE**

Most of the facts relayed in Appellants’ Opening Brief focus on claimed environmental harms of aquaculture practices, and their listed facts extend far beyond the scope of information necessary to resolve the singular statutory interpretation question presented in this appeal. Many of the claimed facts also come from outside the Department’s administrative record. The following few pieces of information provide some contextual background for resolution of this appeal.

#### **A. Early Hydraulic Law History**

The laws at issue in this case originated when the Department of Fisheries was separate from the Department of Game, and each agency was governed by a different RCW title. The Fisheries statutes used to be codified in former Title 75 RCW, and Game statutes were codified in Title 77 RCW. Fisheries was responsible for managing all food fish and classified shellfish, while Game regulated all other wildlife, including game fish. The current Department of Fish and Wildlife opened its doors in 1994 when the two

agencies were merged. *See* Laws of 1993, Spec. Sess., ch. 2. After the merger, all functions combined under the current Department and all statutes were eventually consolidated under Title 77 RCW.

The hydraulic project statute was first enacted in 1943. Laws of 1943, ch. 40, § 1. It required any person desiring to construct any hydraulic project to obtain written approval from Fisheries and from Game. *Id.* According to one paper written by Department staff, Fisheries and Game initially required hydraulic permits only for projects occurring in streams and lakes and did not assert jurisdiction over marine waters. CP 1208. Only in the late 1970s did Fisheries begin requiring hydraulic permits for at least some marine projects, but even then, the agency was apparently uncertain of its legal authority and reluctant to test the legal question. *Id.* In 1983 the legislature recodified and updated the entire chapter of Fisheries statutes, and in that process it amended the hydraulic statute to expressly require hydraulic permits for work in either freshwater or saltwater. Laws of 1983, 1st Ex. Sess., ch. 46, § 75.

Also in 1983, Fisheries and Game jointly adopted the first set of formal hydraulic rules that had been under development since 1978. CP 1209. No portion of those rules expressly addressed application of hydraulic permits to aquaculture operations. *See* Former Chapter 220-110 WAC (1983) (Fisheries hydraulic code rules); Former WAC 232-14-010 (1983)

(Game rule that adopts by reference the jointly promulgated hydraulic rules codified in the Fisheries title of the WAC).

**B. Passage of the Aquatic Farming Act**

The statute that presents the main issue in this case was enacted as part of a 1985 act under the short title, “Aquatic Farming.” Laws of 1985, ch. 457 (“Aquatic Farming Act” or “Act”). The Act included twenty-eight sections creating or amending statutes regarding the Departments of Agriculture, Fisheries, and Game. *Id.* The governor vetoed portions of three sections, and the veto message was included at the back of the session law. *Id.*

The Act can generally be split into three categories separated by state agency. First, the Act significantly increased the role of the Department of Agriculture in regulating and marketing aquaculture products. In this respect, several sections of the Act were codified as a new Chapter 15.85 RCW and concerned the marketing and promotion of Washington State’s aquaculture products. Second, nine sections of the Act addressed the authority of Fisheries. Third, several sections of the Act amended Game statutes to exclude those statutes from applying to aquaculture products.

The main section of the Act at issue in this appeal is section eight. The first subsection of section eight ordered the director of Fisheries and

director of Agriculture to jointly develop a program of disease inspection and control for aquatic farmers, which program was to address twelve listed elements. The second subsection ordered the director of Fisheries to adopt rules implementing the section, with prior approval of the director of Agriculture. The second subsection then stated, “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.” Laws of 1985, ch. 457, § 8. This language has since been amended to reflect the merger of Fisheries and Game and to reflect the newer codifications of the six cited statutes, but the substantive language from the quoted sentence remains the same and is now codified in the fourth sentence of RCW 77.115.010(2).<sup>1</sup>

Section seventeen of the Act expressly limited the rulemaking authority of Fisheries, which authority had been codified in former RCW 75.08.080. That statute had previously authorized the director of Fisheries

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<sup>1</sup> The quoted language from the 1985 Act lists four statutes and then references three new sections of the law, for a total of seven statutes that Fisheries could apply to aquatic farmers. One of the three new sections, section 9, was subsequently repealed in 2000, *see* Laws of 2000, ch. 150, § 2. The cross-reference to that repealed section was not deleted from RCW 77.115.010(2) until 2018. Laws of 2018, ch. 179, § 6. The current version of RCW 77.115.010(2) now lists only six statutes the Department can apply to aquatic farmers and their products.

to adopt rules addressing ten specified topics or areas within the agency's domain. *See* former RCW 75.08.080(1) (1985). The Aquatic Farming Act added a new subsection to former RCW 75.08.080 stating that the rulemaking authority under that statute did not apply to private sector cultured aquatic products, with one exception. Laws of 1985, ch. 457, § 17(3). The one allowed category of rulemaking authorized Fisheries to require statistical or biological reports from individuals harvesting or processing fish or shellfish. *Id.* Former RCW 75.08.080 is now codified at RCW 77.12.047, and the Aquatic Farming Act limit on the Department's rulemaking authority still exists at RCW 77.12.047(3).

**C. Applying the Aquatic Farm Act to the Department's Aquaculture Authority**

In 2006, Representative Patricia Lantz asked the Office of the Attorney General for a formal opinion on whether geoduck aquaculture was subject to hydraulic project permits or substantial development permits. CP 532-37. She stated she was considering potential legislation on the topic and thus desired an answer, if possible, before the 2007 legislative session. CP 532. The request specifically asked whether RCW 77.115.010(2) and 77.12.047(3) precluded the Department from regulating aquaculture under hydraulic permits. In her request letter, Representative Lantz advocated that

the statutes be interpreted so as to allow the Department's hydraulic regulatory authority to apply to aquaculture operations. CP 533-36.

