

FILED
Court of Appeals
Division II
State of Washington
12/23/2019 4:56 PM
No. 53863-6-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner-Appellant

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE and JOE
STOHR, Acting Director of the Washington Department of Fish and
Wildlife,

Respondents,

and

WESTERN FORESTRY AND CONSERVATION ASSOCIATION, d/b/a
WASHINGTON STATE ANIMAL DAMAGE CONTROL PROGRAM,
and WASHINGTON FARM FORESTRY ASSOCIATION,

Intervenors

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

APPELLANT'S OPENING BRIEF

Claire Loeb Davis, WSBA No. 39812
Jonathon Bashford, WSBA No. 39299
*Attorneys for Petitioner-Appellant Center
for Biological Diversity*

ANIMAL & EARTH
ADVOCATES PLLC
2226 Eastlake Ave E, Suite 101
Seattle, WA 98102
Telephone: 206.601.8476
Facsimile: 206.456.5191

BASHFORD LAW PLLC
600 1st Ave, Suite 405
Seattle, WA 98104
Phone/Fax: 206.494.3344

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR AND ISSUES	2
A.	Assignments of Error	2
B.	Issues Pertaining to Assignments of Error	3
III.	STATEMENT OF THE CASE	5
A.	Statement of Facts.....	5
1.	Voters Pass Initiatives to Ban Cruel Hunting Methods	5
2.	Hungry Bears Sometimes Damage Trees by Eating Sapwood	5
3.	Timber Companies Operate Supplemental Feeding Program	7
4.	WDFW Manages Timber Damage with Permits to Kill Bears	7
5.	WDFW Adopts Rules to Govern Hunting Bears on Timberlands Using Banned Hunting Methods.....	9
6.	WDFW Fills Gaps Left by Rules with Non-Public Policies	10
C.	Procedural History and Record Development.....	11
1.	Petitioner Files Action and Secures Preliminary Injunction.....	11
2.	WDFW Struggles with Agency Record	13
3.	Court Grants Motion to Dismiss Permit Challenges.....	15
4.	Superior Court Renders Final Decisions	15
IV.	ARGUMENT	16
A.	Standard of Review for Challenge to Agency Action	16
B.	The Timber Hunt Rule and Special Trapping Rule are Invalid Because They Exceed WDFW’s Statutory Authority	16
1.	The Timber Hunt Rule Exceeds WDFW’s Statutory Authority, by Violating I-655’s Restrictions on Who May Use Bait and Hounds.....	17

2.	The Special Trapping Rule Gives WDFW Unwarranted Authority to Violate I-713’s Standard for Issuing Trapping Permits	21
3.	Supplemental Materials Show that the Timber Hunt Rule Violates I-655 by Illegally Facilitating the Use of Feeding Stations as Bait	24
4.	Supplemental Materials Show the Timber Hunt Rule Violates the Intent of I-655 by Failing to Target Bears Causing Damage	27
C.	WDFW Acted Arbitrarily and Capriciously in Adopting the Timber Hunt Rule	30
1.	The Agency Record Shows WDFW Failed to Consider Any Science, or the Most Fundamental Facts and Circumstances	30
2.	Supplemental Records Show the Agency Willfully Disregarded Substantial Information Undermining its Chosen Approach	34
D.	WDFW’s Unpublished Rules are Invalid Because they are “Rules” Adopted without Rulemaking Procedures.....	37
E.	The Court Should Admit 27 of the Documents Submitted to the Superior Court as Supplements to the Agency Record.....	41
1.	The Court Should Review Superior Court’s Ruling <i>de novo</i>	41
2.	WDFW Suppressed Much of the Proposed Supplemental Evidence from the Final Iteration of the Agency Record ...	43
3.	Court Should Consider Supplemental Evidence that Shows the 2016 Rules and the 2018 Unpublished Rules were Unlawful	45
4.	The Superior Court Abused its Discretion in Refusing to Admit Petitioner’s Proposed Supplements	47
F.	Petitioner Should Receive Attorneys’ Fees and Costs.....	49
V.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union, Local 1384 v. Kitsap Transit,</i> 187 Wn. App. 113, 349 P.3d 1 (2015)	41-42
<i>Armstrong v. State,</i> 91 Wn. App. 530, 958 P.2d 1010 (1998)	24
<i>Asarco, Inc. v. U.S. EPA,</i> 616 F.2d 1153 (9th Cir. 1980)	43, 44-45
<i>Aviation W. Corp. v. Labor & Indus.,</i> 138 Wn.2d 413, 980 P.2d 701 (1999)	30
<i>Ckp, Inc. v. Grs Constr. Co.,</i> 63 Wn. App. 601, 821 P.2d 63 (1991)	19
<i>Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.,</i> 159 Wn.2d 292, 149 P.3d 666 (2006)	50
<i>Costanich v. Soc. & Health Servs. ,</i> 164 Wn.2d 925, 194 P.3d 988 (2008)	50
<i>Davis v. Globe Mach. Mfg. Co.,</i> 102 Wn.2d 68, 684 P.2d 692 (1984)	47
<i>Failor's Pharm. v. Dep't of Soc. & Health Servs.,</i> 125 Wn.2d 488, 886 P.2d 147 (1994)	38
<i>Hayes v. City of Seattle,</i> 131 Wn.2d 706, 934 P.2d 1179 (1997)	30
<i>Herman v. Shorelines Hearings Bd.,</i> 149 Wn. App. 444, 204 P.3d 928 (2009)	42
<i>Hillis v. Dep't of Ecology,</i> 131 Wn.2d 373, 932 P.2d 139 (1997)	16, 37
<i>Hunter v. UW,</i> 101 Wn. App. 283, 2 P.3d 1022 (2000)	42
<i>In re Benn,</i> 134 Wn.2d 868, 952 P.2d 116 (1998)	18

<i>Labor & Indus. v. Gongyin</i> , 154 Wn.2d 38, 109 P.3d 816 (2005)	24
<i>Margitan v. Spokane Reg'l Health Dist.</i> , No. 32907-1-III, 2016 Wash. App. LEXIS 92 (Wash. Ct. App. Jan. 21, 2016)	42-43
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	47
<i>Moss v. Vadman</i> , 77 Wn.2d 396, 463 P.2d 159 (1969)	18
<i>Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.</i> , 114 Wn.2d 572, 790 P.2d 124 (1990)	16
<i>Neah Bay Chamber of Commerce v. Wash. State Dep't of Fisheries</i> , 119 Wn.2d 464, 832 P.2d 1310 (1992)	32
<i>Nw. Ecosystem All. v. Rey</i> , 380 F. Supp. 2d 1175 (W.D. Wash. 2005)	44
<i>Ortega v. Emp't Sec. Dep't</i> , 90 Wn. App. 617, 953 P.2d 827 (1998)	42
<i>Probst v. Ret. Sys.</i> , 167 Wn. App. 180, 271 P.3d 966 (2012)	36
<i>Puget Sound Harvesters Ass'n v. Fish & Wildlife</i> , 157 Wn. App. 935, 239 P.3d 1140 (2010)	33, 37
<i>Rios v. Wash. Dep't of Labor & Indus.</i> , 145 Wn.2d 483, 39 P.3d 961 (2002)	36
<i>Samson v. Bainbridge Island</i> , 149 Wn. App. 33, 202 P.3d 334 (2009)	41
<i>Sleasman v. Lacey</i> , 159 Wn.2d 639, 151 P.3d 990 (2007)	18
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991)	45
<i>State v. Longshore</i> , 97 Wn. App. 144, 982 P.2d 1191 (1999)	36

<i>Swinomish Indian Tribal Cmty. v. Ecology</i> , 178 Wn.2d 571, 311 P.3d 6 (2013)	27, 29
<i>Uni-Com Nw. v. Argus Publ’g Co.</i> , 47 Wn. App. 787, 737 P.2d 304 (1987)	18
<i>Wash. State Hosp. Ass’n v. Health</i> , 183 Wn.2d 590, 353 P.3d 1285 (2015)	16, 17
<i>Waste Mgmt. v. Utils. & Transp. Comm’n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994)	42

Statutes

RCW 34.05.271	27-28
RCW 4.84.340	50
RCW 4.84.350	49, 50
RCW 34.05.010	38, 39, 40
RCW 34.05.271	33
RCW 34.05.558	43
RCW 34.05.558.....	41
RCW 34.05.566	41
RCW 34.05.562	<i>passim</i>
RCW 34.05.570	16
RCW 77.04.012	38, 38-39
RCW 77.15.194	5, 21, 22, 23
RCW 77.15.245	<i>passim</i>

Other

LAWS OF 2013, ch. 68, § 1 (statement of legislative intent)	33
2 Wash. State Bar Ass’n, WASHINGTON APPELLATE PRACTICE DESKBOOK § 21.9(1)(a) (4th ed. 2016)	42

I. INTRODUCTION

Roughly two decades ago, Washingtonians voted overwhelmingly to outlaw the hounding, baiting, and trapping of black bears. Yet those inhumane practices continue nearly unabated: each spring, recreational hound hunters chase bears over vast swaths of state timberlands, while in the same areas, hundreds of “feeding” stations lure bears to their deaths.

How did that happen? Because the agency in charge of enforcing the voters’ edict, the Washington Department of Fish and Wildlife (“WDFW”), instead contrived to thwart the intent of the initiatives. Using carefully camouflaged rules to avoid public scrutiny, WDFW transformed the narrow exceptions of the initiatives into gaping loopholes, granting itself the discretion to allow practices that the voters had expressly banned. WDFW adopted those rules with little thought and no reason—willfully disregarding science, ignoring the objections of its experts, and flouting the mandates of its own strategic plan. Away from the public’s eye, WDFW then conducted a shadow rulemaking process to draft the real “rules” governing its Bear Timber Depredation Program.

