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

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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.

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**WDFW AND JOE STOHR'S RESPONSE TO APPELLANT'S  
OPENING BRIEF**

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## I. INTRODUCTION

The superior court's decision upholding the challenged rules should be affirmed. The rules challenged by Appellant Center for Biological Diversity ("CBD") were adopted by the Fish and Wildlife Commission, the policy body of the Washington Department of Fish and Wildlife ("WDFW"), in November 2015, after a long rule-making process with substantial public participation. The rules simply establish a procedural framework for issuing a small number of permits to protect private property from wildlife damage, which fall squarely within the WDFW's broad legislative mandate to address human-wildlife conflict issues.

Nothing in the challenged rules conflicts with statutory law. The agency record shows that the Fish and Wildlife Commission duly considered the public's input and factors relevant to addressing human-wildlife conflict situations when it adopted the challenged rules. CBD's effort to introduce policy arguments through extra-record documents not presented during the 2015 rule-making runs afoul of basic Administrative Procedure Act principles. All other challenges have been waived because, despite noticing appeal of three superior court orders, CBD fails to assign error or present argument on threshold issues related to the other claims in its Amended Petition.

CBD's appeal should be denied.

## **II. COUNTER STATEMENT OF THE ISSUES**

- A. Whether the superior court acted within its discretion in denying CBD's motion to supplement the agency record with 135 extra-record documents, including the 28 extra-record documents discussed in CBD's Opening Brief.
- B. Whether WAC 220-417-040 and 220-440-210 are within WDFW's broad statutory authority to manage wildlife and do not conflict with any aspect of WDFW's statutory authority, including RCW 77.15.245 and 77.15.194.
- C. Whether the Fish and Wildlife Commission's promulgation of WAC 220-440-210 was reasonable (and thus not arbitrary and capricious) in light of constituent comments and its legislative mandate to mitigate wildlife-human conflict.
- D. Whether CBD has waived its appeal of the superior court's decision to deny Claim 4 by not assigning error and not presenting any argument on CBD failure to demonstrate the threshold requirement of standing to challenge the 2018 guidance documents.

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

This case centers around a set of human-wildlife conflict rules adopted by the Fish and Wildlife Commission in November 2015. In particular, this litigation focuses on one rule that sets forth WDFW procedures for issuing permits for the lethal removal of common black bears that cause property damage to commercial timber stands, WAC 220-440-210.

**A. Constitutional and Statutory Provisions Allow Lethal Removal of Wildlife that Damages Private Property**

In Washington State, title to wildlife belongs to the state in its sovereign capacity. RCW 77.04.012. The State's animal *ferrea naturale*, including black bears, range across both public and private lands. The public and wildlife benefit from wildlife's use of private lands, but sometimes wildlife damage private property and severally impact citizens' economic livelihood. AR 4415 ("Bear damage on small forest ownerships can be financially catastrophic"). Lethal removal of wildlife is governed by the Washington Constitution and multiple statutes.

The Washington Constitution protects a property owner's right to kill wildlife when reasonably necessary to protect property. In 2008, the Washington State Supreme Court reaffirmed this longstanding principle. *State ¶ Vander Houwen*, 163 Wn.2d 25, 33, 177 P.3d 93 (2008) (citing *State v. Burk*, 114 Wash. 370, 376, 195 P. 16 (1921)).

Against this constitutional backdrop, the Washington Legislature has expressly authorized WDFW to issue permits for the lethal removal of wildlife that damage property. The Legislature directed WDFW to promulgate regulations establishing limitations and conditions on the trapping or killing wildlife threatening human safety or causing property damage. RCW 77.36.030; *see also* RCW 77.12.240 (permits removal of

wildlife injuring property). This authority is consistent with WDFW's mandate recognizing the rights of private property owners, which states, "Nothing in this title shall be construed to infringe on the right of a private property owner to control the owner's private property." RCW 77.04.012.

State law also includes certain limitations on the methods of lethal removal. In 1996, voters approved Initiative 655, which limits the use of bait or dogs under hunting laws. Laws of 1997, ch. 1, § 1 (codified as RCW 77.15.245). Several years later, voters approved Initiative 713, which limits the use of body-gripping traps and poisons. Laws of 2001, ch. 1, § 3 (codified as RCW 77.15.194). Each initiative included provisions that ensured that property owners could seek a permit from WDFW to lethally remove wildlife damaging private property. RCW 77.15.245(1)(a), (2)(a); RCW 77.15.194(4)(b). These initiatives survived several judicial challenges, in part, because courts held that the initiatives only limit some methods of removal and do not prohibit the right to protect private property. *See Krick v. Dep't of Fish & Wildlife*, 146 Wn. App. 1023 (2008)<sup>1</sup> (unpublished decision reviewing I-713; body gripping traps do not infringe on protection of property, just limit the ways to kill the animal); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 103

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<sup>1</sup>GR 14.1: This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

P.3d 203 (2004) (state did not give up wildlife regulatory authority because of trapping exceptions); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 71 P.3d 644 (2003) (I-713 not unconstitutional).

**B. Timber Damage Caused by Black Bears**

Washington State has a robust and healthy population of roughly 25,000-30,000 black bears. AR 4085. Forest landowners have repeatedly sought WDFW assistance to address the damage caused by black bears peeling bark from young trees to consume the sugar-rich, soft wood. *See, e.g.*, AR 4587, 4592. Landowners report “hot spots” with numerous damaged trees that result in scarring, tree deaths, and corresponding economic losses for the property owner. AR 4587-90. WDFW has worked with timber owners for decades to address this problem. AR 4367, AR 4587. There has been a gradual decline in the number of permits issued. For example, in 2010, 152 bear timber damage removal permits were issued and in 2015, 100 permits were issued. AR 4091. In 2018, 85 bear timber damage removal permits were issued. *See* CP529-91 (AR index of 2018 Permits).

In contrast to the small number of black bears removed through timber damage permits, citizens harvest the majority of bears annually during recreational hunting seasons. Currently, the Fish and Wildlife Commission (Commission) authorizes a fall and spring hunting season for

black bear. WAC 220-415-090 (fall); WAC 220-415-080 (spring); AR 4086. In 2015, 1535 black bears were killed in the fall and spring hunting seasons. AR 4086. In 2015, the bears removed to prevent further timber damage were less than five percent of the total statewide harvest, and affected one-third of one percent (or 0.00344 percent) of the black bear population in the State. WDFW manages the state's black bear population through recreational hunting harvest, using guidelines developed from harvest data. AR 4085.

**C. WDFW Adopted Wildlife Conflict Rules in 2015.**

Within a month of WDFW's announcing its intention to amend a suite of wildlife conflict rules, in spring 2015, the Commission (the policy body of WDFW) received multiple letters/emails of comment from small forest landowners explaining their families' experiences as tree farm owners suffering black bear timber damage. AR 5001 (Murphy letter); AR 4387 (Stewart letter); AR 4587 (Miller letter). Mr. Ken Miller and Mr. Howard Wilson also provided public comments about bear timber damage to the Commission at a public meeting in April. AR 5017, AR 4373, AR 5002. Mr. Miller had been attending Commission meetings to explain his problems with bear timber damage for years. AR 4407 (June 2012), AR

4400 (December 2012), AR 4401 (February 2013), AR 4384 (September 2014).