The Attorney General issued an opinion on January 4, 2007. AGO 2007 No. 1. AR 949-58. With respect to hydraulic authority, the Opinion concluded that the Department could not require aquaculture farmers to obtain hydraulic permits for geoduck aquaculture because the hydraulic statutes were not included in the list of statutes authorizing Department regulation of aquatic farmers and their products in RCW 77.115.010(2). After the Attorney General released this Opinion, Representative Lantz sponsored at least two bills regarding aquaculture in the 2007 legislative session. One, House Bill 1547, did not pass, and it did not address any statutes in RCW Title 77. The other bill, House Bill 2220, did pass. *See* Laws of 2007, ch. 216. This law did not amend RCW 77.115.010, but it did amend RCW 77.115.040 to require aquatic farmers to submit more details about their operations as part of their aquatic farm registrations. Laws of 2007, ch. 216, § 6.

**D. Agency Action at Issue**

In 2011, the Department commenced rulemaking to update the chapter of Department rules governing hydraulic permits, noting that the chapter had not been substantively updated since 1994. AR 1. The Fish and Wildlife Commission approved the new rules in December 2014, and they

became effective in July 2015. AR 173-344. Whereas the hydraulic rules were previously silent as to their applicability to aquatic farmers or their products, the new 2015 rule at issue in this case states that hydraulic permits are not required for “[i]nstallation or maintenance of tideland and floating private sector commercial fish and shellfish culture facilities (RCW 77.12.047).” WAC 220-660-040(2)(1).

Appellants filed the current action in April 2018, challenging the Department’s authority to exempt aquaculture operations from hydraulic permits. Appellants also named in the complaint a private tideland owner, Pacific Northwest Aquaculture, LLC, and requested the court to order the landowner to obtain a hydraulic permit from the Department for its geoduck aquaculture farm. The trial court dismissed Appellants’ case with a one-paragraph order. CP 1272. Appellants timely appealed that order.

#### **IV. STANDARD OF REVIEW**

Agency rules are presumed valid, and a party claiming a rule exceeds an agency’s statutory authority carries the burden to overcome this presumption. RCW 34.05.570(1)(a); *Spokane Cty. v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 457, 430 P.3d 655 (2018) (citing *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003)). A court may declare a rule invalid only if it determines that the rule: (1) violates constitutional provisions; (2) exceeds the agency’s statutory

authority; (3) was adopted in violation of statutory rulemaking procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c). This case involves a singular claim that the Department’s hydraulic rule exceeds its statutory authority.

A court reviews a question of statutory interpretation as a matter of law and thus applies de novo review. *Spokane Cty.*, 192 Wn.2d at 457. The court’s analysis starts with “the statute’s plain language and ordinary meaning.” *Id.* (quotations omitted). The court’s first priority is to “ascertain and carry out the Legislature’s intent,” and the court looks to “the plain language of the statute as the surest indication of legislative intent.” *Cent. Puget Sound Reg’l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 233-34, 422 P.3d 891 (2018) (internal quotations and citations omitted). The court will interpret a statute to give effect to all language, and unambiguous language subject to only one reasonable interpretation ends the inquiry. *Spokane Cty.*, 192 Wn.2d at 458 (citations omitted).

## V. ARGUMENT

This case presents a simple question of how this Court should interpret one sentence in RCW 77.115.010(2). Because RCW 77.115.010(2) expressly constricts the Department’s authority over aquatic farmers and aquatic products, and because no hydraulic code statutes are included in the statute’s list of permissible authorities, the Department

cannot require aquatic farmers to obtain a hydraulic permit for farming aquaculture products. The Department's 2015 hydraulic rule merely acknowledges this lack of statutory authority. The trial court's dismissal of Appellants' claims should therefore be upheld.

**A. The Plain Language in RCW 77.115.010(2) Limits the Department's Authority to Regulate Aquaculture.**

State agencies, being creatures of statute, possess "only those powers expressly granted by statute or [that] are necessarily implied from the legislature's statutory delegation of authority." *Lenander v. Dep't of Retirement Sys.*, 186 Wn.2d 393, 405, 377 P.3d 199 (2016). While much case law delves into questions of an agency's necessarily implied authority flowing out of an express statutory grant, this case involves the inverse where a statute directly and expressly *limits* the scope of the Department's authority. The fourth sentence in RCW 77.115.010(2) provides:

The authorities granted the department by these rules and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, 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.

The beginning language of this sentence may seem odd at first glance because it suggests that rules constitute a grant of authority to the Department. Rules are normally promulgated *by* agencies and do not serve as grants of authority *to* agencies. In context here, the legislature is referring

to the disease inspection and control rules that the Department is directed to adopt in the first three sentences of subsection two. The legislature, having directed the Department to promulgate rules on disease control, then says in the fourth sentence of RCW 77.115.010(2) that those rules, in addition to six other listed statutes, are the only authorities the Department can rely upon to regulate aquatic farmers and their products.

When the legislature dictates that the Department's disease program rules and just six other listed statutes constitute the "only authorities of the department to regulate" aquaculture farmers and their products, this leaves the Department no latitude to apply any other statutes to aquatic farmers as they farm aquaculture products. It is axiomatic that only means only. *See, e.g., Union Station Assocs., LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1218, 1225 (W.D. Wash. 2002) ("Only means only."). "'Only' is a term of limitation." *Hallmark Mktg. Co., LLC v. Hegar*, 488 S.W.3d 795, 799 (Tex. 2016). Although the current edition of Black's Law Dictionary omits "only" from its lexicon, the sixth edition offers the following definition:

Only. Solely; merely; for no other purpose; at no other time; in no otherwise; along; of or by itself; without anything more; exclusive; nothing else or more.

Black's Law Dictionary 1089 (6th ed. 1990). Because the Department's authority to regulate aquatic farmers and aquaculture products is limited to only disease program rules and six other listed statutes, the fourth sentence

in RCW 77.115.010(2) prohibits the Department from applying any of the hydraulic statutes in Chapter 77.55 RCW to aquatic farmers and their products.