In short, WDFW defied the mandate of the voters to satisfy the demands of the timber industry—perpetuating a program that its own experts have said may not be “effective, defensible, transparent, accountable, or fair

to the timber industry and the public.” CP 2243.¹ In so doing, WDFW ignored its duty to manage wildlife on behalf of all Washingtonians, not just the timber industry. And it forgot that it is compelled by the Washington Administrative Procedure Act (“APA”) to operate within the bounds of its statutory authority, take action only after careful consideration of all facts and circumstances, and subject its rules to the rigors of public debate.

This case is not about a difference of opinion on wildlife policy, or a question of whether an agency wisely exercised its discretion. It is about whether state agencies will be required to follow the law. When an agency goes this far astray, the courts must intervene.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. WDFW erred by adopting WAC 220-440-210 (“Timber Hunt Rule”), because the rule exceeds WDFW’s statutory authority under I-655.
2. WDFW erred by adopting WAC 220-417-040 (“Special Trapping Rule”), because the rule exceeds WDFW’s statutory authority under I-713.
3. WDFW was arbitrary and capricious in its promulgation of the Timber Hunt Rule, because the agency’s action was willful, unreasoning, and taken without regard to the attending facts and circumstances.

¹ References are to the Clerk’s Papers (“CP”); the Agency Record (“AR”), indexed at CP 531-602; Reports of Proceedings (“RP”) of identified hearings; and select exhibits (“Ex. _”) of key materials appended for the Court’s convenience.

4. WDFW violated the requirements of the APA when adopting the 2018 regulations for the Bear Timber Depredation Program (“Program”), because it failed to follow notice-and-comment rulemaking procedures.

5. The superior court erred by denying the motion to supplement the agency record as to 28 of the documents submitted.

B. Issues Pertaining to Assignments of Error

1. I-655 bans hunters or trappers from using bait to kill bears, with an exception for “employees or agents of county, state, or federal agencies while acting in their official capacities.” Did WDFW exceed its statutory authority when it adopted the Timber Hunt Rule, which gives the agency discretion to issue bear baiting permits to any private hunter “authorized by” WDFW? (Assignment 1)

2. I-655 bans hunters from using hounds to kill bears, with an exception for “employees or agents of county, state, or federal agencies while acting in their official capacities” or “the owner or tenant of real property.” Did WDFW exceed its statutory authority when it adopted the Timber Hunt Rule, which gives the agency discretion to issue bear hounding permits to any private hunter “authorized by” WDFW? (Assignment 1)

3. I-655 allows the operation of black bear feeding stations “in order to prevent damage to commercial timberland,” but bans the use of bait, defined as any substance “used for the purpose of attracting black bears to an area where one or more persons hunt or intend to hunt them.” Did WDFW exceed its statutory authority when it adopted the Timber Hunt Rule to allow the agency to issue permits to kill bears near feeding stations on commercial timberlands? (Assignment 1)

4. I-655 prohibits the use of bait or hounds to kill bears, except for the “purpose of protecting livestock, domestic animals, private property, or the public safety.” Did WDFW exceed its statutory authority when it

promulgated the Timber Hunt Rule, which provides for it to issue permits to use bait and hounds to kill bears indiscriminately on commercial timberlands, without targeted bears causing property damage? (Assignment 1)

5. I-713 bans the use of body-gripping traps, but allows WDFW to issue special permits for such traps “[u]pon making a finding in writing that the animal problem has not been and cannot be reasonably abated by nonlethal control tools.” Did WDFW exceed its statutory authority when it adopted the Special Trapping Rule, which gives the agency discretion to issue bear trapping permits without making such findings? (Assignment 2)

6. Did WDFW act arbitrarily and capriciously by adopting a wildlife management rule with no consideration of the problem the rule was designed to address, the effectiveness of the program the rule governed, the scientific basis for the rule’s approach, the rule’s potential negative consequences, the existence of potential alternatives, or whether the rule aligned with its strategic plan? (Assignment 3)

7. Does WDFW act arbitrarily and capriciously when it adopts wildlife management rules while willfully disregarding science and the opinions of its internal subject-matter experts? (Assignment 3)

8. Are agency regulations subject to rulemaking requirements, when they set rules of general applicability governing who may kill wildlife using otherwise banned hunting methods, the procedures they must follow, and how, where, and when that wildlife may be killed? (Assignment 4)

9. Should the agency record be supplemented under RCW 34.05.562(1), when the supplemental evidence is necessary for the court to determine whether the agency adopted rules that exceed its statutory authority, disregarded material facts during rulemaking, and promulgated rules without adhering to the APA’s rulemaking procedures? (Assignment 5)

10. Did the superior court abuse its discretion when it denied Petitioner’s motion to supplement the agency record on the basis of case delays caused by WDFW, and without consideration of the merits? (Assignment 5)

III. STATEMENT OF THE CASE

A. Statement of Facts

1. Voters Pass Initiatives to Ban Cruel Hunting Methods

In 1996, Washington voters approved I-655 to outlaw the use of bait and hounds to hunt bear. *See* RCW 77.15.245 (codification of I-655, with amendments) (Ex. A). In 2000, they passed I-713 to ban the use of body-gripping traps. RCW 77.15.194 (codification of I-713, with amendments) (Ex. B). Both I-655 and I-713 (collectively, the “Initiatives”) contain narrow exceptions. I-655 allows “employees or agents of county, state, or federal agencies while acting in their official capacities” to use bait or hounds to kill bears “for the purpose of protecting . . . private property, or the public safety,” and (2) allows WDFW to issue permits to landowners and tenants to hunt with hounds (but not bait) to protect their property. RCW 77.15.245(1)(a), (2)(a). I-713 allows WDFW to issue permits for body-gripping traps, upon written findings of an “animal problem” that “has not been and cannot be reasonably abated by nonlethal” methods. RCW 77.15.194(4)(b).

2. Hungry Bears Sometimes Damage Trees by Eating Sapwood

After bears emerge from hibernation, food resources can be scarce, especially in intensely cultivated timberlands. CP 1420, 1794, 3125.² As a

² The agency record contains virtually no information on issues such as the nature of bear timber damage, the details of the Program, the supplemental feeding program, or the positions taken by agency experts. As a result, many of the background facts on these issues come from the supplemental documents Petitioner is asking the court to accept as extra-record evidence.

result, some bears “peel” the bark from trees to eat the carbohydrate-rich sapwood underneath, which can damage and sometimes kill the trees. CP 3218. Studies show female bears cause nearly 90% of the damage from peeling. *Id.*; *see also* CP 3125, 3129. However, if nursing female bears are killed during this period, their orphaned cubs also face certain death. CP 2938. Bears generally stop peeling trees by mid-June. CP 2018.

Modern forestry practices have worsened the problem of tree peeling. CP 1794, 2995-3000. Industrial thinning and fertilizing also increase sapwood production, while the use of herbicides and other forestry practices remove other vegetation and sources of food. CP 2023, 2928. Peeling can be reduced by changing silvicultural practices to address these issues. CP 2038.

WDFW’s scientists do not have sufficient data to effectively assess the extent of tree peeling in Washington or its financial toll on the timber industry. *See* CP 1775, 1778, 1794-95, 2039, 2045-46, 2188. Past estimates have been unreliable, in part because damage from other sources, such as insects or disease, is often mistakenly attributed to peeling. CP 2028-30, 2046. Damage estimates also overestimate the actual financial loss to the industry, because damaged trees are often salvageable, and even if a damaged tree dies, the surrounding trees often grow larger and increase in value, thus compensating for the loss. CP 1775, 2039.

3. Timber Companies Operate Supplemental Feeding Program

Since 1985, Washington timber producers have used a supplemental feeding program each spring to divert bears from peeling. CP 2022. Initial studies showed this approach significantly reduces timber damage if done properly. CP 3009-10, 3147-48. However, if feeders are not maintained, or removed before natural sources of food are available, surrounding timber stands will suffer *greater* damage than if feeders had not been used. CP 3148. I-655's baiting ban specifically allows supplemental feeding on commercial timberlands. RCW 77.15.245(1)(b).

WDFW does not regulate, restrict, or collect reliable information about the feeding program. CP 1732, 2042, 2046. However, the available information indicates that supplemental feeding occurs on a massive scale, with nearly 500,000 pounds of commercial bear feed produced in 2005 (CP 1486) and more than 850 supplemental feeding stations scattered across state commercial timberlands in 2014 (CP 2041). *See also* 2024-25 (graphs showing fluctuations in feeding program from 1985 to 2007).

4. WDFW Manages Timber Damage with Permits to Kill Bears

For more than three decades, WDFW has managed timber damage by issuing permits allowing private hunters to kill bears, largely with the use of hounds. CP 2186. The number of permits issued fluctuates each year, but from 2004 to 2016, nearly 2,000 bears were killed under the Program. CP

2625. Despite WDFW's reliance upon these permits to manage timber damage, it has not collected data to assess whether the Program is effective at reducing peeling, or if nonlethal measures may work better. CP 2186.

WDFW's Chief Bear Scientist Rich Beausoleil has repeatedly voiced serious concerns about the Program, including about the: (1) the lack of reliable information to indicate whether the Program is justified by the financial impact of peeling on the timber industry; (2) the absence of evidence showing that the Program effectively reduces tree damage; (3) the fact that the Program issues permits allowing hunters to kill bears in areas where they are often lured by supplemental feeding; (4) the significant data indicating that the Program largely kills non-offending bears, rather than targeting those actually damaging trees. *See, e.g.* CP 1775-76, 1794-95, 2031-35, 2039. WDFW has acknowledged the shortcomings of its Program and the need to re-evaluate its approach since at least 2009, but has not made any significant changes as a result. CP 1775, 1779-80.

At the same time that it began a public rulemaking process in 2014, WDFW convened a Bear Timber Depredation Subcommittee, consisting of agency biologists, conflict specialists, and enforcement staff ("Expert Committee"). *See* CP 2221 (list of members). The Committee was charged with "rebuild[ing]" the Program, and met frequently in 2014 and 2015 to develop recommendations. CP 2041, 2222. The Committee developed its

recommendations in tandem with the rulemaking process, issuing a draft report in November 2015, and final report in January 2016. CP 2153-2222; 2225-78. Wildlife Conflict Manager Stephanie Simek sat on the Expert Committee and was its liaison with management (CP 2221, 2224), at the same time she served as the proponent for the 2016 rules (AR 4229, 4421).