On May 6, 2015, WDFW filed proposed rules to update the wildlife conflict program. AR 4123. WDFW identified ten existing rules that it proposed to amend, and proposed seven new rules. *See, e.g.*, AR 4119, AR 4218 (proposed amended trapping rule), AR 4221 (proposed new rules – trapping rule and bear timber damage depredation rule). The proposed rules “are intended to clarify roles, responsibilities, process and requirements for trappers, wildlife control operators, permit holders, hunters and landowners that participate in activities” regarding abating damage caused by wildlife, addressing wildlife conflict, and improving the information and access to information provided by WDFW to address wildlife conflict issues. AR 4123 (CR-102).

WDFW explained as reasons for the proposal:

During 2013, several wildlife conflict responsibilities were transferred from WDFW Law Enforcement to WDFW Wildlife Program. As a result the Department is advancing efforts to improve management of wildlife conflict issues. The proposed revisions will address frequent questions and concerns regarding the various components of wildlife conflict mitigation; including permits, license, tags, and reporting requirements for the variety of harvest opportunities afforded through assisting the Department with conflict abatement. These revisions will further facilitate the Department’s ability to address wildlife conflict problems. The proposed changes are largely a result of the recent transition of conflict responsibilities

from Enforcement to Wildlife, discussions with stakeholders, and the need for clear guidance to the Department and the public.

*Id.*

Of the seventeen rules proposed for new adoption or amendment, WDFW grouped them under four subjects: rules for compensation for damage to agriculture; killing wildlife in protection of property; compensation for damage caused by wildlife; and wildlife control operators. AR 4127.

Lead WDFW staff Stephanie Simek, Wildlife Conflicts Section Manager, gave a PowerPoint presentation about wildlife interactions, conflict and the rule proposals to the Commission at its June 12-13, 2015 regular public meeting. AR 4421. A public hearing on the proposed rules followed Ms. Simek's presentation, and seven people signed up to testify. AR 4577 (*see* Agenda item #8). During the several days before the Commission meeting, small forest landowners also sent several emails with comments about bear timber damage. AR 4805, AR 4807, AR 4809, AR 4368.

WDFW extended the date for written comments on the rule proposals from May 31, 2015, to June 30, 2015. AR 4491. Shortly before the second comment period closed, WDFW received two comments that largely opposed trapping. One short comment was from a single individual. AR 4337. CBD and other organizations collectively submitted comments

touching on several specific rules, including the three rules at issue in the Amended Petition. AR 4325. The CBD letter began with an overview of RCW 77.15.194 (Initiative 713), expressing concerns about the effect of traps on wildlife. The CBD letter did not mention RCW 77.15.245 (Initiative 655), which is the primary focus of CBD's arguments in this case.

Supplemental rule filing. On August 5, 2015, WDFW filed revised proposed rules with the Code Reviser, and provided notice of an additional public hearing at the Commission meeting September 18-19, 2015. AR 4125. WDFW chose to conduct the supplemental rule filing because WDFW staff made changes to the initially proposed rules based on public input, suggestions and concerns raised by stakeholders and interest groups. AR 4125. Around the same time that WDFW sent out notice of the newly amended proposed rules, WDFW also provided letter responses to the earlier comments from the Howard Wilson, Washington Farm Forestry Association, Washington Cattlemen's Association, and the conservation groups, including Petitioner, and invited additional comment. AR 4353, AR 4339, AR 4303.

WDFW's response letter to CBD addressed the concerns expressed about RCW 77.15.194 (Initiative 713). WDFW wrote:

While it may appear that new rules are being proposed, in most instances the rules identified as “new” are simply current rules or segments of current rules being moved into the wildlife interactions chapter ... as stand-alone rules. We are not expanding authority for use of body-gripping traps through this rule.

AR 4306. After WDFW’s response, CBD did not provide further comment.

WDFW received just one new written public comment on the revised rule proposals from a small forest landowner, expressing concerns about timber bear damage (AR 4399). At the August Commission meeting, the Commission also heard public testimony from Mr. Steve Pedersen, a small forest landowner with black bear timber damage. AR 4761.

Supplemental rule public hearing. The Commission took up the wildlife conflict rule proposals at its September 18-19, 2015 meeting. Ms. Simek presented a PowerPoint regarding the reasons for the rules and the recent changes proposed. AR 4928, AR 4818 (*see* Agenda item #7). After Ms. Simek, the Commission opened the hearing on the proposed rules. The Commission’s minutes show five people provided public comment. AR 4821 (*see* Agenda item #7). George Brady, Washington State Trappers Association, who provided public comments, later provided a written “digest” of his testimony, which focused on trapping and the trapping rules. AR 4388.

Commission rule adoption. The Commission considered adoption of the wildlife conflict rules at its November 13-14, 2015 public meeting. The Commission had received additional public written comment including letters noting the disproportionate impact of bear timber damage on small forest landowners, the long history and hard work these landowners and WDFW have put in to addressing bear timber damage, and related suggestions for the proposed rules. AR 4370, AR 4367, AR 4405.

On Friday, November 13, 2015, the Commission took even further additional public comment (AR 4642); considered a WDFW-staff summary and PowerPoint presentation detailing the history of issues, the rule-making discussions and work with various stakeholders, and the ultimate WDFW staff rule recommendations. AR 4600 (PowerPoint), AR 4646-50 (Nov. 13-14, 2015, Rule Adoption, Summary Sheet), AR 4596 (Agenda, Item No. 7); and voted to adopt the wildlife conflict rules (including the three challenged rules). AR 4642 (Minutes, Agenda No. 7).

The Rule Adoption Summary Sheet summarized the public involvement process and the concerns different stakeholders had expressed during the process, including the competing concerns “related to wise wildlife management” and “protection of property.” AR4649. The rules’ Concise Explanatory Statement (“CES”) noted the same stakeholder concerns and stated that the central reason for the rule-making was to

provide guidance and clarity around wildlife conflict issues after the transfer of some wildlife conflict responsibilities from the WDFW's law enforcement program to the wildlife program. AR 4200.

Due to WDFW staff vacancies, the final documents reflecting the Commission's adoption of the wildlife conflict rules were not filed with the Code Reviser until January 28, 2016. AR 4161 (CR-103).<sup>2</sup>

The Rules: WAC 220-440-210 and WAC 220-417-040

The black bear timber damage depredation permit rule, WAC 220-440-210, sets forth basic application procedures and defines key components of the permit program. A landowner or designee submits an application for problem bear removal to WDFW, and WDFW confirms the timber damage. WAC 220-440-210(1)(a), (2)(b)-(c). In administering the program, WDFW also evaluates whether the small number of timber damaging bears removed under these permits impacts WDFW's population-level management of black bears. WAC 220-440-210(2)(d). The rule provides a landowner or representative for the landowner with some flexibility to identify the hunters who will carry out the lethal removal but retains significant control over the manner of the removal by

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<sup>2</sup> In February 2017, WDFW rules were reorganized and renumbered. The "recodification" of the rules did not change any of the substance of the three rules challenged by CBD. For clarity and convenience, the parties agreed to use the new numbers for each rule throughout their briefing.

requiring WDFW approval of all hunters who participate in a damage control operation. WAC 220-440-210(3). If WDFW concludes that a bear caused the timber damage and there is no concern about impacting larger black bear population management, it will issue a permit. WAC 220-440-210(4). Any bears removed under the permit must be reported to WDFW within 24 hours. WAC 220-440-210(5)(a). If a permit is violated, WDFW can revoke the permit and render the permittee ineligible for future permits, or pursue criminal remedies. WAC 220-440-210(5)(d), (e).