The statutory limit on the Department's authority over aquatic farmers and aquaculture products precludes application of hydraulic regulations against the farmers for their aquaculture practices. It is true, as argued by Appellants, that the legislature separately defines "aquatic farmer" as the actor, "private sector cultured aquatic products" as the object, and "aquaculture" as a process. *See* RCW 15.85.020. It is also true that RCW 77.115.010(2) limits the Department's authority over aquatic farmers and aquaculture products, without separately mentioning the process of "aquaculture." But the Legislature's omission of "aquaculture" from RCW 77.115.010(2) does not thereby allow the Department to apply hydraulic authority to aquaculture operations. The Department cannot regulate an abstract "process" without an actor to apply for and receive the permit. The aquaculture "process" does not fill out and sign a hydraulic permit application. The Department does not issue a permit decision to an abstract "process." An abstract "process" is not held accountable for violating terms of a granted permit. Every aspect of the Department's hydraulic authority and hydraulic program applies to the person or entity doing the work that triggers hydraulic jurisdiction—the aquatic farmer in this case. *See*

RCW 77.55.021(1) (any *person* desiring to undertake a hydraulic project shall “secure the approval of the department in the form of a permit”); RCW 77.55.021(9)(a) (“The *permittee* must demonstrate substantial progress on construction . . . .”) (emphasis added). Because RCW 77.115.010(2) limits Department authority over aquatic farmers, the Department cannot require aquatic farmers to obtain hydraulic permits for their aquaculture operations.

The 1985 legislature’s approach in the Aquatic Farming Act was to focus and limit Fisheries’ authority to disease control and other minor ancillary matters such as aquatic farm registrations. Because disease inspection and control became the central remaining portion of Fisheries’ authority over aquaculture, it makes sense that the legislature used the disease control statute, now RCW 77.115.010, to include the plain statement precluding Fisheries from relying on any more than the seven listed statutes to regulate aquatic farmers.<sup>2</sup> The legislature was clearly thoughtful in deciding which Fisheries statutes it chose to include within the limited list of Fisheries’ narrowed authority. Three of the seven listed statutes were new sections enacted by the 1985 Aquatic Farming Act. Four of the listed statutes came from three separate chapters within former RCW Title 75—

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<sup>2</sup> As explained in footnote 1 above, one of the originally listed seven statutes was repealed in 2000, so the current language in RCW 77.115.010(2) lists only six statutes.

chapters 75.08, 75.24, and 75.28—demonstrating the legislature looked across the entire Title when picking and choosing which Fisheries authorities to continue forward over aquaculture. The legislature failed to list former RCW 75.20.100, the sole hydraulic statute in existence at that time, thereby precluding Fisheries from exercising hydraulic code authority over aquatic farmers.

No reasonable basis exists to suggest that the legislature unintentionally overlooked the hydraulic statute, former RCW 75.20.100, from the list of authorities that Fisheries could continue to apply to aquaculture. In fact, a different section in the Act inserted a new reference to RCW 75.20.100, proving the legislature clearly understood and contemplated Fisheries' role in regulating hydraulic projects as part of the bill. Section 19 of the Aquatic Farming Act amended former RCW 75.28.280 regarding mechanical clam harvesters. The previous law had already required a shellfish harvester desiring to use a mechanical or hydraulic clam harvester on a "clam farm" to obtain a license from Fisheries for operating the mechanism. The Aquatic Farming Act amended this subsection of the statute by adding language stating that the mechanical harvester license was not required if "the requirements of RCW 75.20.100 are fulfilled for the proposed activity." Laws of 1985, ch. 457, §19.

The legislature's act of linking the mechanical clam harvester license to the hydraulic statute does not prove a legislative intent to subject aquaculture to hydraulic authority, because mechanical harvesting is not necessarily connected to aquaculture operations. Historically, mechanical harvesters were often used to harvest naturally occurring shellfish. *See, e.g., Clam Shacks of America, Inc., v. Skagit Cty.*, 45 Wn. App. 346, 725 P.2d 459 (1986), *aff'd*, 109 Wn.2d 91, 743 P.2d 265 (1987). In *Clam Shacks*, the harvester argued that its use of a hydraulic clam rake did not constitute "aquaculture" under the Shorelines Management Act because it was only harvesting a wild and naturally existing resource without reseeding or culturing activity. *Id.* at 353. The Court of Appeals disagreed and found that the harvest of wild clams still fit the definition of aquaculture within the county's shoreline master program. The different definitions of "private sector cultured aquatic products" and "aquaculture" in chapter 15.85 RCW, however, do not encompass the mere act of harvesting naturally setting shellfish. *State v. Hodgson*, 60 Wn. App. 12, 18, 802 P.2d 129 (1990). As a result, a shellfish harvester using a mechanical or hydraulic harvesting machine to harvest naturally set shellfish does not qualify as an aquatic farmer and is therefore subject to all of the Department's statutes, including hydraulic statutes. But an aquatic farmer using a mechanical harvester is not subject to the Department's hydraulic permitting authority because neither

RCW 77.55.021 nor RCW 77.65.250 are included in the list of statutes the Department is authorized to apply to aquatic farmers. Given that the legislature inserted RCW 77.55.021 in one section of the Aquatic Farming Act with respect to mechanical clam harvesters, but omitted it from the list of statutes in RCW 77.115.010(2), the omission of RCW 77.55.021 from that list of statutes must be deemed intentional. *See State v. Bacon*, 190 Wn.2d 458, 466, 415 P.3d 207 (2018) (legislature’s omission of a subsection from a list of exemptions in RCW 13.40.160(10) must be considered intentional under the interpretive rule, *expression unius est exclusio alterius*).