As directed, the Expert Committee made several recommendations for reform of the Program within the existing structure. *See, e.g.*, CP 2230-42. At the same time, however, it emphasized the urgent need to gather information to assess the Program on a more fundamental level, so the agency could determine whether its approach was “effective, defensible, transparent, accountable, or fair to the timber industry and the public.” CP 2243.

5. WDFW Adopts Rules to Govern Hunting Bears on Timberlands Using Banned Hunting Methods

In 2014, WDFW started rulemaking for new wildlife conflict management responsibilities that it had shifted from its enforcement division to wildlife services. AR 4200. WDFW repealed two rules, instituted six new rules, and amended 10 rules. AR 4094-95, 4199. WDFW published its proposed rules on May 6, 2015; the Fish and Wildlife Commission (“Commission”) approved the rules November 13, 2015; and they became effective February 28, 2016. WSR 16-04-066; AR 4123-24, 4597. This appeal challenges two of those rules: the Timber Hunt Rule, WAC 220-440-

210 (Ex. C) and the Special Trapping Rule, WAC 220-417-040 (Ex. D).³

The Timber Hunt Rule replaced WAC 232-12-025, to become the principal rule regulating the Program. AR 4159, 4649. While the old rule included specific regulations for hound hunting, the Timber Hunt Rule dropped any explicit reference to hounding. *Compare* WAC 220-440-210 *with* former WAC 232-12-025 (Ex. E). While the Timber Hunt Rule cites RCW 77.15.245 (I-655) as statutory authority, it does not mention dogs or bait, or include any provisions regulating their use. Instead, it generally establishes the ability of timber owners with tree “damage” to request permits to kill bears “pursuant to” I-655, using “hunters authorized by” WDFW. WAC 220-440-210(1)(b), (2)(a) & (3)(a).

Trapping is regulated by two rules amended in 2016. Under WAC 220-440-070, timber owners may obtain a special permit to use body-gripping traps. Those permits are governed by the Special Trapping Rule, under which WDFW “may” deny a permit if it determines appropriate nonlethal methods were not tried, or that the alleged animal problem either does not exist or does not justify lethal removal. WAC 220-417-040(14)(a).

6. WDFW Fills Gaps Left by Rules with Non-Public Policies

The Timber Hunt Rule leaves the most basic questions about the

³ WDFW’s rules were recodified and renumbered in 2017. Before then, current WAC 220-440-210 was WAC 232-36-310, and WAC 220-417-040 was WAC 232-12-142. To avoid confusion, the parties have used the current WAC citations in briefing.

Program unanswered. It does not address the details about how the Program will operate, or set regulations governing the use of the banned hunting methods. WAC 220-440-210(2)(a). It leaves open the questions about how WDFW will define “damage,” and what hunters it will “authorize” for participation. WAC 220-440-210(1)(a), (2)(b), (3)(a).

WDFW answered these questions through policies developed it developed privately, with substantial industry input and influence. CP 2111, 2279, 2288-90 (industry viewpoint prevailed over views of Expert Committee). These policies are expressed through Program documents such as pamphlets, protocols, and the provisions of the permits and applications (collectively, the “Unpublished Rules”). The Unpublished Rules outline who may receive permits and under what conditions; limit how many bears hunters may kill, during what period, and in which areas; constrain methods used to kill bears; and set requirements for reporting and carcass disposal.⁴

C. Procedural History and Record Development

1. Petitioner Files Action and Secures Preliminary Injunction

Petitioner Center for Biological Diversity (“Petitioner” or the “Center”) initiated this action against WDFW on May 31, 2018, and filed an amended petition (“Petition”) on June 13, 2018, in Thurston County

⁴ Ex. F contains the Unpublished Rules (AR 1-10), and an appendix summarizing their requirements (CP 866-73).

Superior Court. CP 1-32, 3751. Petitioner is a national, non-profit conservation organization with more than 63,000 active members and offices around the country, including Seattle. CP 6. Petitioner and its members are concerned with the conservation and humane treatment of wildlife, including black bears in Washington. *See* CP 6 (Petition); CP 3541-43 (Declaration of Timothy Coleman); CP 3537-39 (Declaration of Kurt Beardslee). Two parties ultimately intervened: the Western Forestry and Conservation Association, doing business as the Washington State Animal Damage Control Program (“ADCP”) (CP 327), and the Washington Farm Forestry Association (CP 523) (collectively, “Intervenors”).

The Petition sought to invalidate three rules WDFW adopted in 2016 as arbitrary and capricious and exceeding the agency’s statutory authority. CP 28-30 (“Rule Challenge”). It also challenged the Unpublished Rules for failure to comply with statutory rulemaking procedures. CP 30 (“Process Challenge”). Finally, the Petition challenged Bear Timber Depredation Program permits issued in spring 2018 as arbitrary and capricious and exceeding WDFW’s statutory authority. CP 25-28 (“Permit Challenges”).

On June 15, 2018, the superior court entered a preliminary injunction, restraining WDFW from continuing to issue Program permits until the final hearing. CP 331. The court required Petitioner to post a \$100,000 bond and ordered that a hearing on the merits be “set as quickly as possible.” *Id.*

2. WDFW Struggles to Develop Agency Record

The parties immediately began collaborating to identify the categories of information that the agency record would include. *See, e.g.*, CP 952-54 (WDFW's initial list); CP 950 (WDFW's additions); CP 939-43 (Petitioner's additions). WDFW agreed to add certain materials that Petitioners suggested, while Petitioner agreed to WDFW's proposals to shorten the record. CP 921 ¶ 1, 3863. In addition, the parties negotiated a comprehensive agreement on record issues ("Record Agreement"), under which WDFW agreed to provide Petitioner with a draft record along with documents responsive to certain public disclosure requests, so the parties could negotiate additions to the record before it was filed. CP 945-48.

As WDFW assembled the record, its estimated size fluctuated dramatically. In July 2018, WDFW estimated the record would have 2,882 documents, including 319 for the Rule Challenge. CP 3876. In September 2018, it predicted it would contain 21,011 documents, with nearly 15,000 related to the Rule Challenge. CP 3825. By November 2018, WDFW reported it had generated an unindexed proposed record of 61,339 documents, with 16,512 documents for the Rule Challenge. CP 337. However, WDFW determined it had made a number of "unintentional but significant errors" in assembling this record, resulting in a draft record that contained "substantial non-relevant and duplicative documents." CP 341.

After conferring with the other parties, WDFW concluded that it needed to compile a new record. CP 341, 3780 ¶ 3. Intervenor ADCP filed a successful motion to increase the bond securing the preliminary injunction as a result of the delay. CP 349, 525. At that hearing in February, the court expressed great frustration with the failure to expedite the case. *See* RP for February 8, 2019 hearing (“Bond RP”) at 6-7, 14, 16, 27-28. Under pressure from the court, new counsel for WDFW agreed to file the record within two weeks—without providing it to the parties to review first, as provided in the Record Agreement. *Id* at 15. WDFW’s counsel later confirmed that WDFW was disregarding the Record Agreement, as well as other agreements that prior WDFW counsel had made regarding record content. CP 3782 ¶ 7.

On February 21, 2019, WDFW certified and filed a record with 2,560 documents. *See* CP 527-602 (certification and index). The vast majority consists of permits issued in 2018 and related documentation. AR 15-4081; CP 531-99. Only 78 documents relate to the Rule Challenge. AR 4082-5024; CP 599-602. Just 7 relate to the Process Challenge. AR 1-13; CP 531.

The certified record omits several categories of documents the parties had agreed would be included. *Compare* CP 921 ¶ 1, 950-51, 952-53 *with* CP 531-602. Due to these omissions, Petitioner filed a motion to remand the record. CP 607-23. After WDFW insisted that the record included all the documents it had considered in taking the challenged actions, Petitioner

withdrew the motion, indicating it would move to supplement instead. *See* CP 627-28, 634-35, 638-39 (WDFW’s response); CP 771 (withdrawal).

3. Court Grants Motion to Dismiss Permit Challenges

In March, Intervenor filed a motion to dismiss the Permit Challenges, contending they were moot because the 2018 Permits had expired in summer 2018. CP 773-82. Intervenor claimed, and WDFW agreed, that the public interest exception to mootness should not apply, because the Permit Challenges did “not address any unique issue of public policy that [would] not be fully addressed” by the remaining claims. CP 778; *see* CP 774, 777, 779 (similar); CP 786-87 (WDFW’s statement of support).

At the April hearing on the motion to dismiss, the court again expressed frustration with the case delays. RP for April 26, 2019 Hearing (“MTD RP”) at 11-12, 18-19. As a result of these delays, the court dismissed the Permit Claims, indicating it may not have done so if the case had been moving more quickly, even though the permits would have still expired by the date of the hearing. *Id.* at 20-21; CP 83.

4. Superior Court Renders Final Decisions

On June 25, 2018, Petitioner filed its opening brief along with a motion to supplement, asking the court to consider 135 documents as extra-record evidence. CP 902, 3592-93; CP 835, 3575-84. The court heard argument on the motion to supplement the morning of August 9, 2019, and

on the merits that afternoon. *See* RP for Motion to Supplement (“MTS RP”); RP for ALR Hearing (“ALR RP”). Following argument on each, the court issued rulings from the bench denying the motion to supplement (MTS RP at 24-26) and the Petition in full (ALR RP at 79-83). The rulings were reduced to writing in two orders issued August 30, 2019. CP 3746-54.

Petitioner timely appealed. CP 3756.