The special trapping rule, WAC 220-417-040, contains 16 subsections, but only one subsection is at issue in this case. That subsection lists five instances when WDFW may deny an application for a special trapping permit, including “(a) Other appropriate nonlethal methods to abate damage have not been utilized; (b) The alleged animal problem either does not exist or the extent is insufficient to justify lethal removal; ... (e) The application is incomplete.” WAC 220-417-040(14).

#### **D. CBD Challenged Multiple Agency Actions**

CBD’s Amended Petition in the superior court presented a complex set of different types of APA claims, challenging multiple permits, 3 rules, and unspecified guidance documents used in 2018. CBD’s Claims 1 and 2 encompassed the 85 black bear timber damage depredation permits issued by WDFW in 2018 (“2018 Permits”). *See* CP529-91 (AR index listing

permits and related AR documents). Claim 3 alleged statutory authority and arbitrary and capricious challenges to administrative rules codified at WAC 220-440-210, 220-417-040, and 220-440-070. CP28-30. Claim 4 alleged that aspects of the protocols and permitting documents (hereinafter “guidance”) used in issuing the 2018 permits were in fact legislative rules that should have gone through notice and comment rule-making procedures. CP30.

This comingling of disparate APA claims, especially the 85 “other agency action” (Claims 1 and 2) and three rule-making (Claim 3) APA challenges, were a source of concern for the superior court and respondents. The court noted that these claims were “put together in one case in a way that does not allow me or the appellate court after me to separate those things out.” RP, Mar. 1, 2019 (Status Conference) at 6. Intervenors moved to dismiss, or alternatively to bifurcate, Claims 1 and 2 (2018 Permits). CP773-82. On April 26, 2019, the superior court dismissed CBD’s Claims 1 and 2 as moot, and in the alternative, would have bifurcated those claims. CP830. Thus, only Claim 3 (rule-making) and Claim 4 (2018 Guidance) remained for substantive review.

When CBD filed its merits brief, it also noted a motion to supplement the agency record with 135 extra-record documents for the same day as the merits hearing. After argument, the Court ruled that CBD

had failed to show that its proposed supplemental evidence met any of the narrow categories for supplementation under RCW 34.05.562(1). CP3767-69. In doing so, the superior court adopted all of the substantive arguments made in WDFW's brief opposing supplementation. CP3769. The superior court also procedurally faulted CBD's tardiness in presenting its evidentiary motion to the court, noting that "the parties need to know how to brief the case and the Court needs to know how to review the case. The tardiness of the motion has put the Court and the parties in a very difficult position." *Id.* The superior court probed for the reason for the delay, and CBD's counsel was unable to provide a satisfactory reason why the motion could not have been filed or noted earlier. *Id.*; *see also* RP, Aug. 9, 2019 (Suppl. Mot. Hearing), 10-12.

Later that afternoon, the superior court heard argument on the merits of CBD's claims and denied the Amended Petition. CP3760-64. The court found that the challenged rules are consistent with WDFW's statutory authority. In addition, the rules are not arbitrary and capricious because WDFW considered public input and other attendant facts. Finally, the superior court agreed that CBD lacked standing to bring its procedural challenge to 2018 guidance documents and also held that the guidance documents did not require notice and comment procedures.

**E. CBD Pursues a Limited Number of Issues on Appeal**

CBD appealed the two superior court orders that cumulatively resulted in the dismissal of CBD's APA petition, as well as the denial of its motion to supplement the agency record. However, CBD has dropped arguments related to each of the four claims, as they were initially plead, so the issues have narrowed considerably on appeal. CBD has waived in full its challenge to the superior court's order dismissing Amended Petition Claims 1 and 2 (2018 Permits, CP25-28) by not assigning error or presenting any argument disputing that decision. Opening Br. at 2-3. And discussed in greater detail below, CBD also fails to assign error or present argument related to the superior court's ruling that it lacks standing to pursue the challenge in Amended Petition Claim 4 (CP30).

The only remaining claim for this Court's review is Claim 3 of the Amended Petition (CP28). The Amended Petition asserted three WDFW rules exceed statutory authority and are arbitrary and capricious. On appeal, however, CBD no longer challenges WAC 220-440-070, Opening Br. at 10 (appeal challenges two rules), and no longer argues that WAC 220-417-040 is arbitrary and capricious. *See id.* at 2-3, 16-36.

**IV. APA STANDARD OF REVIEW FOR RULE-MAKING**

The Administrative Procedure Act (APA) governs judicial review of the rules challenged in this case. RCW 34.05.570(2). CBD alleges

WDFW's challenged rules exceed WDFW's statutory authority and are arbitrary and capricious. RCW 34.05.570(2)(c).

To determine whether WDFW's rules were within its statutory authority, this Court interprets the governing statutes in Title 77 RCW. *D.W. Close Co., Inc. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 125-26 ¶9, 177 P.3d 143 (2008) (citations omitted). "An agency's interpretation of a statute ... is an issue of law subject to de novo review." *Id.* at 126 (citation omitted). The reviewing court gives "substantial weight to an agency's interpretation of the law it administers, especially when the issue falls within the agency's expertise." *Southwick, Inc. v. Dep't of Licensing*, 191 Wn.2d 689, 695, 426 P.3d 693 (2018).

CBD bears a heavy burden because rules are presumed to be valid, and CBD has the burden to demonstrate invalidity. RCW 34.05.570(1)(a); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). "[W]here the Legislature has specifically delegated rule-making authority to an agency, the agency's regulations are presumed valid, and only compelling reasons demonstrating that the regulation conflicts with the intent and purpose of the legislation warrant striking down a challenged regulation." *Armstrong v. State*, 91 Wn. App. 530, 536-37, 958 P.2d 1010 (1998) (citations omitted). The reviewing court cannot consider

the wisdom or desirability of a rule. *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990).

“APA judicial review is limited to the record before the agency.” *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 64, 202 P.3d 334 (2009) (citing RCW 34.05.566(1)). Record-based review ensures that a reviewing court “limits its function to assuring that the agency has exercised its discretion in accordance with law.” RCW 34.05.574(1); *see also Motley-Motley-Motley*, 127 Wn. App. 62, 76, 110 P.3d 812. The APA allows supplementation of the agency record with new evidence only under “highly limited circumstances,” and the proposed new evidence must fit “squarely” within one of the statutory exceptions set forth in RCW 34.05.562(1). *Motley-Motley*, 127 Wn. App. at 76; *Samson*, 149 Wn. App. at 64-65.