Appellants essentially ask this Court to rewrite RCW 77.115.010(2) by adding RCW 77.55.021 to the list of authorities the Department can apply to aquatic farmers. But a court “may not add words to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Dennis*, 191 Wn.2d 169, 173, 421 P.3d 944 (2018). “We recognize that the legislature intends to use the words it uses and intends *not* to use words it does not use.” *State v. Nelson*, 195 Wn. App. 261, 266, 381 P.3d 84 (2016) (emphasis in original) (citing *State v. Larson*, 184 Wn.2d 843, 851-52, 365 P.3d 740 (2015)). Courts have disregarded unambiguous plain language in exceptionally rare cases to avoid absurd results that were contrary to clear legislative intent, but the court “may not

invoke that canon just because we question the wisdom of the legislature’s policy choice.” *In Re Dependency of D.L.B.*, 186 Wn.2d 103, 119, 376 P.3d 1099 (2016) (citations omitted). The proper audience for Appellants’ arguments is the legislature. *State v. Granath*, 190 Wn.2d 548, 556, 415 P.3d 1179 (2018) (“If the legislature disagrees with our plain language interpretation, then it may amend the statute.”) (citation omitted).

Appellants downplay the language in RCW 77.115.010(2) and focus the majority of their analysis on the hydraulic statutes in chapter 77.55 RCW. They accurately point out that none of the multiple hydraulic statutes expressly exempt aquaculture activities, but this observation has no impact on the issue. Appellants’ Br. 21-22, 39-41. They claim that the legislature’s failure to insert express exemptions for aquaculture into the hydraulic statutes proves a legislative intent for the Department to impose hydraulic code statutes to aquaculture farming. Appellants’ Br. 39. This argument completely ignores the legislative approach. In RCW 77.115.010(2), the legislature has directly precluded the Department from applying anything other than disease control rules and six listed statutes to aquatic farmers and their products. This express jurisdictional limit is complete and effective. By choosing to expressly limit the Department’s authority with a simple and direct sentence in RCW 77.115.010(2), the legislature did not need to also amend and add an exemption within every other Departmental statute across

the entire code that is potentially applicable to aquaculture. The legislature could have chosen to write an express exemption into the hydraulic statute to parallel the jurisdictional limitation in RCW 77.115.010(2), but it was not required to do so.<sup>3</sup> The legislature’s decision not to add an exemption to the hydraulic statute cannot overcome the application of the plain jurisdictional limit in RCW 77.115.010(2).

**B. The Restriction in RCW 77.12.047 Aligns with the Plain Language of 77.115.010(2).**

The Department’s main source of rulemaking authority resides in RCW 77.12.047.<sup>4</sup> This statute traces back to the separate Department of Fisheries and was previously codified at RCW 75.08.080. The 1985 Aquatic Farming Act amended former RCW 75.08.080 to restrict Fisheries’ rulemaking authority over aquaculture in a fashion that roughly parallels the restriction of authority contained in RCW 77.115.010(2). As currently worded, subsection one of RCW 77.12.047 lists fifteen different categories

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<sup>3</sup> The legislature did add an express exception for aquaculture to two of Fisheries’ commercial licensing statutes as part of the Aquatic Farming Act, *see* Laws of 1985, ch. 457, §§ 18 & 20. Those statutes, former RCW 75.28.010 and 75.28.300, were not included in the narrow list of statutes the Department could apply to aquaculture, so those exceptions seem unnecessary, and arguably represent a precautionary effort to make double-sure that the restriction of authority was fully understood by the agency and by citizens.

<sup>4</sup> A separate and more recent statute generally references the authority of the Fish and Wildlife Commission to enact rules implementing fish and wildlife laws. *See* RCW 77.04.055(5). To the extent RCW 77.12.047 imposes express limits on the Department’s rulemaking authority, it would constitute a more specific statute that overrides the more general mandate in RCW 77.04.055(5). *See Ohio Security Ins. Co. v. Axis Ins. Co.*, 190 Wn.2d 348, 353, 413 P.3d 1028 (2018) (“It is well settled that a more specific statute prevails over a general one should an apparent conflict exist.”) (quoting *Flight Options, LLC v. Dep’t of Revenue*, 172 Wn.2d 487, 504, 259 P.3d 234 (2011)).

of topics that the Department can address in rulemaking, including the catch-all category of “[o]ther rules necessary to carry out this title and the purposes and duties of the department.” RCW 77.12.047(1)(o). The Aquatic Farming Act precludes application of all but one of those categories of rulemaking against aquaculture products. As currently worded, subsection three provides:

Except for subsection (1)(g) of this section, this section does not apply to private sector cultured aquatic products as defined in RCW 15.85.020. Subsection (1)(g) of this section does apply to such products.

RCW 77.12.047(3). Subsection (1)(g) authorizes the Department to enact rules requiring entities harvesting or handling fish or wildlife to submit statistical or biological reports. The quoted language from RCW 77.12.047(3) expressly prohibits the Department from applying any other rules authorized under RCW 77.12.047 to aquaculture products.

The Department’s 2015 hydraulic rules rely upon RCW 77.12.047 as their source of rulemaking authority because the main hydraulic project statute, RCW 77.55.021, does not contain a separate authorization for agency rulemaking. *See, e.g.*, WAC 220-660-010 (bracketed information identifying statutory authority as RCW 77.04.012, 77.04.020, and

77.12.047).<sup>5</sup> Because the hydraulic rules were adopted under the authority of RCW 77.12.047, but the only rules authorized to be applied to aquatic products are statistical and biological reporting requirements, the Department cannot apply its hydraulic rules to aquaculture products.

Appellants claim the legislature’s differentiation between the terms “aquaculture,” “aquatic farmer,” and “private sector cultured aquatic products” is significant as those terms are used in RCW 77.115.010 and RCW 77.12.047(3). Appellants’ Br. 27. Neither statute expressly restricts the Department’s authority over “aquaculture” in general, and RCW 77.12.047(3) mentions only aquaculture products, while RCW 77.115.010(2) mentions both aquaculture products and aquatic farmers. As explained in the prior section above, hydraulic permits regulate the conduct of actors, so the express statutory limit on the Department’s jurisdiction against aquatic farmers in RCW 77.115.010(2) precludes application of hydraulic statutes to aquatic farmers.