IV. ARGUMENT

A. Standard of Review for Challenge to Agency Action

This Court exercises *de novo* review of the challenges to WDFW’s actions, because an appeals court sits in the same position as a superior court in reviewing administrative actions. *Wash. State Hosp. Ass’n v. Dep’t of Health*, 183 Wn.2d 590, 594-95, 353 P.3d 1285 (2015) (appeals court also reviews questions of statutory interpretation *de novo*). An agency’s rule is presumed valid, and the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” *Hillis v. State Dep’t of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). Under the Washington APA, 34.05 RCW, which governs this appeal, a rule is invalid if it (1) exceeds the agency’s statutory authority; (2) is arbitrary and capricious; or (3) was adopted without statutory rulemaking procedures. RCW 34.05.570(2)(c).

B. The Timber Hunt Rule and Special Trapping Rule are Invalid Because They Exceed WDFW’s Statutory Authority

The Timber Hunt Rule and Special Trapping Rule are invalid because

they are inconsistent with both the plain language and the “intent and purpose” of the Initiatives. See *Multicare Medical Ctr. v. Dep’t of Soc. & Health Servs.*, 114 Wn.2d 572, 589, 790 P.2d 124 (1990). A rule that amends its governing statute or is inconsistent with the purpose of the statute it implements is invalid, because it exceeds the agency’s statutory authority. *Wash. State Hosp. Ass’n*, 183 Wn.2d at 595-97 (invalidating rule that “expands the meaning” of terms in a statute).

1. Timber Hunt Rule Exceeds WDFW’s Statutory Authority, by Violating I-655’s Restrictions on Who May Use Bait and Hounds

The Timber Hunt Rule is invalid because it unlawfully amends I-655, by giving WDFW discretion to expand the limited categories of people who are authorized under the statute to kill bears using bait and hounds.

a. *Timber Hunt Rule Gives WDFW Unwarranted Authority to Issue Bait Permits to Private Trappers*

Under I-655, only “employees or agents of county, state, or federal agencies while acting in their official capacities” may use bait to kill bears. RCW 77.15.245(1)(a); CP 3625 (“WDFW agrees that it cannot permit the use of bait unless the hunter identified in the permit application is an employee or agent of a federal, state, or local agency.”).

But the Timber Hunt Rule expands WDFW’s discretion beyond the scope of I-655, to allow the agency to issue bait permits to private hunters. Although the Timber Hunt Rule applies to all participants in a “black bear

timber depredation hunt pursuant to . . . RCW 77.15.245,” which includes hunting with bait, it authorizes WDFW to give permits for such hunts to private hunters selected by landowners and “authorized by” WDFW. WAC 220-440-210(3)(a). Private hunters chosen by landowners and “authorized” by WDFW are neither state employees nor agents of the state.

For a hunter to be its “agent,” WDFW must show it has the right to control the hunter’s conduct, and has consented to the hunter acting on its behalf. *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969). This “right to control” must extend beyond WDFW’s ability to require a hunter to adhere to permit provisions—WDFW must also control the specific manner in which its “agent” hunts. *See In re Benn*, 134 Wn.2d 868, 912, 952 P.2d 116 (1998) (government does not control agent unless it has ability to control the undertaking); *Uni-Com Nw. v. Argus Pub. Co.*, 47 Wn. App. 787, 796-97, 737 P.2d 304 (1987) (principal must control specific manner of agent’s performance beyond right to require contract adherence).

In assessing whether the Timber Hunt Rule accords WDFW unlawful discretion, the Court should give deference to how WDFW has interpreted its rule “as a matter of agency policy.” *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). WDFW’s interpretation of the Timber Hunt Rule illustrates its invalidity: the agency has consistently used the rule as authority to allow baiting by private hunters who are not WDFW’s “agents.”

WDFW relies on its Unpublished Rules to run the Program, and these rules make abundantly clear that WDFW does not consider permittees to be its “agents.” The Unpublished Rules specify that all permits for trappers “allow the use of bait.” *See* AR 2(5)(c). But, as with other hunters authorized under the Program, WDFW asserts no control over trappers, nor indicates any intent to allow them to act on its behalf. Quite the opposite: WDFW is explicit that all permittees are “independent contractors.” *See, e.g.*, AR 510 (2018 trapping permit with standard language specifying that permittee “shall be deemed an independent contractor”). If a trapper is an “independent contractor,” he is by definition not WDFW’s agent. *See Ckp, Inc. v. Grs Constr. Co.*, 63 Wn. App. 601, 607, 821 P.2d 63 (1991) (an “agent is distinguished from an independent contractor”).

WDFW takes pains to emphasize that the hunters are not acting on its behalf, and that the Program is *not* a means for hunters to “assist” the agency in managing “its” bears. AR 3924-25. Indeed, WDFW’s permits expressly disclaim the essential elements of agency. WDFW repudiates any control over the manner in which permittees conduct their hunt. AR 510 (“the State has not in any way directed, advised or otherwise indicated how the removal allowed by this Permit is to be carried out except as stated within this Permit”). And WDFW does not authorize permittees to act on its behalf. *Id.* (“This limited grant . . . does not constitute authority to bind the state”).

In practice, only a small subset of the trappers “authorized by” WDFW meet the requirements of I-655: a handful of employees from the U.S. Department of Agriculture’s Wildlife Services Division. On the other hand, WDFW routinely gives baiting permits to private trappers with no government affiliation, including five during the abbreviated 2018 season. See AR 376-78, 510-12, 1724-26, 2433-45, 3119-21, 2162-64.

b. Timber Hunt Rule Gives WDFW Unwarranted Authority to Issue Hounding Permits to Hunters Who Are Not Landowners

In addition to permitting government employees and agents to use hounds, I-655 also allows WDFW to issue hounding permits to “the owner or tenant of real property.” RCW 77.15.245(2)(a). But the Timber Hunt Rule does not require hound hunters to be landowners or tenants, any more than it requires them to be government employees or agents. To the contrary, WDFW specifically contemplates that landowners will “select hunters authorized by the department.” WAC 220-440-210(3)(a)). The Timber Hunt Rule thus expands I-655’s narrow exception for individual landowners into a massive exemption for commercial interests, potentially opening up 4.6 million acres of industrial forestland to hunting with the banned methods.⁵ Such an interpretation countermands I-655’s unambiguous requirements.

⁵ See *Washington Forests*, WASHINGTON FOREST PROTECTION ASSOCIATION, <http://www.wfpa.org/our-forest-today/washington-forests/> (last visited Dec. 23, 2019).

WDFW's interpretation confirms that does not expect "authorized" hunters to be either government agents or landowners. As with the bait permits, WDFW's hounding permits disclaim an agency relationship. *See, e.g.,* AR 97 (hounding permit states permittee is an "independent contractor"). WDFW also assumes permittees will not be landowners: Implicit throughout the Unpublished Rules is an assumption that *the hunter is the permit holder, and the landowner is not*. For example, the permittee affidavit distinguishes between signatures needed from the "landowner or their designee" and "each individual permittee[.]" AR 1.

Indeed, *none* of the 73 hounding permits WDFW granted in 2018 were to (1) landowners or tenants *or* (2) government employees or agents. Many permits designate the same set of hunters for different properties; none of the hunters are affiliated with any governmental entity; and for each permit the name of the landowner or designee is different from the permittee.

2. Special Trapping Rule Gives WDFW Unwarranted Authority to Violate I-713's Standard for Issuing Trapping Permits

WDFW's Special Trapping Rule is invalid because it grants WDFW discretion that I-713 expressly does not allow. Under I-713, body-gripping traps require a special permit that WDFW may issue *only* upon "making a **finding in writing** that the animal problem has not been and cannot be reasonably abated by nonlethal control tools or if the tools cannot be

reasonably applied.” RCW 77.15.194(4)(b) (emphasis added). The Special Trapping Rule makes no mention of written findings, and provides that a permit “*may* be denied” if, in WDFW’s judgment, “appropriate nonlethal methods to abate damage have not been utilized” or the “alleged animal problem does not exist.” WAC 220-417-040(14)(a), (b) (emphasis added).

The rule’s standard is thus the opposite of what the voters required. Under I-713, WDFW *may not* issue a special trapping permit *unless* it verifies, in writing, that the applicant: (1) has an “animal problem” *and* (2) has tried, but failed, to abate the problem through reasonable nonlethal means. RCW 77.15.194(4)(b). Through the Special Trapping Rule, WDFW grants itself the authority to issue a permit *even if* it has concluded that the applicant (1) *does not* have an “animal problem,” or (2) *has not* tried any reasonable nonlethal means to resolve that problem. WAC 220-417-040(14)(a), (b).

Once again, WDFW interprets its rule in a manner violating the statute. The Unpublished Rules do not require any written findings, WDFW’s permit materials do not have a section for WDFW to insert such findings, and the record contains no such findings in connection with any 2018 trapping permits. *See* AR 376-78, 510-12, 1724-26, 2433-45, 3119-21, 2162-64. Indeed, as a result of the 2016 Special Trapping Rule amendments, WDFW no longer even gathers sufficient information upon which such findings could reasonably be based. WDFW’s previous rule required applicants to provide

details about their “animal problem,” including the nonlethal measures they took to alleviate the problem, and an explanation of why those measures could not be effective. *See* former WAC 220-417-040(6)(c)-(f) (2015); AR 4137 (blackline changes for amendment).

In 2018, WDFW’s only nod to I-713 in its bear timber application was a request for applicants to check one of a series of boxes reporting “Non-Lethal Methods Used,” which include supplemental feeding, avoided thinning, heavy stocking, and “public hunting opportunity.” *See, e.g.* AR116 (2018 permit application). WDFW’s inclusion of “hunting” as a “nonlethal” method is nonsensical. And even if applicants report using *actual* “nonlethal” methods, a checked box provides insufficient information for WDFW to judge whether an applicant made a reasonable attempt to mitigate damage without killing bears. It is certainly not a “**finding in writing** that the animal problem has not been and cannot be reasonably abated by nonlethal control tools” and/or that “the tools cannot be reasonably applied.” RCW 77.15.194(4)(b) (emphasis added).