## V. ARGUMENT

CBD has repeatedly attempted to co-mingle what should be discrete APA claims (e.g., rule-making challenges to rules adopted in 2015 and “other agency action” challenges to permitting decisions in 2018) in an effort to challenge an alleged, amorphous Washington Department of Fish and Wildlife (“WDFW”) “Program.” CBD’s Opening Brief improperly relies on extensive extra-record documents that were not part of the rule-making file. WDFW first addresses why CBD’s proffered extra-record

documents are not properly before the Court before addressing the substantive claims.<sup>3</sup>

**A. The Superior Court Did Not Err in Denying the Motion to Supplement the Agency Record**

A reviewing court may admit new evidence under RCW 34.05.562(1) by supplementing the record in an APA case only under “highly limited circumstances.” *Motley–Motley*, 127 Wn. App. at 76. short cite Under RCW 34.05.562(1), supplementation is limited to evidence “only if it relates to the validity of the agency action at the time it was taken,” and further, it must fit into one of three narrow subsections. The party challenging the sufficiency of the record bears the burden to show one of the narrow categories for supplementation. *See Samson*, 149 Wn. App. at 64-66.

**1. The superior court’s ruling on a motion to supplement is reviewed for abuse of discretion**

It is well-established that a superior court’s decision to deny a motion to supplement is reviewed under an abuse of discretion standard.<sup>4</sup>

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<sup>3</sup> The Court should disregard and strike CBD’s merits arguments that improperly rely on proposed supplement documents that are not properly before the Court. *See, e.g., US W. Commc'ns, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 48, 73, 949 P.2d 1321, 1336 (1997) (striking extra-record materials); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1451 (9th Cir. 1996) (same).

<sup>4</sup> CBD filed a duplicative motion to supplement the agency record directly on appeal, and WDFW and Intervenors have already responded explaining why that motion is improper.

*See, e.g., Amalgamated Transit Union. Local 1384 v. Kitsap Transit*, 187 Wn. App. 113, 122–23, 349 P.3d 1 (2015); *Gerow v. Wash. State Gambling Comm'n*, 181 Wn. App. 229, 237, 324 P.3d 800, 803 (2014); *Samson*, 149 Wn. App. at 64.<sup>5</sup> “The admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse of discretion.” *Lund v. State Dep't of Ecology*, 93 Wn. App. 329, 334, 969 P.3d 1072 (1998).

The cases that CBD cites in support of de novo review are distinguishable. In *Herman v. Washington Shorelines Hearings Board*, 149 Wn. App. 444, 454, 204 P.3d 928 (2009), the superior court decision had admitted additional evidence without articulating a basis under RCW 34.05.562(1). *Id.* at 455. Thus, the *Herman* court cited the de novo standard that applies to review of legal principles in APA cases. Similarly, the Supreme Court in *Ass'n of Wash. Bus. v. Ecology*,<sup>5</sup> P.3d \_\_\_, 2020 WL 240321 (Jan. 16, 2020) faced a situation where the trial court did not articulate a basis for denying the motion to supplement. Thus, the Supreme Court's footnote analysis of RCW 34.05.562(1) did not address the standard

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<sup>5</sup> Federal appellate courts also apply the abuse of discretion standard when reviewing a trial court's denial of a motion to supplement the agency record in a federal APA case (though the actual standard applied when considering potential supplementation varies between federal circuits). *See, e.g., Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996); *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1378 (Fed. Cir. 2009); *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 462 (6th Cir. 2014).

of review, and instead, explained that supplementation fits under RCW 34.05.562(1) in the unusual circumstance where the agency asked the trial court to consider the remedial issue of whether portions of the rule were severable. *Id.* at 9, n.3.

**2. The superior court acted well within its discretion in denying the motion to supplement.**

In the case under review here, the superior court acted well within its discretion denying the motion to supplement the agency record with 135 extra-record documents. CBD narrows its focus to 28 documents (approximately 550 pages) in briefing to this Court, but its arguments for supplementation continue to be fatally insufficient.

The superior court read the Parties' numerous filings closely and probed the inconsistencies in CBD's arguments at multiple hearings. *See* WDFW Resp. to Mot. to Suppl. at 3-10 (procedural history related to agency record); *see also* RP (Feb. 8, 2019, Bond Hearing) 17-18; RP (Mar. 1, 2019 status conference) at 9-11; RP (Aug. 9, 2019, Mot. to Suppl. Hearing) at 10-12. Contrary to CBD's characterization (Opening Br. at 4, Issue No. 10), the superior court based its decision on two separate grounds: the timing of the motion to supplement and on substantive legal arguments.

The superior court appropriately based its decision, in part, on the timing of events as they unfolded in that court. "Trial courts have the

inherent authority to control and manage their calendars, proceedings, and parties.” *State v. Gassman*, 175 Wash. 2d 208, 211, 283 P.3d 1113, 1114 (2012). The superior court gave close attention to the disputed record issues in this case. *Supra* at 21 (Sec. V.A.2). The court carefully stated in its order denying the motion to supplement that it “does not know where the fault lies and recognizes that the record is voluminous” before it faulted CBD for its own tardiness in filing the motion to supplement. CP3747. The superior court accurately stated in its order denying the motion to supplement that “the parties need to know how to brief the case and the Court needs to know how to review the case. The tardiness of the motion has put the Court and the parties in a very difficult position.” *Id.* The superior court probed for the reason for CBD’s delay, and CBD’s counsel was unable to provide a satisfactory reason why the motion could not have been filed or noted earlier. *Id.*; *see also* RP, Aug. 9, 2019 (Suppl. Mot. Hearing), 10-12, 25.

In addition, the superior court correctly concluded that CBD had not met the high burden necessary to supplement an agency record under RCW 34.05.562(1). A party cannot supplement the agency record by merely arguing that extra-record documents are necessary to decide disputed issues related to the validity of the agency’s challenged actions or the agency record is incomplete, *see, e.g., Herman*, 149 Wn. App. at 454; *Samson*, 149 Wn. App. at 64-65; *see also* WDFW Resp. to Mot. to Suppl. at 14-15

(further discussion of differences between RCW 34.05.562(1) and (2)). Yet those were CBD's arguments for supplementation (CP3587, 3592-601; *see also* Opening Br. at 41-47). This is insufficient as a matter of law. Moreover, CBD had previously acknowledged in March 2019 that the agency record was complete. CP771. The superior court correctly denied the motion to supplement the record under RCW 34.05.562.

The superior court also correctly denied the motion to supplement the record for three additional reasons. First, the majority of the records related to a claim that was not properly before the Court. Second, its arguments lacked necessary specificity. Third, CBD misstated APA requirements and relied on inapplicable Ninth Circuit case law.

**a. CBD attempted to supplement the record to pursue claims not before the superior court.**

After the 2018 Permit challenges were dismissed, CBD attempted to construe CBD's rule-making claim as an "as-applied" rule-making challenge that challenged an alleged "Program." CP3599. But CBD had not plead an as-applied rule-making challenge in its Amended Petition Claim 3. As WDFW explained in opposing the motion to supplement (CP3698, 3704-05), CBD was misapplying APA review in a thinly disguised attempt to change WDFW's internal policy through litigation by conflating arguments against the challenged rules, against 2018 permitting decisions,

against 2018 policies, or against past practices from 2016 or 2017 that are no longer used in issuing permits. This approach was clearly improper because rule-making challenges must focus on the agency record for the rule adoption at issue, and “[t]he validity of agency action shall be determined in accordance with the standards of review provided in this section, *as applied to the agency action at the time it was taken.*” RCW 34.05.570(1)(b) (emphasis added).