The fact that the legislature allowed only one category of rulemaking over aquaculture products to the exclusion of the fourteen other listed categories demonstrates a broad legislative intent to restrict the

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<sup>5</sup> The very first set of hydraulic rules in 1983 similarly cited the earlier codification, RCW 75.08.080, as a source of the Department of Fisheries’ statutory authority. *See* Former WAC 220-110-010 (1983) (bracketed information identifying statutory authority as “RCW 75.20.100, 75.08.080, and chapter 34.04 RCW”).

Department's regulation of the industry. The single allowed category of rulemaking regarding statistical and biological reports involves data about the things being harvested, which could explain why the legislature listed only aquaculture products in RCW 77.12.047(3). If the rulemaking ban, however, was construed as not applying to aquatic farmers, the Department still cannot apply any rules against aquatic farmers if those rules implement statutes not included in the narrow list of six statutes specified in RCW 77.115.010(2), as discussed in the prior section above. The hydraulic rules implement statutes that are not included in the narrow list of the Department's restricted authority over aquaculture farmers.

**C. The Broader Context of the Aquatic Farming Act Supports Applying the Plain Language of RCW 77.115.010(2) as It Is Written.**

Interpreting the plain language of RCW 77.115.010(2) as prohibiting the Department from applying hydraulic statutes and requirements to aquatic farmers is consistent with the broader context of the Aquatic Farming Act. The main focus of the Act was to restrict the authority of Fisheries and Game, and to have the Department of Agriculture manage aquaculture similar to how it manages upland agricultural industries. *See, e.g.,* RCW 15.85.010 (legislative intent section); *see also* 1985 Final Legislative Report, SB 3067 ("Aquatic farmers believe that over-regulation by a variety of state agencies hinders growth of their industry. . . . Aquatic

farmers feel that aquaculture should be under the control of the Department of Agriculture.”), at Attachment A. The only conceded area of continued Fisheries regulation involved disease inspection and control, along with farm registrations and collection of statistical data.

The Aquatic Farming Act’s animosity towards Fisheries’ regulation of aquaculture was not subtle. The session law included a provision that subjected the Department to treble damages if the Department unreasonably seized or destroyed aquaculture products under its remaining disease control authority. Laws of 1985, ch. 457, § 8(7). The governor vetoed this provision, explaining that “[t]reble damages against the state are without precedent and are, I believe, excessive and unnecessary.” Laws of 1985, ch. 457, veto message.

The legislature’s animosity towards Fisheries’ regulation of aquaculture is further demonstrated by portions of the legislative history behind the Aquatic Farming Act. Although the plain language of RCW 77.115.010(2) precludes reliance on legislative history, the legislative history behind this Act nonetheless supports application of the plain language as severely restricting the Department’s authority over aquaculture. *See Spokane Cty.*, 192 Wn.2d at 461. Senator Frank “Tub” Hansen, chairman of the Senate Agriculture Committee and the lead sponsor of the Aquatic Farming Act, sent a letter to the chairman and

members of the Senate Ways and Means Committee urging passage of the bill. In his letter, Senator Hansen expressed a hostile view of the Department of Fisheries' management of aquaculture: "Because of the historical and continuing opposition of the Department of Fisheries, it is vital that the aquacultural industry come under the umbrella of an agency which is at least neutral to their interests." Attachment B. This characterization by the bill sponsor contradicts Appellants' claims that the legislature silently intended to retain Fisheries' hydraulic authority over the aquaculture industry. *See Appellants' Br. 36.*

The legislative history behind the Aquatic Farming Act does not expressly declare a legislative intent to remove Fisheries' hydraulics authority from aquaculture farmers. Appellants argue the court should speculate about this silence and rewrite the statute. Appellants' Br. 37-38. The legislature's intent is best indicated, however, by the words used in the statute. *Cent. Puget Sound Reg'l Transit Auth.* 191 Wn.2d at 223. As discussed above, the short list of statutes Fisheries was authorized to apply to aquatic farmers does not include former RCW 75.20.100. A court should not rewrite a plainly worded statute because of the lack of discussion in the legislative history justifying which statutes the legislature chose to include in a list, versus which statutes the legislature omitted. Because Fisheries and Game had not traditionally applied hydraulic authority to marine waters

(where most shellfish aquaculture farms operated), and because hydraulic jurisdiction over saltwater was only clarified in 1983, legislators in 1985 may not have viewed it worth highlighting in legislative history documents that hydraulic authority was not included in the narrow list of statutes Fisheries could apply to aquaculture.

The context of the Aquatic Farming Act demonstrates a legislative intent to severely restrict the Department's authority to regulate aquaculture. Applying the plain language in RCW 77.115.010(2) as it is written is consistent with that broader context and with the legislative intent. The statutory language leaves the Department no argument to apply hydraulic authority over aquatic farmers. The Appellants' case is misdirected—their proper relief is to convince the legislature to amend the laws to authorize the Department to subject aquaculture to hydraulic permits.

**D. Legislative Acquiescence Further Supports Applying the Plain Language of RCW 77.115.010(2) as It Is Written.**

Given the plain and unambiguous language in RCW 77.115.010(2), the Department need not rely upon further theories of statutory interpretation. Yet, this case presents a model for application of the legislative acquiescence principle. A legislator requested an Attorney General's opinion on the applicability of hydraulic regulations to

aquaculture operations with the express intent of enacting further legislation on the topic, and the legislator even advocated for a specific outcome on the question. CP 532. The Opinion answered the question contrary to that particular legislator's intent, and the Opinion was issued just prior to the commencement of the 2007 legislative session. AR 949-58. Even though the Opinion answered contrary to Representative Lantz's expressed position on the issue, she did not sponsor any bill that proposed to amend RCW 77.115.010(2) to expand the list of statutes the Department could rely upon to regulate aquatic farmers. Representative Lantz did successfully sponsor one bill in apparent response to the Opinion, which was enacted into law. That law directly addressed aquaculture, in part, by amending RCW 77.115.040 to require aquatic farmers to include more detailed information with their aquatic farm registrations. *See* Laws of 2007, ch. 216, § 6. No part of that law addressed the hydraulic authority issue. Had the legislature disagreed with the Attorney General Opinion's interpretation of RCW 77.115.010(2), that law would have been a perfect vehicle to do so. *Cf. Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 520-21 & n.5, 387 P.3d 690 (2017) (fact that legislature had not taken action over 15 years to amend the Public Records Act in response to a prior judicial decision suggests approval rather than disapproval).