Indeed, WDFW interprets the Special Trapping Rule to give it discretion to issue trapping permits even if an applicant does not report trying *any* nonlethal methods. *See, e.g.*, AR 2123-24 (application with no nonlethal methods reported); AR 2130-32 (permit); AR 2121 (two bears killed). It grants permits to applicants who only tried “hunting.” *See, e.g.*, AR 3101

(application); AR 3119 (permit). It will even grant permits when it knows applicants have falsely claimed nonlethal methods. *See* AR 994 (application checking hunting, feeding, and no thinning); AR 996 (WDFW specialist notes there are no feeders, and the trees were thinned); AR 1034 (applicant admits information was incorrect); AR 1017-18 (renewed application marking *no* nonlethal methods); AR 982 (two bears killed on ensuing permit).

3. Supplemental Materials Show the Timber Hunt Rule Violates I-655 by Illegally Facilitating the Use of Feeding Stations as Bait

No supplemental evidence is necessary to find that both the Special Trapping Rule and the Timber Hunt Rule exceed WDFW's statutory authority, as discussed *supra* IV (B) (1-2). But in the alternative, evidence before WDFW during rulemaking (but not considered by the agency) provides additional support for the conclusion that WDFW exceeded its authority by adopting a rule that conflicts with the "intent and purpose" of I-655. *See Armstrong v. State*, 91 Wn. App. 530, 533, 958 P.2d 1010 (1998).

Agency rules must be "written within the framework and policy of the applicable statutes." *Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 50, 109 P.3d 816 (2005). I-655 allows the "operation of feeding stations for black bear in order to prevent damage to commercial timberland." RCW 77.15.245(1)(b). That provision must be read in the framework of the statute's purpose to ban the use of bait, which it defines as "a substance

placed, exposed, deposited, distributed, scattered, or otherwise used for the purpose of attracting black bears to an area where one or more persons hunt or intend to hunt them.” RCW 77.15.245(1)(d). The statute thus forbids a “feeding station” from being used for “attracting bears to an area” where people intend to hunt them, *i.e.* as *de facto* bait. *See* RCW 77.15.245(1)(b), (d). If a hunter kills a bear near a feeder, he thus transforms that feeder into “bait” under the definition of I-655. *See* CP 1731 (WDFW letter conceding that “hunting on top of supplemental feeders [is] baiting, which is illegal”).

As WDFW knew when it adopted the 2016 Rules, there are several hundred active bear feeding stations in undisclosed locations on commercial timberlands in Washington each spring. CP 2024-25. WDFW’s experts repeatedly cautioned that allowing hunting near these feeders was illegal baiting. *See* CP 1787 (WDFW biologist asking for 2014 bear damage meeting to address the fact that feeders may serve as “bait” for permit hunters); CP 2124 (August 2015 Expert Committee recommendation that WDFW stop issuing permits to kill bears in areas with supplemental feeding).

WDFW disregarded these warnings, approving the Timber Hunt Rule to serve as a mechanism for issuing permits to kill bears on the very same timberlands that are crowded with active feeders each spring. Indeed, the Timber Hunt Rule does not even mention supplemental feeders, much less provide for any safeguards to prevent them from being used as use as *de facto*

bait. And until 2018, WDFW made no attempt to require hunters to remove supplemental feeders even around active hunting. CP 1732.

In 2018, WDFW altered its Unpublished Rules to require landowners to remove feeders within a permitting area “prior to” the permit start date. *Id.*; AR 6. But bears do not stop coming to an area the day a feeder is removed: they continue to visit feeding locations for days or weeks after the food is gone, even returning to the same locations in subsequent years. CP 3009, 3148.⁶ Indeed, WDFW’s management acknowledged that its 2018 change was essentially meaningless: Game Division Manager Dan Brinson concurred with an enforcement captain’s conclusion that timber operators must “Feed **OR** hunt, not both.” CP 1980 (emphasis in original). As the captain explained, and Brinson agreed, allowing hunting at feeding sites immediately after removing the feed “makes little sense,” and “in any other context would be a violation of state law,” because it kill bears who were “effectively baited to this location.” *Id.*

And the facts show that the Timber Hunt Rule, as interpreted through the 2018 Unpublished Rules, not only allows but *facilitates* baiting with supplemental feeders. *See, e.g.*, AR 2159-60, 2153, 2155 (feeder removed, replaced by bait); AR 2149 (male bear killed there a day later).

⁶ For this reason, hunters “pre-bait” sites, so bears will establish a routine of visiting before hunting begins. AR 6 (WDFW limits “pre-baiting” to 72 hours prior to active hunting).

Perversely, the bears faithfully visiting a feeding station in lieu of peeling trees are those most likely to be killed when the feed is suddenly replaced by traps and hounds. *See, e.g.*, CP 874-75 (maps with GPS locations of reported feeders and bear kills in two areas, showing 20 bears killed by hounds within 2 miles of feeders) (Ex. G); CP 900 ¶ 6 (declaration explaining data) (Ex. H); CP 876-98 (charts of data expressed in maps, with AR numbers); *see also* CP 1775 (only 25% of bears killed in timber hunt have bark in their stomach).

4. Supplemental Materials Show the Timber Hunt Rule Violates the Intent of I-655 by Failing to Target Bears Causing Damage

Another clear purpose of I-655 was to eliminate the use of bait and hounds for the indiscriminate and widespread hunting of bears. Toward this end it created only limited exceptions, including the use of banned methods in specific instances “for the purpose of protecting . . . private property.” RCW 77.15.245(1)(a), (2)(a).

Agencies must narrowly construe statutory exceptions so as to give effect to the intent of a statute’s general provisions. *Swinomish Indian Tribal Cmty v. Dep’t of Ecology*, 178 Wn. 2d 571, 582, 311 P.3d 6 (2013). An agency thus may not interpret an exception as “broad authority” to issue a rule allowing an “end-run” around the purposes of the statute. *Id.* at 576, 590. However, with the Timber Hunt Rule, WDFW turned its narrow authority to issue property-protection permits into a broad rule allowing bears to be killed

indiscriminately on commercial timberlands using banned methods.

To begin with, the Timber Hunt Rule fails to set any reasonable parameters around the “damage” timber owners must show to obtain kill permits. It does not require that the “damage” be recent or meet any minimum threshold. WAC 220-440-210(1)(a). WDFW has frequently interpreted this rule to allow a timber company to get a permit to kill two bears, based on minimal tree damage from prior years—without *any showing* of recent damage, even if bears had already been killed based on that same damage the year before. *See* AR 191 (2016 Baiting Protocol); CP 1347 (2017 guidelines); 2295 (practice in 2016). In 2018, WDFW nominally required timber owners to show evidence of “confirmed, current year, fresh peeled trees,” but this “rule” still allowed minimal damage to a single tree to justify killing two bears. In fact, if hunters killed only one bear in the first 30 days, they could get an *automatic* renewal, without any showing that damage continued after they killed the first bear. AR 9 (2018 operating guidelines).

The Timber Hunt Rule also does not restrict the area in which bears can be killed to where “damage” was found. As WDFW knew when it passed the rule, timber companies and their hunters routinely abuse this flexibility to plot overlapping permit zones to create large “hunting grounds” in which hunters can recreationally run dogs after bears. CP 1875, 1896. One hound hunter admitted to strategically identifying damage points so the

hunting zones would overlap to create a large hunting, and timing applications so his party could hunt the entire “season.” CP 2294. In 2016, that hunter and his party treed about 17 bears, many of them multiple times, but only killed seven—just enough to “make it look like they were effective.” *Id.* And WDFW interprets the Timber Hunt Rule to allow such abuses to continue. In four areas near Mt. Rainier in 2018, hound hunter teams linked as many as 13 permits to create 68-to-180 square mile hunting zones. CP 875 (App. C), CP 881-898 (App. E); CP 900 (Clouser Decl. ¶ 5). One such zone was created by the same hunter who admitted in 2016 that he used permits for purely recreational hunts. *Compare* CP 1880 *with* CP 895 -98 (App. E).

Finally, the Timber Hunt Rule does not limit the means hunting to those with any likelihood of killing bears who have damaged trees. WDFW’s data on the stomach contents of bears shows only 25% of the bears killed by hound hunters had peeled trees. CP 1775, 2033. In addition, nearly 90% of peeling damage is by female bears. CP 3218. Yet nearly all of the hunting through the Program is hound hunting, and two-thirds of the bears killed through the Program are consistently male. CP 2625 (program statistics showing bears killed between 2004 and 2016).

It was clearly not the voters’ intent to grant unlimited discretion to WDFW to preserve the practice of bear hounding and baiting. But the numbers show this is exactly what WDFW has done: in several years since I-

655, nearly as many bears were killed under WDFW’s special permits as before voters “banned” hound hunts, showing that WDFW’s “end run” around I-655 rendered it almost completely ineffectual. *Compare* CP 984 (204 bears killed by hounds in 1994) *with* CP 2580 (194 bears killed in timber hunt in 2007); *see* CP 1490 (graph showing rise of permits after I-655).

C. WDFW Acted Arbitrarily and Capriciously in Adopting the Timber Hunt Rule

When adopting the Timber Hunt Rule, WDFW bypassed consideration of fundamental considerations, ignored basic facts, refused to engage in meaningful reasoning or analysis, and willfully disregarded all adverse information—including its own expertise and strategic planning. As the Washington Supreme Court has held, such “conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious[.]” *Hayes v. City of Seattle*, 131 Wn.2d 706, 717, 934 P.2d 1179 (1997) (internal citations omitted).

1. Agency Record Shows WDFW Failed to Consider Any Science, or the Most Fundamental Facts and Circumstances

What information did WDFW consider when adopting the Timber Hunt Rule? According to its record, almost none. If a rulemaking file is a metaphorical “big cardboard box into which copies of things considered are thrown,” then in this case, the box is nearly empty. *See Aviation West Corp. v. Dep’t of Labor and Indus.*, 138 Wn.2d 413, 418, 980 P.2d 701 (1999)

(internal citation omitted). Other than procedural rulemaking documents and public comments, WDFW's box contains one six-page excerpt from one WDFW report, with a single paragraph on bear timber damage. AR 4091.