**b. CBD’s arguments lacked necessary specificity.**

CBD lumped together numerous categories of documents (e.g., various publications, WDFW communications, subsequent policy documents, expert declarations) and argued these materials are necessary for judicial review of the “Program” that CBD seeks to challenge. CP3599 (categories of documents to supplement Claim 3), CP3601 (seeking to supplement with groups of WDFW documents). CBD’s generalized and expansive arguments were insufficient to carry the burden of a party seeking to supplement an agency record with new evidence. *See also Motley-Motley*, 127 Wn. App. at 76; *Samson*, 149 Wn. App. at 64-65.

Under RCW 34.05.562(1), typically a single document is admitted for a specific, clearly articulated narrow purpose. For instance, in *Hunter v. Univ. of Washington*, 101 Wash. App. 283, 287 n.1, 2 P.3d 1022, 1025 (2000), the court admitted a declaration of a university official for the sole

purpose of addressing the scope of authority of the decisionmaker. And in *Association for Washington Business*, \_\_\_ P.3d \_\_\_, 2020 WL 240321, n.3 (Jan. 16, 2020), the Supreme Court found that a declaration with calculations regarding the remedial issue of severability fit the narrow restrictions for supplementation because it was “needed to decide disputes around material facts that were not required to be determined on the agency record, RCW 34.05.562(l)(c), and that severability was not addressed in the agency record because the issue did not arise until after the final Rule was adopted.”

Unlike these narrowly constrained instances of limited supplementation, CBD essentially seeks to create an improper, dueling agency record before the reviewing court. WDFW’s response explained to the superior court in detail why the 135 documents were not proper for supplementation, and how CBD’s conclusory assertions were insufficient to meet the high burden to supplement the record under RCW 34.05.562(1). CP3700-03; CP3705-06. CBD offered no specific response to these arguments. CP3731-36.

**c. CBD misstated applicable APA requirements and relied on inapplicable federal case law.**

CBD erroneously argued that RCW 34.05.562(1) applies broadly to any documents that contain facts related to disputed matters, including

internal agency communications, additional scientific materials, and documents post-dating the challenged rulemaking (including standing declarations, numerous publications and agency communications). Not only was this sweeping approach insufficient to meet the high burden for supplementation under RCW 34.05.562(1), CBD's arguments for supplementation ran afoul of other provisions of the Washington APA:

- Under RCW 34.05.370(3), internal agency documents are generally exempt from inclusion in the rule-making file. This is because judicial review under the APA is based on the rationale provided by the agency and the information considered by the agency in the course of making the decision—not on the agency's internal decision-making process. CP3702 (WDFW Resp.)<sup>6</sup>.

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<sup>6</sup> CBD inaccurately implies that WDFW disregarded opinions of its own staff in the rule-making process. *See, e.g.*, Opening Br. at 31-32. CBD seeks to supplement and rely on with materials from an internal WDFW committee process. As noted above, such internal agency documents are not typically included in a rule-making record. The cherry-picked extra-record documents proffered by CBD highlight that some WDFW staff had divergent opinions on some bear management topics. Divergent views are not a hallmark of arbitrariness, but rather demonstrate that WDFW staff feel free to express their views. *See, e.g., Friends of Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.*, 129 Wn. App. 35, 58, 118 P.3d 354 (2005).

However, more fundamentally, none of CBD's proffered internal agency communications relate to the development of the rules adopted in November 2015. As WDFW responses to comments in the rule-making makes clear, the separate committee had a separate task; it considered additional alternatives to address black bear timber damage and coordinated procedures for implementing the rule across the different WDFW regional areas. *See, e.g.*, AR4361 (Issue "O" regarding deer bait would be referred to committee), AR4362-63 (Issue "T" regarding policy prohibiting retention of bear gall bladders referred to committee). While some members of the committee questioned the status quo of the program, which was part of the committee's function, these were just a subset within a range of views throughout the department. The Committee's work continued after the challenged rules were adopted in November 2015, and the committee's various drafts and communications were not presented to the Commission, the policy setting body for WDFW.

- CBD incorrectly contended that RCW 34.05.271 applied to the challenged rule-making (CP3593, CBD Mot.; CP3700, WDFW Resp.). Pursuant to RCW 34.05.271(2)(a)(i) and its cross-reference to RCW 34.05.328, that section of the APA only applies to WDFW rules that implement RCW Chapter 77.55 (“Construction projects in state waters”). RCW 34.05.328(5)(a)(i). Similarly, CBD incorrectly asserted that RCW 34.05.370(2)(f) mandated supplementation of additional scientific information. CP3593 (CBD Mot.); CP3700 (WDFW Resp.).
- CBD sought to supplement with numerous documents that post-dated the challenged rule adoptions. “Under RCW 34.05.562(1) and RCW 34.05.570(1)(b), the validity of a rule is determined as of the time the agency took the action adopting the rule.” *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn. 2d 887, 906, 64 P.3d 606 (2003). *See, e.g.*, CP3599 (CBD Mot.); CP3703 (WDFW Resp.).

The arguments in CBD’s motion for supplementation under the Washington APA were fatally flawed, so it turned to federal Ninth Circuit case law in its reply supporting the motion to supplement the agency record and in oral argument. CP3729-32; 3736; RP Aug. 9, 2019 (Suppl. Mot. Hearing), 19, 22. WDFW explained at oral argument that the Ninth Circuit applies a significantly different standard for supplementation compared to the statutory standard in the Washington APA, RCW 34.05.562(1). RP Aug. 9, 2019 (Suppl. Mot. Hearing), 14. The superior court correctly restricted its analysis to the statutory standard in RCW 34.05.562(1) and denied the motion to supplement. *Id.*, 25-26; CP3747-48; *see also Samson*,

149 Wn. App. at 64-65 (proposed new evidence must fit “squarely” within one of the statutory exceptions set forth in RCW 34.05.562(1)).

In sum, the superior court correctly faulted CBD both for its failure to meet the high bar necessary to supplement an agency record and belated effort to evade the constraints of closed record APA judicial review. The record for APA review should be limited to the certified agency record which contains “agency documents expressing the agency action” and “other documents identified by the agency as having been considered by it before its action and used as a basis for its action.” RCW 34.05.566(1); *see also* RCW 34.05.570(1)(b); RCW 34.05.562(1). The superior court’s denial of CBD’s motion to supplement should be affirmed, and CBD’s separate motion to supplement the appellate record with the same extra-record documents should be denied and dismissed.

**B. The Challenged Rules, WAC 220-417-040 and 220-440-20, Are Consistent with WDFW's Statutory Authority.<sup>7</sup>**

There is no question that WDFW may authorize the removal of wildlife that is injuring property. RCW 77.12.240; 77.36.030. The rules that CBD challenges are authorized by those statutes and are consistent with the statutory limitations adopted by I-655 and I-713. Those limitations restrict a few specified methods for removing problem animals in certain circumstances. As relevant here, RCW 77.15.194 limits the use of body-gripping traps to a limited set of situations set forth in the statute, and RCW 77.15.245 allows the removal of black bear by dogs in limited circumstances.