In the twelve years since issuance of the Opinion, the legislature has considered nine bills that proposed amendments to RCW 77.115.010.<sup>6</sup> None of those bills proposed adding any hydraulic statutes to the list of authority the Department could apply to aquatic farmers. The bill that did pass amended RCW 77.115.010(2) only by deleting the obsolete statute, former RCW 77.115.020, that had been repealed in 2000. Laws of 2018, ch. 179, § 6.

The circumstances of the legislature declining to take action to overturn or correct 2007 Attorney General Opinion No. 1, despite the act of amending the list of statutes construed in the Opinion to delete an obsolete reference, strongly supports finding legislative acquiescence in the Opinion's conclusion. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (“we presume that the legislature is aware of formal opinions issued by the attorney general and a failure to amend the statute in response to the formal opinion may, in appropriate circumstances, be treated as a form of legislative acquiescence in that interpretation.”) (citation omitted). The plain language of RCW 77.115.010(2) unequivocally precludes the Department from applying hydraulic authority to aquatic farmers.

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<sup>6</sup> In chronological order, these are SB 6053 (2007); SB 5127 (2009); SB 5669 (2011); HB 1850 (2011); HB 1118 (2015); HB 2859 (2018); HB 2957 (2018) (enacted as Laws of 2018, ch. 179, § 6); SB 6086 (2018); and HB 2260 (2018).

**E. Appellants' UDJA Claim Was Properly Dismissed.**

Because the trial judge dismissed all of the Appellants' claims on the direct merits with a one-paragraph ruling, the judge did not separately address the State's arguments about the Appellants' secondary UDJA claim. The Uniform Declaratory Judgments Act expressly does not apply to state agency actions reviewable under the Administrative Procedure Act. RCW 7.24.146. Petitioner's UDJA claim was statutorily prohibited and the judge's dismissal of all claims should be upheld.

**VI. CONCLUSION**

When construing statutes, courts "are tasked with discerning what the law is, not what it should be." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014). The plain language of RCW 77.115.010(2) does not list any hydraulic statutes among the limited authorities the Department can apply to aquatic farmers and their products. The Department's rule acknowledging no hydraulic authority over aquaculture farming projects is fully consistent with the Department's limited authority and Appellants' challenge to WAC 220-660-040(2)(1) should be denied.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of August, 2019.