Thus, the record is most remarkable for what it does not contain. In its response to the Motion to Remand, WDFW confirmed that the record was "complete and accurate," and reflects everything the agency considered in taking the challenged actions. CP 633. The record thus demonstrates that the agency gave no thought to the following fundamental factors:

The Problem, Policy Options and WDFW's Proposed Solution.

Other than industry comments, the record contains no information about bear peeling, even from within the agency's own expertise. It shows the agency gave no thought to alternatives for addressing this problem—or even to the approach it selected. Although the Timber Hunt Rule was adopted to regulate bear baiting and hounding, the record shows the agency gave no consideration to these methods, including whether their continued use was effective, necessary, ethical, or even legal. Remarkably, the fact that the rule governs the use of bait and hounds is not mentioned *anywhere* in the text of the proposed or final rule (AR 4156-57, 4663-66); the CR-101 pre-proposal inquiry (AR 4118); the CR-102 notice of proposed rulemaking (AR 4125-60); the CR-103 rulemaking order (AR 4161-97); the State Environmental Policy Act Checklist (AR 4231-46); the rule-briefing for the Commission

(AR 4646-66); or the Concise Explanatory Statement (AR 4199-4217).

Similarly, although the new rule was to regulate an existing Program, the record reflects no consideration of that Program, and contains no data on the Program or information about its effectiveness. This omission is especially striking because WDFW revealed in response to comments that it had assembled the Expert Committee to review the Program (AR 4356-63). Yet the record shows WDFW did not consider any information from that Committee before approving its rule.

Before an agency takes an action, the law demands that it “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 471, 832 P.2d 1310 (1992) (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983)) (some internal citations omitted). Here, WDFW not only failed to “examine relevant data,” it also did not even attempt to provide any meaningful explanation of its choice, or draw any “rational connection” between the two. *Id.* The Timber Hunt Rule thus lacks any rational basis, and should be invalidated as arbitrary and capricious. *Id.* (“[W]e may not supply a reasoned basis for the agency’s action that the agency itself has not given.”) (internal citation omitted).

WDFW's Strategic Priorities. WDFW adopted its 2015-2021 Game Management Plan ("Strategic Plan") to set forth agency objectives on issues including conflict management. AR 4090. But the Plan is not in the agency record, showing the agency did not even consider whether its new rule was consistent with its own strategic goals and objectives. "When an agency makes rules without considering their effect on agency goals, it acts arbitrarily and capriciously, without regard to the attending facts or circumstances." *Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 949-50, 239 P.3d 1140 (2010).

Science. The Legislature has emphasized that it is critically important that agencies such as WDFW, whose expertise is founded on science, base their policies on scientific information of the "highest quality and integrity," and that they be transparent about the science informing their decisions. LAWS OF 2013, ch. 68, § 1 (statement of legislative intent). The Legislature thus requires WDFW to identify all scientific information it "reviewed and relied upon" in developing any "significant legislative rule." *See* RCW 34.05.271(1)(a). But this agency record contains no science. None. Incredibly, when developing a rule to regulate an important wildlife management issue, using controversial methods, WDFW did not consult *any* scientific data, reports, or even its own scientists.

2. Supplemental Records Show the Agency Willfully Disregarded Substantial Information Undermining its Chosen Approach

The gaps in the record show the *categories* of information WDFW failed to consider, which is enough to invalidate the rules. The proposed supplemental documents reinforce this conclusion, by showing that the facts WDFW excluded from consideration include damning condemnations of its chosen approach, thus reinforcing the arbitrary and capricious nature of its decision. Those records confirm WDFW acted arbitrarily and capriciously.

WDFW adopted the Timber Hunt Rule in the face of its Expert Committee's conclusion that its approach may not be "effective, defensible, transparent, accountable [or] fair to the timber industry and the public." CP 2245 (final proposal by Expert Committee); *see also* CP 2186 (similar assessment in Nov. 16, 2015 draft proposal). In approving a new rule to perpetuate its historic approach, WDFW willfully disregarded the criticism that it had already run the Program for three decades without determining if it was scientifically supportable or economically justified. CP 2186. Approving the Timber Hunt Rule thus violated one of the fundamental directives of WDFW's own Strategic Plan, which mandates that when the science is "not as strong as managers might like," WDFW's management efforts will be "conservative," to "minimize the potential for significant negative impacts to hunted wildlife species." CP 1367.

WDFW likewise ignored the opinions from its internal experts that:

- (1) the Bear Timber Depredation Program was ineffective at addressing the problem of bear peeling, and might even be making it worse (CP 1775, 2035, 2186);
- (2) the Program resulted in the widespread hunting of non-offending bears, while failing to target the bears causing tree damage (CP 1775, 2033, 2043);
- (3) there may be better solutions to deter bears from peeling trees during the short window of time that peeling occurs, including silvicultural approaches (CP 1775, 1795, 2038, 2189);
- (4) aspects of the Program might be illegal (CP 2050, 2111-12, 2198);
- (5) the Program's permits allow hunters to illegally use feeding stations as bait (CP 1787, 2112, 2124);
- (6) the Program allowed abusive hunting practices (CP 2032, 2294-95); and
- (7) the Program implicated other ethical issues about which WDFW refused to be transparent, such as the likelihood of orphaning bear cubs (CP 1765).

These were not isolated concerns raised by a few low-level staff members. They were repeated criticisms voiced by WDFW's Expert Committee, its Bear Specialist, and the conflict specialists and enforcement officers who managed the Program—in multiple communications and meetings dating back years. *See, e.g.*, CP 1775 (notes from 2009 meeting reflecting the same concerns raised by communications in 2014 and 2015). WDFW's blatant disregard of these concerns violated the Plan's mandate that "[s]cience and the professional judgment of biologists" are to serve as

the “foundation for all objectives and strategies.” CP 1367.

Case law confirms that WDFW acted arbitrarily and capriciously by willfully disregarding the repeated concerns raised by its own experts, and the recommendations of the Expert Committee it formed to examine the Program. *See Rios v. Washington Dep’t of Labor & Indus.*, 145 Wn.2d 483, 505-08, 39 P.3d 961 (2002) (agency is arbitrary and capricious when it ignores the findings of its own expert committee); *Probst v. State Dep’t of Ret. Sys.*, 167 Wn. App. 180, 193-94, 271 P.3d 966 (2012) (agency’s decision to continue its historical practices without evaluating internal concerns was a “willful and unreasoning disregard of the facts and circumstances”).

Finally, WDFW not only disregarded the concerns of its staff—it also willfully ignored the clearly expressed opinion of the citizens whose interests in wildlife it is charged with protecting. *See State v. Longshore*, 97 Wn. App. 144, 150, 982 P.2d 1191 (1999) (state manages wildlife in trust for its people). WDFW staff, including the Expert Committee, frequently worried that the Program violated the spirit, if not the letter, of the Initiatives. *See* CP 2111, 2176, 2295. Not only did WDFW choose to continue a Program that made almost exclusive use of the cruel hunting methods that the voters had decided to ban; it also knew Washingtonians were *overwhelmingly* opposed to killing bears to protect timber interests—no matter what the means. *See* CP 2395 (in 2014 poll commissioned 70% of Washingtonians indicated they opposed

killing bears to prevent timber damage, with only 17% in support). WDFW's Plan stresses the importance of developing programs that both "achieve key biological objectives and are supported by the public." CP 1385. WDFW knew the Timber Hunt Rule achieved *neither* of these strategic ends, but it proceeded anyway. *Puget Sound*, 157 Wn. App. at 949-50 (agency arbitrary and capricious if it acts "without considering their effect on agency goals").

D. WDFW's Unpublished Rules are Invalid Because they are "Rules" Adopted without Rulemaking Procedures

On the most pressing issues related to the Program, the Timber Hunt Rule is either silent or explicitly leaves gaps—such as providing that "damage" was to be defined by WDFW, indicating that timber owners need to request a permit "following the procedures established" by WDFW, and that they could select hunters "authorized by" WDFW. WAC 220-440-210(1)(a), (2)(a), & (b), (3)(a), (5)(b). This as by design. At the same time it was engaged in public rulemaking, WDFW conducted a shadow process to develop regulations governing most aspects of the Program, through invitation-only meetings with industry and hunter "stakeholders." CP 2111 (Committee met privately with industry to exclusion of environmental groups), 2288-90 (industry viewpoint prevailed over views of Committee).

These Unpublished Rules are invalid because they are "rules" under the APA that were not adopted in compliance with rulemaking procedures.

Hillis, 131 Wn.2d at 398. An agency action is a “rule” if it is an “order, directive, or regulation of general applicability” that has one of a list of specified effects, including if (1) the regulation “establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law” or (2) the violation of the regulation “subjects a person to a penalty or administrative sanction.” RCW 34.05.010(16).

First, most of the Unpublished Rules were of “general applicability,” because they applied “uniformly to all members of a class,” *i.e.* all the timber producers and hunters who wished to participate in the Program. *Failor’s Pharmacy v. Dep’t of Soc. and Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). A policy is of general applicability where, as here, it is applicable to all participants in a particular program, rather than being implemented through individualized contracts or assessments of individual benefits. *Id.* (citing *Simpson Tacoma Kraft Co. v. Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992) (rejecting argument that an agency standard applied to each individual, when all permittees faced the same general requirement)).

Second, a permit to kill bears under the Program is a “benefit or privilege” under RCW 34.05.010(16). In *Hillis*, the Court found the “right to apply and be considered” for a permit to withdraw groundwater was a “benefit or privilege.” 131 Wn.2d at 398-99. Like the water in *Hillis*, wildlife is a public resource. RCW 77.04.012. As WDFW makes clear, the right to

kill wildlife with a state permit is a “privilege.” Indeed, the 2018 permits refer to these “privileges” five times, and the “benefits” once. *See, e.g.* AR 97 (“Any person exercising the **privileges** granted by this Permit”); *id.* (“I understand that the State of Washington is issuing this Permit to allow me the **benefits** of the statutes and regulations listed herein.”) (emphasis added).