The core of CBD's argument is that the two challenged rules should have contained further restrictions, seemingly to reflect the "spirit" or "intent" of RCW 77.15.194 and RCW 77.15.245. CBD's argument, however, runs up against the clear exemptions in the statutes for the protection of private property, *see* RCW 77.15.194(4)(b) and

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<sup>7</sup> CBD conflates the challenged rules and the subsequent implementation of the rules in 2018, attempting to argue that a combination of both exceed statutory authority. The superior court dismissed CBD's challenges to the 2018 implementation (Claims 1 and 2 – 2018 Permits) as moot, and CBD has not assigned any error to that decision, *supra* at 14. Indeed, CBD assigns error only to the adoption of the rules and not their implementation. Opening Br. at 2. CBD cannot reframe its rule-making challenge as as-applied rule challenges to resurrect its challenges to the 2018 implementation (Claims 1 and 2), as an end run around to superior court's dismissal of those claims. Because 2018 implementation of the rules is not properly before the Court, WDFW does not address those arguments.

RCW 77.15.245(1)(a), (2)(a), and the more fundamental, constitutional right to protect property from wildlife damage that underlies those exemptions. *Vander Houwen*, 163 Wn.2d at 34 (2008) (property owner has a right to protect his or her property from wildlife damage under the state constitution); *see also* RCW 77.04.012 (“Nothing in this title shall be construed to infringe on the right of a private property owner to control the owner’s private property.”).

The exemptions for the protection of private property and the prohibitions in RCW 77.15.194 and RCW 77.15.245 on baiting, dog-hunting and trapping must be balanced recognizing underlying constitutional principles. In light of the larger constitutional and legislative framework that ensures a landowner is able to protect private property from wildlife damage, *see Wash. State Hosp. Ass’n v. Dep’t of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015) (statutory provisions must be read in light of the surrounding legal framework), RCW 77.15.194 and RCW 77.15.245 cannot be read expansively beyond the statutes’ plain terms.

CBD’s arguments that “WDFW erred by adopting” WAC 220-440-210 and WAC 220-417-040 weaves a simplistic and faulty narrative by mischaracterizing the challenged rules and citing materials that post-date the 2015 rule-making. Opening Br. at 2; *id.* 3-4; 16-29. These are policy arguments masquerading as statutory authority arguments, and they lack

merit. The challenged rules establish a procedural framework for issuing black bear timber damage depredation permits. WDFW is not required to restate (as CBD implicitly argues) all possible statutory limitations in its implementing rules. In each instance addressed below, the challenged rules are “reasonably consistent with [WDFW’s] controlling statutes,” including RCW 77.15.245 and RCW 77.15.194, and thus, do not exceed WDFW’s statutory authority. *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013) (citation omitted). CBD’s statutory arguments must fail.

**1. RCW 77.15.245 does not require a regulatory restatement of limits on use of bait.**

The bear timber damage rule, WAC 220-440-210, is enacted pursuant to, and is consistent with, RCW 77.15.245.

Contrary to CBD’s assertion, the bear timber damage rule, WAC 220-440-210, does not exceed statutory authority by providing for the issuance of “bear baiting permits” or “bait permits to private hunters.” Opening Br. at 3 (CBD Issue No. 1); *id.* at 18. CBD does not, and cannot, point to language in the rule that permits the use of bait, because no such provision exists. WAC 220-440-210 (no reference to bait). The first sentence of the challenged rule establishes that the procedural framework for issuing permits under the section “applies to any person participating

in a director-authorized black bear timber depredation hunt pursuant to RCW 77.12.240 or 77.15.245.” *Id.* The general prohibition in RCW 77.15.245 against baiting (which contains exceptions) does not require rules to be effective. This Court should not invalidate the challenged rule simply because it does not reiterate the statutory bait prohibition.

In fact, RCW 77.15.245(1) is silent on the issue of permits for the use of bait when killing a black bear to protect private property. Pursuant to RCW 77.15.245(1)(a), bait may be used for lethal removal of black bear “by employees or agents of county, state, or federal agencies while acting in their official capacities for the purpose of protecting livestock, domestic animals, private property, or the public safety.” As Intervenors aptly argued before the superior court, “no lay voter would engage in a technical legal analysis of agency law in interpreting th[is] clause.” CP3651. Instead, “a lay voter would interpret this clause using commonsense and colloquial language to mean a person could hunt with bait only if they had been specifically authorized and approved to do so by a government in order to protect livestock, domestic animals, private property or safety.” *Id.*

CBD may bring as-applied challenges to individual permits, but this appeal concerns only the validity of the rules. Because the black bear timber damage rule, WAC 220-440-210, does not exceed RCW 77.15.245

with respect to permitting (or not permitting) the use of bait, this argument must fail.

**2. WAC 220-440-210 appropriately allows “landowners” to act through representatives.**

CBD’s next argues that the black bear timber damage rule, WAC 220-440-210, exceeds RCW 77.15.245(2)(a) because the rule does not limit the use of dogs to pursue and kill black bear to government employees, agents or landowners. Opening Br. at 3 (Issue No. 2), 20-21. Under CBD’s restrictive reading of RCW 77.15.245, a landowner could not arrange to have a skilled hounds-handler assist with the removal of a black bear that is damaging her property under a WDFW-issued permit. CBD’s overly restrictive reading of the phrase “the owner or tenant of real property” must fail because statutory provisions that ensure owners are able to protect their private property from damage-causing wildlife should be read with the property owner’s underlying constitutional protection in mind.

CBD’s interpretation disregards the practical realities of timberland ownership and the special expertise required to run dogs. Its approach would render the second sentence of RCW 77.15.245(2)(a) largely meaningless by making it nearly impossible for large industrial landowners to use dogs to remove problem bears. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 656 ¶ 23, 294 P.3d 695 (2013) (“courts must not construe

statutes so as to nullify, void or render meaningless or superfluous any sections or words of the statute”) (citation omitted). Timberland in Washington is owned by a wide variety of entities, including federal land, state-owned land managed and/or leased by the Department of Natural Resources, state or locally-owned land, such as a State Park or County Park, industrial timberland, and timberland owned by small landowners. Many of these entities do not have a specific individual “owner” who can respond to the problem bears. For example, Weyerhaeuser, which owns many millions of acres, is a corporation that acts through its Board and Directors, and then through its employees. There is no single human “owner” of Weyerhaeuser who can run dogs.

One purpose of rule-making is the exercise of implied authority to “fill in the gaps” when necessary to implement a statute. *Armstrong*, 91 Wn. App. at 538 (“Appropriate rules may be adopted to ‘fill in the gaps’ in legislation if such rules are ‘necessary to the effectuation of a general statutory scheme.’”) (citations omitted). In adopting the rule, WDFW reasonably read “owner” to also include “designees” identified by the landowner. Thus, under its rule, WDFW may issue a permit to a landowner or her designee, and that person can choose whether to do the removal herself, use her own employees, or use an independent contractor or agent – just as a property owner may decide whether to set her own mousetraps

or hire an exterminator. Nothing in the statute forecloses a landowner from delegating a permitted removal. *See* RCW 77.15.245(2)(a) (an owner of real property may use dogs consistent with a WDFW permit).