ROBERT W. FERGUSON  
Attorney General

*s/ Joseph V. Panesko*

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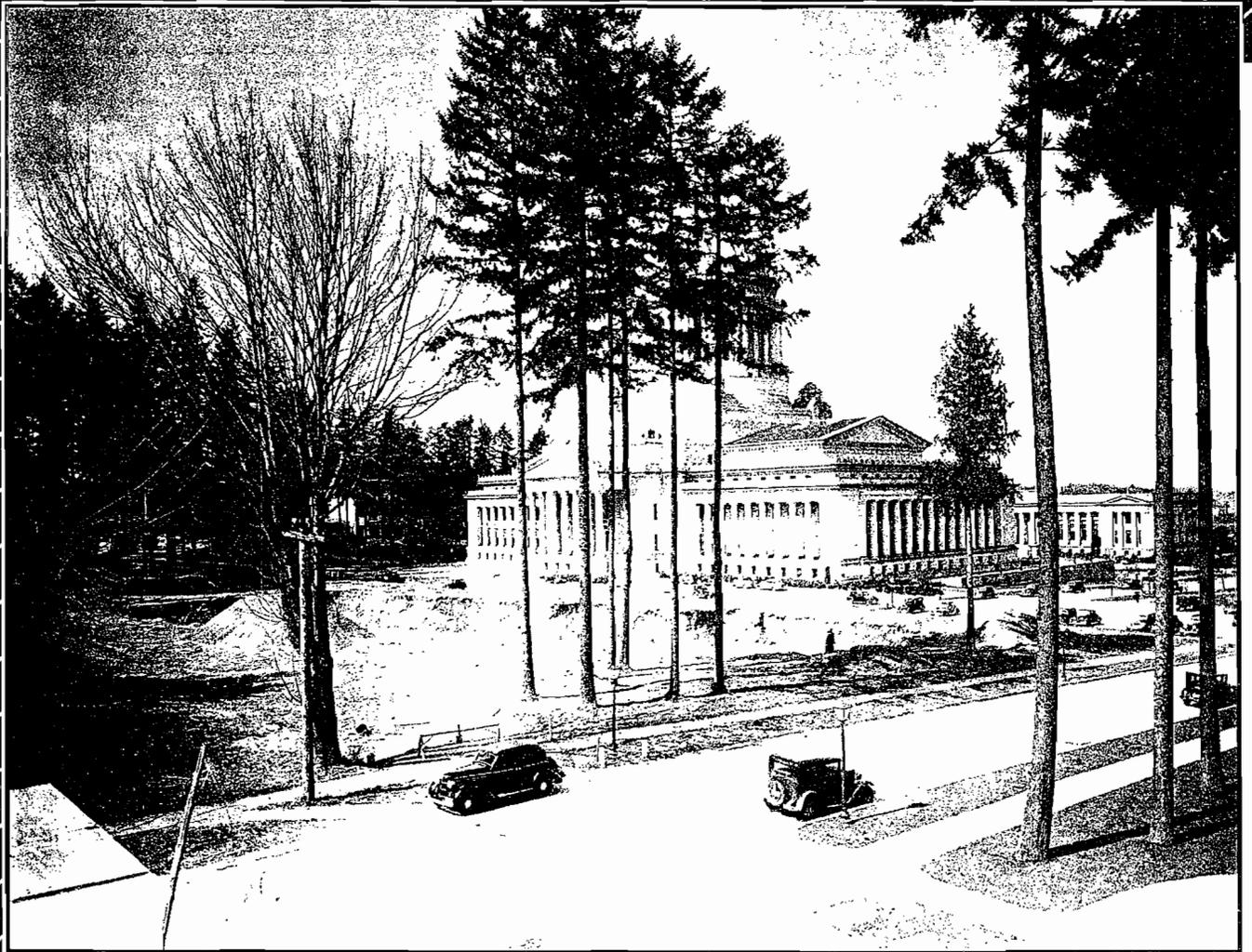
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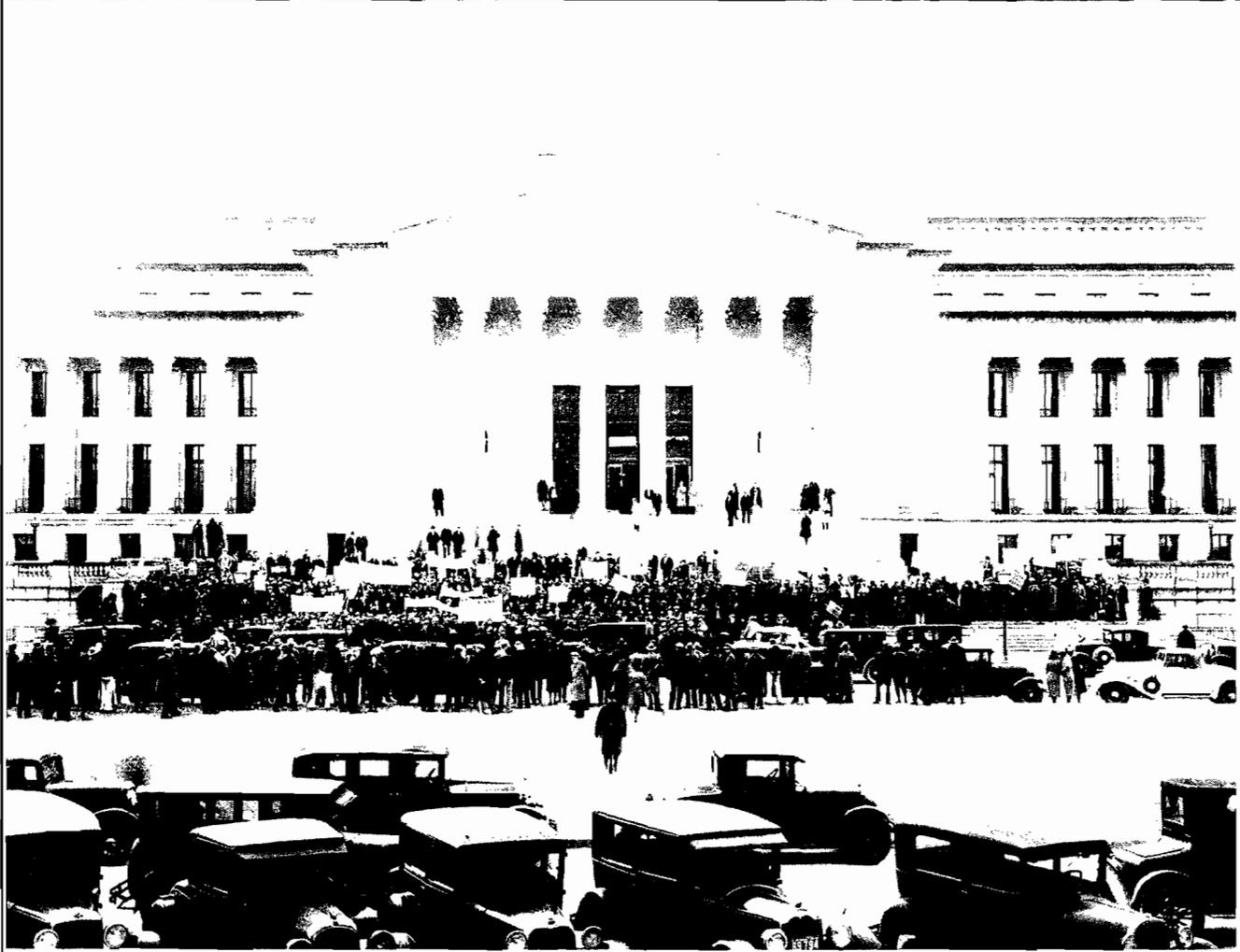
ATTACHMENT A

# FINAL LEGISLATIVE REPORT



**FORTY-NINTH  
WASHINGTON STATE LEGISLATURE  
1985 Regular and 1st Special Sessions**

# FINAL LEGISLATIVE REPORT



Hunger marchers descended on the Capitol in 1932 to protest the depression-era policies of Governor Roland Hartley.

© 1932 Vibert Jeffers, courtesy Susan Parish Collection.

**FORTY-NINTH  
WASHINGTON STATE LEGISLATURE  
1985 Regular and 1st Special Sessions**

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205 House Office Building  
Olympia, Washington 98504  
(206) 786-7100

**Senate Committee Services**

101 John A. Cherberg Building  
Olympia, Washington 98504  
(206) 786-7400

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**SSB 3066**

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**SSB 3066**

C 468 L 85

By Committee on Commerce & Labor (originally sponsored by Senators Moore, Sellar, Warnke, Barr, Vognild, Bottiger, Deccio, Peterson, Conner, Newhouse and Hansen)

Modifying provisions relating to gambling.

Senate Committee on Commerce & Labor

House Committee on Commerce & Labor

**BACKGROUND:**

The Gambling Commission, through administrative rules, prohibits a public cardroom from having more than five separate card tables on its premises.

Cardroom fees are limited to \$1 per half hour of playing time. The fee for entry into a card tournament is limited to \$25 per player. Additionally, punch boards and pull-tab(s) fees are limited to \$.25 per chance.

**SUMMARY:**

A licensed public cardroom is prohibited from having more than five separate card tables on its premises. The maximum cardroom and card tournament fees are increased to \$2 per half hour and \$50 respectively. The maximum fees for punch boards and pull tabs are increased to 50 cents per chance.