Third, the Unpublished Rules “establish[]” or “alter[] a number of “qualification[s]” and “requirement[s]” relating to the enjoyment of these benefits or privileges. *See* RCW 34.05.010(16). For example, compared to those effective in 2017, the 2018 Unpublished Rules “establish” a new “requirement” that hunters undergo a background check. AR 1, 10; CP 1732. They also “alter” the “requirement” of “damage” necessary to receive a Permit, to any “confirmed, current year, fresh-peeled trees.” *Compare* AR 9, 11 to CP 1347 (2017 standard). Collectively, the 2018 Unpublished Rules address more than 30 requirements or qualifications, which are of exactly the same type that WDFW routinely uses rulemaking to set in other circumstances. For example, the Unpublished Rules designate:

- **Where a hunt may take place:** (1) bears can be trapped and hounds can “strike” on a scent within a 1-mile radius of a damage area, which is (2) defined as an area with “confirmed, current year, fresh-peeled trees. . . within a stand of Douglas-fir or hemlock trees less than or equal to 30 years of age.” AR 1(E), 2(2)(e), 9, 11, 97, 98(D)-(E).⁷

⁷ For other hunting activities, WDFW enacts rules specifying hunting boundaries. *See, e.g.*, WAC 220-413-180 (restricted and special permit hunting areas); 220-415-010, -020 (deer); 220-415-070 (moose); 220-415-080 (spring bear); 220-415-100 (cougar).

- **What hunting methods may be used:** (1) permittees may choose hounds, traps, or shooting; (2) hound hunters may not use bait, but trappers and master hunters may; and (3) bait sites must be registered, and follow rules as to how much bait may be used, what kind of bait may be used, and where it must be placed. AR 1(E); 2(5)(c), (d); 4-6; 10, 11.⁸
- **When hunting may take place, and how many bears may be killed:** (1) the removal season runs April 15 to June 30; (2) each permit lasts 30 days, and (3) hunters may kill two bears for each permit. AR 2(5)(c-d), AR 9, AR 98(N).⁹
- **How hunters must dispose of the carcass:** (1) they may not retain any parts of bears; (2) they must turn in gall bladders, hides, skulls and paws; and (3) they must donate meat. AR 2(8-10), 9, 98(J) (K-L).¹⁰

Finally, in the alternative, the Unpublished Rules are “rules” because they set forth a variety of procedures, the violation of which can subject the violators to administrative penalties, or even criminal sanctions. *See* RCW 34.05.010(16). The Special Trapping Rule warns it is unlawful to fail to comply with the provisions of a trapping permit. WAC 220-417-040(3). The Timber Hunt Rule provides that violating any permit condition could result

⁸ In other cases, WDFW issues rules regarding hunting methods, including the use of bait. *See, e.g.*, WAC 220-415-020 (deer hunters may use modern firearms, bows or muzzleloaders during specified seasons); 220-414-020 (use of some firearms unlawful); 220-414-030(2) (restricting volume of bait used to hunt deer or elk).

⁹ WDFW enacts rules setting dates for other hunting activities, including special permit hunts, and “bag limits” for each. *See, e.g.*, WAC 220-415-020 (deer general seasons); 220-415-030 (deer special permit hunts); 220-415-080 (spring bear); 220-415-090 (fall bear); 220-415-100 (cougar, including designating timing variables due to harvest guidelines).

¹⁰ For other species, WDFW sets such requirements by rule. *See, e.g.* WAC 220-400-050 (requirements for otter, cougar, lynx, bobcat pelts, and cougar skulls); 220-415-110 (horns of bighorn sheep must be presented to WDFW for inspection); 220-440-080 (wolf carcass must be surrendered to WDFW if wolf is killed in act of attacking a domestic animal).

in Program suspension, with some violations punishable as crimes. WAC 220-440-210(5)(d), (e). Indeed, the Unpublished Rules themselves make clear that violation of their restrictions can result in both administrative penalties and criminal sanctions. *See* AR 98(M).

E. The Court Should Admit 28 of the Documents Submitted to the Superior Court as Supplements to the Agency Record

Petitioner asks the Court to consider 28 of the documents proffered to the superior court as supplements to the agency record,¹¹ which are necessary to decide disputed issues related to the validity of the agency’s challenged actions. *See* Appendix (“App.”) (collection of supplements under appeal).

1. The Court Should Review Superior Court’s Ruling *de novo*

Judicial review of an agency action is generally based on the agency’s certified record. *See* RCW 34.05.558; 34.05.566. However, a reviewing court may supplement the record with evidence that “relates to the validity of the agency action at the time it was taken,” and is “needed to decide disputed issues regarding” elements including the “[u]nlawfulness of procedure or of decision-making process,” or “[m]aterial facts in rule making. . . not required to be determined on the agency record.” RCW 34.05.562(1)(b), (c).

The decisions of the court of appeals are inconsistent regarding the

¹¹ In this brief, Petitioner asks the Court to reverse the superior court’s ruling to admit these supplemental documents upon review of the superior court’s ruling. In the alternative, Petitioner will submit a motion to supplement directly to this Court.

standard of review it will use to review a superior court's decision on a motion to supplement. Some cases indicate the court of appeals will review the denial of a motion to supplement for abuse of discretion. *See Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334 (2009); *Amalgamated Transit Union, Local 1384 v. Kitsap Transit*, 187 Wn. App. 113, 122-23, 349 P.3d 1 (2015). However, other authority indicates it is question of law that will be reviewed *de novo*. *See Herman v. Shorelines Hearings Bd.*, 149 Wn. App. 444, 454, 204 P.3d 928 (2009); 2 Wash. State Bar Ass'n, WASHINGTON APPELLATE PRACTICE DESKBOOK § 21.9(1)(a) (4th ed. 2016).

Petitioner asks the court to apply the *de novo* standard, as it is consistent with the Washington Supreme Court's holdings on the standards for reviewing challenges to agency actions. In *Waste Management v. Utils. & Transp. Comm'n*, the Court confirmed that "the appellate court stands in the same position as the trial court when reviewing the decision of an agency." 123 Wn.2d 621, 632, 869 P.2d 1034 (1994). The appellate and superior courts likewise stand in the same position as to the supplemental evidence, as both would be equally able to review whether the proposed evidence fits APA requirements. Indeed, appellate courts may directly consider motions to supplement the agency record under RCW 34.05.562, without a finding of error in the court below. *See, e.g., Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 287 n. 1, 2 P.3d 1022 (2000), *rev. denied*, 142

Wn.2d 1021, 16 P.3d 1263 (2001) (supplementing record on appeal under RCW 34.05.562); *Ortega v. Emp't Sec. Dep't*, 90 Wn. App. 617, 626 n.2, 953 P.2d 827 (1998) (denying motion to supplement under RCW 34.05.062); *see also Margitan v. Spokane Reg'l Health Dist.*, No. 32907-1-III, 2016 Wash. App. LEXIS 92, at *19, 21-22 (Ct. App. Jan. 21, 2016) (appeals court applies same rules as superior court on whether to admit evidence under RCW 34.05.562) (unpublished opinion cited under GR 14.1).

2. WDFW Suppressed Much of the Proposed Supplemental Evidence from the Final Iteration of the Agency Record

Under state law, an agency's self-certified record is limited to documents *identified by the agency* as having been considered by it before its action and used as a basis for its action." RCW 34.05.558(1) (emphasis added). Washington law thus gives an agency the discretion to select the contents of its record. However, the APA provides a check on this discretion, by giving courts the authority to consider material adverse information that the agency has not "identified . . . as a basis for its action" (RCW 34.05.558(1)), and which thus was "not required to be determined on the agency record." RCW 34.05.562(1)(a), (c). Such a check is essential to meaningful judicial review, which would be impossible if the court was "required to take the agency's word that it considered all relevant matters." *Asarco, Inc. v. U. S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (it would be

“both unrealistic and unwise to ‘straightjacket’ the reviewing court with the administrative record”) (internal citation omitted).

In this case, WDFW took full advantage of its discretion before certifying its record, scrubbing substantial adverse information that it had previously indicated would be included. This was not the type of case that the superior court had envisioned, in which “an agency keeps a rulemaking record as it’s making an agency rule, and a record exists at the time that the rule is implemented.” RP for March 1, 2019 hearing (“Status RP”) at 5. Just the opposite: the content of the WDFW’s rulemaking file vacillated from an initial 319 documents (CP 3876), to 16,512 (CP 337), and then down to a mere 78 in the certified record. AR4082-5024; CP 599-602.

WDFW made this dramatic reduction, in part, by cutting out a number of adverse documents that it had identified as part of the rulemaking file in its first proposal to Petitioner, including WDFW’s Strategic Plan; scientific studies, reports and information; Program data; and information from internal Program workgroups. CP 953. WDFW also cut from the final record several categories of documents it had agreed to add after initial discussions with Petitioner in July 2018, including records of staff concerns, Program reports, and all materials related to the Expert Committee. CP 950, 921.

Indeed, the case illustrates exactly why the safety valve of supplementation is so crucial, so a court can determine if an agency has

“considered all relevant factors”—and especially, whether it has “swept stubborn problems or serious criticism under the rug.” *See Nw. Ecosystem All. v. Rey*, 380 F. Supp. 2d 1175, 1184 (W.D. Wash. 2005) (quoting *National Audubon Soc. v. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993)); *Asarco*, 616 F.2d at 1160 (court cannot “determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not”).