In light of underlying constitutional principles and because the initiative specifically provides for the continued use of dogs for landowners and the vast majority of landowners do not have the necessary expertise to run dogs, CBD's interpretation should be rejected and this Court should uphold WAC 220-440-210 as consistent with RCW 77.15.245.

**3. Supplemental feeding is not defined as bait in RCW 77.15.245.**

CBD also makes the implausible argument that black bear feeding stations are "bait" under RCW 77.15.245. Taking that false premise as true, CBD derivatively argues the black bear timber damage rule, WAC 220-440-210, exceeds statutory authority. Opening Br. at 3 (Issue No. 3); Opening Br. at 24-25.

As an initial matter, just as CBD's general arguments related to the use of bait and the challenged rule lack merit, *see supra* at 30-31, this derivative argument also must fail. The rule is simply silent on the issue of how and when bait might be used. The rule implementing RCW 77.15.245 provides a procedural framework for issuing permits, and nothing in RCW

77.15.245 requires that a regulation to address when a permit would be issued for the use of bait.

But CBD’s argument is even more fundamentally flawed. The statute at RCW 77.15.245(1) separately addresses supplemental feeding stations (subsection (1)(b)) and bait (subsection (1)(c)). Supplemental feeding is not included in the definition of “bait.” Instead, RCW 77.15.245(1)(b) explicitly states that “nothing in this subsection shall be construed to prevent the establishment and operation of feeding stations for black bear in order to prevent damage to commercial timberland.” The plain text of the initiative clearly recognizes the use of supplemental feeding stations and chooses to treat them differently than bait. CBD’s assertion that the rule must limit supplemental feeding on the basis that it is “bait” lacks merit.

**4. RCW 77.15.245 does not require individual identification of problem bears.**

CBD makes another conclusory argument based on a false premise when it argues that the black bear timber damage rule, WAC 220-440-210, is insufficiently specific in permitting lethal removal of black bears. Opening Br. at 3-4 (Issue No. 4); *id.* at 27-28. According to CBD, the phrase “employees or agents of county, state or federal agencies while acting in their official capacities for the purpose of protecting livestock,

domestic animals, private property, or the public safety,” RCW 77.15.245(1)(a), mandates individual identification of damaging bears before any lethal removal action can be taken.

An initial, textual flaw in this argument is the absence of this cited phrase in the second sentence of RCW 77.15.245(2)(a) where the statute expressly allows a landowner or tenant to use dogs to remove black bears pursuant to a permit. But more fundamentally, there is no inconsistency between the generalized approach articulated in the statute toward protection of private property, and the similar approach articulated in WAC 220-440-210, the black bear timber damage rule. The statutory language cited by CBD exempts bear removals from the statutes’ limitations based simply on the *purpose and intent* of protecting property or for public safety. Consistent with the cited exemptions in RCW 77.15.245 for protection of private property, the *purpose and intent* of the black bear timber rule is clearly to protect private property. WAC 220-440-210 (repeated references to “black bear timber depredation” and “bear depredation removals for damage to timberlands”). To that end, the black bear timber damage rule requires verifiable bear-caused timber damage before WDFW issues a black bear timber damage depredation permit. WAC 220-440-210(2)(b)-(c).

In sum, the black bear timber damage rule, WAC 220-440-210 is “reasonably consistent with the controlling statutes,” and thus, CBD’s four arguments asserting the rule exceeds statutory authority must fail. *See, e.g., Swinomish*, 178 Wn.2d at 580-81.

**5. WAC 220-417-040 does not grant WDFW extra-statutory discretion to issue trapping permits.**

The special trapping rule, WAC 220-417-040, is promulgated pursuant to, and is consistent with, RCW 77.15.194.<sup>8</sup> Both the statute and the rule require a finding in writing that an animal problem exists and cannot be abated through alternatives. The rule section to which CBD specifically objects, WAC 220-417-040(14), lists five instances when WDFW may deny a permit, after reviewing the application and applying its judgment:

- (a) Other appropriate nonlethal methods to abate damage have not been utilized;
- (b) The alleged animal problem either does not exist or the extent is insufficient to justify lethal removal;
- (c) The use of the requested body-gripping trap(s) would result in direct or indirect harm to people or domestic animals;
- (d) The use of the requested body-gripping trap(s) would conflict with federal or state law, local ordinance or department rule.
- (e) The application is incomplete.

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<sup>8</sup> Two of WDFW’s wildlife conflict rules address special permits for the use of body-gripping traps: WAC 220-417-040 and WAC 220-440-070. In the superior court, CBD sought invalidation of both rules. CP3552. On appeal, CBD directs its arguments solely toward WAC 220-417-040. *See* Opening Br. at 2 (assignment of error 2).

A reviewing court “accord[s] substantial weight to the agency interpretation.” *D.W. Close Co. v. Dep’t of Labor & Indus.*, 143 Wn. App. at 126. DFW’s Concise Explanatory Statement for the challenged rules explicitly states “the department *is not expanding authority* for use of body-gripping traps through these rules.” AR 4209 (emphasis added). Analysis of the text accords with WDFW’s assurance during the rule-making process that the rules did not expand upon RCW 77.15.194. The statutory provisions at issue grant WDFW discretion in assessing whether 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 rule similarly provides WDFW with discretion in applying “*the judgment of the department*” to determine whether any of the five listed instances is a basis for denying the permit. WAC 220-417-040(14).

CBD narrowly focuses on the word “may” in the phrase “may be denied” in WAC 220-417-040(14), arguing essentially that “may” should be read as “may or may not.” See Opening Br. at 4 (Issue No. 5); *id.* at 21-22. The word “may,” however, is sometimes appropriate substituted for “shall” or “must.” Black’s Law Dictionary (11th ed. 2019); *see also* RAP 1.2(b) (distinguishing between the use of “shall” and “must” when describing acts by parties and the use of “will” or “may” when referring to an act of the appellate court). To ascertain meaning, “a term in a regulation

should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole.” *See, e.g., City of Seattle v. Allison*, 148 Wn.2d 75, 81–82, 59 P.3d 85 (2002). When the term “may” is read in context with the statute (RCW 77.15.194), the surrounding regulatory text in WAC 220-417-040, and with its companion special trapping rule, WAC 220-440-070, it is readily apparent that WAC 220-417-040(14) lists five potential circumstances when WDFW foresaw that it *would deny* a permit, and that the subprovision was not intended to grant WDFW additional authority to grant permits beyond the scope of its statutory authority.

WAC 220-417-040(14) is “reasonably consistent with [WDFW’s] controlling statutes,” and that subprovision does not exceed WDFW’s statutory authority. *Swinomish*, 178 Wn.2d at 580.

**C. The Fish and Wildlife Commission Adopted Reasonable Rules in Light of Constituent Comments and Its Mandate to Mitigate Wildlife-Human Conflict**

The arbitrary and capricious standard is a very high burden for a challenger. A rule is only arbitrary and capricious when it is willful and unreasoning and taken without regard to attending facts and circumstances. RCW 34.05.570(2)(c); *Wash. Indep. Tel. Ass’n v. Wash. Util. & Transp. Comm’n*, 148 Wn.2d 887, 903-05, 64 P.3d 606 (2003). The arbitrary and capricious standard accords significant deference to WDFW decision-making, and requires the reviewing court to uphold the rule so long as it

was enacted with due consideration. *Id.* When a record “shows an evolutionary process whose final result is the rule at issue,” and where the challengers “had a full opportunity to present their views, and [the record] is obvious that the Commission considered them,” the rule is not arbitrary and capricious. *Id.* at 910.