**VOTES ON FINAL PASSAGE:**

Senate	27	22	
House	61	37	(House amended)
Senate			(Senate refused to concur)

**Free Conference Committee**

House	67	22
Senate	28	18

EFFECTIVE: July 28, 1985

**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

**BACKGROUND:**

The State of Washington is a major center for aquatic farming in the nation. Aquatic farmers believe that over-regulation by a variety of state agencies hinders growth of their industry. 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 a joint 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 is to 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 is to use the services of a veterinary pathologist and is not to place more rigorous constraints on the aquaculture industry 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 which 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 must jointly adopt a schedule of user fees for the disease inspection and control program. The program is to 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 are to 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 is to be delivered by January 1, 1987.

**REGISTRATION AND PENALTIES.** All private sector aquatic farmers are to register with the Department of Fisheries and provide production data. The Department is to provide the State Veterinarian and Department of Game 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 is to advise the Departments of Agriculture, Fisheries and Game on all aspects of aquatic farming. The Council expires 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 is to 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 is to 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 authority.

**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.** Statutes authorizing the issuance of aquaculture permits by the Department of Fisheries and requiring oyster or clam farm licenses are repealed. 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, the possible treble damages a court could award an aquatic farmer where the Department has acted unreasonably, and the boundaries survey of the state's Puget Sound oyster reserves. (See VETO MESSAGE)

**SSB 3068**

C 22 L 85

By Committee on Transportation (originally sponsored by Senators Thompson, Barr and Peterson)

Providing for a special movement permit decal for mobile homes.

Senate Committee on Transportation

House Committee on Transportation

**BACKGROUND:**

Any person moving a mobile home must purchase a special permit from the jurisdictions responsible for the maintenance of the roads upon which the mobile home will be transported. The special permit is not valid unless attached to a tax certificate issued by the county treasurer in the county where the mobile home was located before being transported. The tax certificate states that all property taxes on the mobile home have been paid, and includes a description of the mobile home, its destination, and its owner. The special permit is not required for the movement of mobile homes from the manufacturer, or from the sales location, to the purchaser's designated location.

Counties are currently losing revenue when mobile home owners move their homes into other jurisdictions without first paying the property taxes they owe.

**SUMMARY:**

Whenever a special mobile home movement permit that is attached to a tax certificate is approved by the county treasurer, an easily recognizable decal shall be issued for display during transit.

A crime is created that is punishable as a gross misdemeanor for people who alter or forge a decal, or who knowingly display an altered decal.

**VOTES ON FINAL PASSAGE:**

Senate	42	2
House	95	1

**EFFECTIVE:** July 28, 1985

**SSB 3069**

PARTIAL VETO

C 431 L 85

By Committee on Human Services & Corrections (originally sponsored by Senators Moore, Sellar, Kreidler and Conner; by Lieutenant Governor request)

Providing that licensed health care professionals may organize nonprofit nonstock corporations.

Senate Committee on Human Services & Corrections

**ATTACHMENT B**



**Frank "Tub" Hansen**  
State Senator  
Thirteenth District

401-C Legislative Building  
Olympia, Washington 98504  
(206) 753-7624

## MEMORANDUM

DATE: February 19, 1985

TO: Senator Jim McDermott, Chairman, and Members  
Senate Ways and Means Committee

FROM: Senator Frank "Tub" Hansen, Chairman  
Senate Agriculture Committee

SUBJECT: Senate Bill 3067 -- Aquaculture Legislation

I urge your support for Senate Bill 3067, which creates a state policy and statutory framework for encouraging aquaculture in this state. Presently, the nation has an annual \$3 billion net trade deficit in seafood products. For example, the United States imported over 5,000 metric tons of fresh pen-reared salmon from Norway in 1984. The only way we can compete with fish produced in Norway and other countries in the year-round fresh market is through developing a domestic aquaculture industry of our own.

The Department of Fisheries has had an opportunity over the last 20 years to encourage a domestic aquaculture industry in this state, but has chosen not to do so. They remain opposed to the concept of the bill as evidenced by the fact that they refused to make written comments during the bill's development as requested by the Senate Agriculture Committee, in order to frustrate its development.

Their one concern, aside from the turf question, is proper disease control. Section 4 of the bill establishes a far superior disease control program than either the Department of Fisheries or the Department of Game presently have for their own operations, including hatcheries, transfer of eggs, fry, and the outplanting of these in rivers and streams across the state. The opportunity for the spread of disease is far greater from the Department's range and scale of activities than from the activities of fish reared entirely within very isolated and confined rearing areas.

Because of the historical and continuing opposition of the Department of Fisheries, it is vital that the aquacultural industry come under the umbrella of an agency which is at least neutral to their interests. In every state where the change to the Department of Agriculture has been made, the aquaculture industry has flourished. Congress in 1980 passed the National Aquaculture Act which recognized aquaculture as an agricultural industry. Financing of the development of this industry depends on being recognized as an agricultural industry. As long as annual permits, which can be cancelled with no notice by the Department of Fisheries, remains the law, risk capital will not be available for expansion of this industry.

Agriculture, Chairman  
Transportation, Vice Chairman  
Parks and Ecology

Some have attempted to put false blame on aquaculture for the current woes of the fishing industry. The opposite is true. Increased quantities of pen-reared fish will become available for processing and smoking on a year-round basis. The length of the ocean fishing season since the late 1970s has decreased from over 120 days to only 9 days in 1984. This problem is due to the lack of production of sufficient fish in this state which is the proper place for the Department of Fisheries to focus their attention.

Aquaculture provides opportunities for increased year-round employment and economic development for severely depressed coastal communities as well as inland areas. It is an industry with a future, if given a chance. Despite fear of retaliation from the Department of Fisheries, the people in the aquaculture industry who know the situation continue to support this proposal.

I urge you to approve the passage of SB 3067.

FH:gs9-12

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

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