3. Court Should Consider Supplemental Evidence that Shows the 2016 Rules and the 2018 Unpublished Rules were Unlawful

Under RCW 34.05.562(1)(c), Petitioners ask the Court to consider the following evidence WDFW possessed when adopting the Timber Hunt Rule, which the agency was arbitrary and capricious for refusing to consider.¹²

- WDFW’s Strategic Plan, and a public opinion poll WDFW commissioned in developing the Plan. CP 1364-1474 (Strategic Plan) (excerpts at App. 3); CP 2389-97 (poll) (App. 19) (cited *supra* at 5, 34, 35, 26).¹³
- Materials related to the Expert Committee, developed prior to or in conjunction with the rulemaking process, including: draft and final Committee recommendations (CP 2153-2223 (App. 15); CP 2224-79 (App. 16)); and notes from Committee meetings (CP 1779-80 (App. 7); CP 2041-42 (App. 11); CP 2045-47 (App. 12); CP 2049-53 (App. 13); CP 2111-26 (App. 14)) (cited *supra* at 6, 7, 8, 11, 13, 29, 34, 35, 36, 37).

¹² As indicated by the *supra* citations, all the evidence Petitioner proposes for supplementation has been incorporated into the arguments above, demonstrating how it is “needed to decide disputed issues.” *See* RCW 34.05.562(1).

¹³ Even if the Court did not admit the strategic plan as a supplement to the record, it could take judicial notice of the plan as a matter of public record. *See State v. Hoffman*, 116 Wn.2d 51, 67, 804 P.2d 577 (1991).

- Opinions of WDFW experts, including WDFW’s Bear Specialist ((CP 1775-76 (App.7); CP 1794-95 (App. 8); CP 2016-39 (App. 10)), and other biologists (CP 1761-66) (App. 6) (CP 1787-99) (App. 28) (cited *supra* at 5, 6, 8, 13, 29, 35, 45).
- A presentation by WDFW about bear damage hunts. (CP 1476-1516) (App. 4) (cited *supra* at 7, 30).
- Data about the operation of the Program. CP 2580-99 (App. 50); CP 2625 (App. 21); CP 981-87) (App. 1) (1995 newsletter from I-655 proponents, containing pre-Initiative data) (cited *supra* 7, 29, 30)
- Scientific studies conducted that WDFW possessed before the 2016 rulemaking. CP 2927-32 (App. 22); CP 2934-46 (App. 23); CP 2966-3011 (App. 24); CP 3124-30 (App. 25); CP 3145-50 (App. 26); CP 3195-3252 (App. 27) (cited *supra* at 5, 6, 7, 26)

Much evidence listed above should also be considered under RCW 34.05.562(1)(c), because it demonstrates the 2016 rules exceeded WDFW’s statutory authority. *See supra* at 25-30.

In addition, Petitioner asks the Court to admit a few documents that post-date the 2016 rulemaking, because they (1) are necessary to determine whether the 2016 rules exceeded statutory authority, because they show how WDFW has interpreted the initiatives and its own rules (submitted under RCW 34.05.562(1)(c)); and (2) illustrate that the Unpublished Rules were unlawfully adopted “rules” that changed prior policy (submitted under RCW 34.05.562(1)(a)). This category consists of reports of staff concerns (CP 2292-23 (App. 18)), management decisions ((CP 2286-90 (App. 17), descriptions of the Unpublished Rules in place in 2017 (CP 1347-8 (App. 2));

and 2018 letters from WDFW to the Humane Society of the United States, and related communications (CP 1731-34 (letters) (App. 5); CP 1979-86 (discussion of commitments made) (App. 9) (cited *supra* at 37, 39)).

4. The Superior Court Abused its Discretion in Refusing to Admit Petitioner's Proposed Supplements

Although Petitioner maintains that the Court should review the supplementation issue *de novo*, it should reverse the denial of the Motion to Supplement even if it reviews for abuse of discretion. A court abuses its discretion when a ruling is “manifestly unreasonable or based upon untenable grounds or reasons.” *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). A decision is “manifestly unreasonable” if “the court adopts a view ‘that no reasonable person would take.’” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (internal citation omitted).

First, the superior court abused its discretion by failing to give genuine consideration to the merits. The court’s *pro forma* ruling that Petitioner had not met the “statutory criteria” for supplementation did not cite or examine the standard set by RCW 34.05.562, but summarily indicated its ruling was based on “each and every one of” the arguments advanced by WDFW. CP 3748. This failure to properly examine the motion to supplement was consistent with the court’s prior statements, when it summarily dismissed any supplementation of the record file, claiming “the agency determines the

rulemaking file,” and “[a]ll the parties can do is agree to reduce that file.” Status RP at 10.

Second, the superior court abused its discretion by denying the Motion to Supplement because of a delay that it knew had been caused by WDFW. A reading of the court’s order and oral remarks shows that the court’s continued annoyance over case delays was the primary reason it denied the motion. CP 3747 (it was “filed and argued extremely late in these proceedings”); *see also* Bond RP at 6-7, 14, 16, 27-28 (expressing similar frustration during February hearing); Status RP at 13 (during March hearing); MTD RP at 11-12, 18-19 (during April hearing). Remarkably, the court indicated it “does not know where the fault lies” for the delay. CP 3747. Yet it had previously recognized Petitioner was not to blame (Bond RP at 6), Intervenors had likewise acknowledged Petitioner bore no fault (*id.*), and counsel for WDFW had accepted full responsibility (*id.* at 13; CP 341).

In light of the largely undisputed facts presented to the court, it was “manifestly unreasonable” for it to deny the motion to supplement because of its frustrations over delays for which WDFW had been almost entirely responsible. CP 3747-48, *see* MTD RP at 20 (similarly dismissing the Permit Claims as moot a result of its frustrations with the delay in the agency record).

Finally, the superior court abused its discretion by denying the motion on the grounds that the “tardiness of the motion has put the Court and the

parties in a very difficult position.” CP 3748. Neither WDFW nor Intervenors had claimed any prejudice as a result of the timing of the motion—nor could they, as they both had previously advocated that the motion to supplement and the merits be briefed concurrently and heard on the same day. CP 604, 606. Although Petitioner had notified the court immediately after the record was filed that it found it “wholly inadequate” (CP 604-05), and had apprised the court multiple times of its upcoming motion to supplement (Bond RP at 17-18, CP 771, 784), the court did not schedule a deadline for the motion in its scheduling order. CP 834. And despite the court’s assertion that a hearing on the motion should not be scheduled the same day as the merits hearing, it is common practice for those issues to be briefed, heard, and/or decided at the same time.¹⁴ Indeed, a decision on supplementation may require the court to make an assessment of the merits, as the standard requires the court to decide if the evidence is “needed to decide disputed issues.” *See* RCW 34.05.562(1).

F. Petitioner Should Receive Attorneys’ Fees and Costs

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 below, the Court should also award

¹⁴ *See, e.g.*, Docket for *Center for Biological Diversity v. WDFW*, No. 17-2-05206-34, at 7-8 (Thurston County 2017) (WDFW filed motion to supplement agency record after Petitioner filed opening brief) (Ex. R); *Willapa Bay Gillnetters Assoc. v. WDFW*, No. 15-2-02078-34 (Thurston 2015) (WDFW filed second supplement to rulemaking record four days before final hearing) (Ex. S); *Amalgamated Transit Union Local 1384 v. Kitsap Transit*, No. 13-2-00883-9 (Thurston 2013) (Ex. T) (motion to submit new evidence filed with reply brief).

Petitioner its costs on appeal, as provided in RAP 14.2.

Under RAP 18.1, attorneys' fees are available to the prevailing party on appeal where authorized by "contract, statute, or a recognized ground in equity." *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremon I'sdt, Inc.*, 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006). Should the Court invalidate the challenged rules, Petitioner is 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. Soc. & Health Servs.*, 164 Wn.2d 925, 933-35, 194 P.3d 988 (2008). Petitioner is a "qualified part[y]" under the EAJA because it is a non-profit entity. CP 77-78; RCW 4.84.340(5). Because the rules are invalid, petitioner will meet the EAJA's other requirements. *See* RCW 4.84.350(1).¹⁵

V. CONCLUSION

For the foregoing reasons, Petitioner asks the court to grant the motion to supplement, and invalidate the Timber Hunt Rule, the Special Permit Rule, and the Unpublished Rules.

¹⁵ Petitioner likewise requested an award of fees below. CP 26. The superior court should have determined that Petitioner was the prevailing party and awarded it fees under the EAJA. The Court should remand to the superior court for consideration of a fee and cost award.

RESPECTFULLY SUBMITTED this 23rd day of December 2019.

ANIMAL & EARTH ADVOCATES PLLC

By *s/Claire Loeb Davis*
Claire Loeb Davis, WSBA No. 39812

BASHFORD LAW PLLC
Jonathon Bashford, WSBA No. 39299

*Attorneys for Petitioner-Appellant Center
for Biological Diversity*

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 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 amy.dona@atg.wa.gov ieanner@atg.wa.gov fwdef@atg.wa.gov Attorneys for Respondents	<input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by E-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
Northwest Resource Law PLLC 101 Yesler Way, Suite 205 Seattle, WA 98104 dbechtold@nwresourcelaw.com dsteding@nwresourcelaw.com lrahman@nwresourcelaw.com ehinkes@nwresourcelaw.com Attorneys for Intervenors	<input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by E-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: December 23, 2019

s/Claire Loeb Davis

ANIMAL & EARTH ADVOCATES PLLC
2226 Eastlake Ave E, Suite 101
Seattle, WA 98102
Telephone: 206.601.8476
Facsimile: 206.456.5191
Email: claire@animaladvocates.com

ANIMAL & EARTH ADVOCATES

December 23, 2019 - 4:56 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53863-6
Appellate Court Case Title: Center for Biological Diversity, App v. Dept. of Fish and Wildlife, Resp
Superior Court Case Number: 18-2-02766-4

The following documents have been uploaded:

- 538636_Briefs_20191223165301D2462809_8610.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Opening Brief.pdf

A copy of the uploaded files will be sent to:

- admin@bashfordlaw.com
- amy.dona@atg.wa.gov
- dsteding@nwresourcelaw.com
- jon@bashfordlaw.com
- Irahman@nwresourcelaw.com

Comments:

Sender Name: Claire Davis - Email: claire@animalearthadvocates.com
Address:
2226 EASTLAKE AVE E #101
SEATTLE, WA, 98102
Phone: 206-601-8476

Note: The Filing Id is 20191223165301D2462809