Here, the central purpose of the challenged rule-making was an administrative update after some wildlife conflict responsibilities had been shifted from WDFW’s law enforcement program to the wildlife program. AR 4199 (“CES”). WDFW’s rule-making file shows that WDFW considered diverse concerns about bear removal, including CBD’s comments. *See, e.g.*, AR 4208-17 (CES); AR 4303-25 (WDFW Resp. to CBD, et al.); AR 4353 (response to Mr. Wilson, small forest landowner). The majority of comments came from small timberland owners who explained their problems with bear timber damage for years and the monetary losses they suffered as a consequence. *See, e.g.*, AR 4367, AR 4370, AR 4399, AR 4761, AR 4805, AR 4807. The Commission did not adopt the suite of wildlife conflict rules until after it solicited feedback from the public, incorporated feedback and again sought additional comment. *See supra* at 6-10.

Now more than three years after the rule-making was concluded, CBD argues that WDFW’s amendments to the conflict rules were

unreasonable because, according to CBD, WDFW inadequately considered scientific issues, agency goals, and how the rule would affect individual bears that might be removed to protect timberlands. The issues that CBD pursues now were not raised during the rule-making. Thus, in support of these arguments, CBD relies solely on proposed supplemental materials that were not raised in comments before the Commission during the rule-making. This discrepancy is most obvious in CBD's comments during the 2015 rule-making process: despite the fact that the main focus of CBD's arguments in this case has been the interpretation and requirements of RCW 77.15.245 (Initiative 655), CBD did not mention that statutory provision, or the originating initiative, in its 2015 comments. *See* AR 4325.

Under the APA, when a rule is challenged as arbitrary and capricious, the reviewing court “scrutinize[s] the record to determine if the result was reached through a process of reason, *not whether the result was itself reasonable in the judgment of the court.*” *Rios v. Dep’t of Labor and Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (emphasis in original). The court also asks whether the decision was “rational at the *time* it was made.” *Id.* at 502 (citation omitted). As a threshold matter, CBD's arbitrary and capricious arguments must fail because they rely upon materials outside the scope of the APA record, and thus beyond APA review.

Even if CBD’s arguments were properly presented to the Court and tied to material within the agency record, the arguments are fatally flawed. CBD misunderstands the agency’s complex set of mandates, *see* Opening Br. at 30-33. The Legislature has tasked WDFW with multiple, competing objectives, including conservation, diversity, recreational hunting, and conflict and compensation.<sup>9</sup> *See* RCW 77.04.012 (WDFW mandated broadly to “preserve, protect, perpetuate, and manage”; RCW 77.12.020 (directed to classify species as game, endangered, etc.); RCW 77.36.030 (commission “shall establish the limitations and conditions” on trapping or killing wildlife threatening human safety or causing property damage). Undeniably, tension exists between WDFW’s multiple legislative mandates, and not all constituents will be pleased with the balance that WDFW strikes. [Courts] “avoid exercising discretion that our legislature entrusted to the agency.” *Squaxin Island Tribe v. Dep’t of Ecology*, 177 Wn. App. 734, 742, 312 P.3d 766, 771 (2013) (citing *Port of Seattle*, 151 Wn.2d 568, 90 P.3d 659 (2003)). A rule is not arbitrary and capricious

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<sup>9</sup> While limited monetary compensation is sometimes available for certain types of wildlife damage (e.g., deer damage to crops), contingent on legislative appropriation of funds, commercial timberland owners do not have statutory or regulatory basis for compensation for timber damage from bear. *See* RCW 77.36.100; WAC 220-440-140.

merely because CBD disfavors an element of WDFW's legislative mandate.

Contrary to CBD's assertion (Opening Br. at 33), WDFW is not mandated under the APA (RCW 34.05.271) to consider science in promulgating rules like these where the Commission establishes conditions and limitations on the killing of wildlife that damages private property. As noted *supra* at 27, the APA provision that identifies additional requirements for "significant agency action," RCW 34.05.271(2)(a)(i) through its cross-reference to RCW 34.05.328, only applies to WDFW rules that address construction projects in state waters (RCW Chapter 77.55). *See* RCW 34.05.328(5)(a)(i) (establishing that the section applies only "to the legislative rules of the department of fish and wildlife implementing chapter 77.55 RCW").

The rule-making record, in fact, reflects that while WDFW recognized scientific and conservation issues at play in the wildlife conflict rules, those components of WDFW's diverse mandate did not drive the rule-making. *See, e.g.*, AR 4200 (CES reasons for rule-making – provide guidance and clarity around wildlife conflict issues); AR 4216 (CES, summary of changes to bear timber damage depredation rule, including verification of damage); AR 4649 (Nov. 13, 2015, WDFW summary of rule adoption, noting commenter concerns about potential impact to

endangered species recovery and general wildlife conservation, as well as concerns about protection of property, compensation, and conflict mitigation). Instead, the rule-making file makes it clear that WDFW's purpose for the suite of wildlife conflict rules and the central policy issues addressed the Commission's legislatively mandated role to mediate human-wildlife conflict. *See, e.g.*, AR 4200 (CES reasons for rule-making); AR 4648 (Nov. 13, 2015, WDFW summary of rule adoption, stating revisions are needed "to provide the Department guidance for managing wildlife conflict issues and implementing abatement measures"); AR 4649 (Nov. 13, 2015, WDFW summary of rule adoption, summarizing wildlife damage and control policy issues).

CBD attempts to place great significance on WDFW's Game Management Plan (Opening Br. at 33), however, CBD's 2015 comments submitted at the time of the rule-making made no reference to the Game Management Plan. *See generally* AR 4325-36. Moreover, as explained to the superior court in oral argument, WDFW reasonably did not reference the Game Management Plan because the rule adoption was primarily administrative in nature; the human-wildlife conflict at issue involved a very small number of a common species; and the Plan had already been considered and cited in WDFW's most recent assessment of trends and status of black bear population, which was considered as part of the rule-

making and is part of the certified agency record. RP Aug. 9, 2019, (Merits Hearing) at 47, 66.

CBD fails to support its assertions with citations to the agency record – as it must, as the challenger – to support any of these allegations, which are thinly disguised attempts to change WDFW’s policy through litigation, rather than through the Legislature. WDFW did not act arbitrarily or capriciously in adopting the rules. WDFW respectfully requests that this Court uphold the rule.

**D. CBD Lacks Standing to Bring a Procedural Challenge to the 2018 Guidance and Waived This Issue on Appeal.**

Standing is a jurisdictional, threshold issue and must be established before a court can address the merits of a claim. *Pac. Marine Ins. Co. v. State ex rel. Dep’t of Revenue*, 181 Wash. App. 730, 740, 329 P.3d 101, 107 (2014); *State v. A.W.*, 181 Wash. App. 400, 409, 326 P.3d 737, 742 (2014). Among other arguments refuting Claim 4, CBD’s notice-and-comment challenge to WDFW’s internal guidance documents, WDFW argued that CBD had failed to meet its burden to demonstrate standing to bring that procedural challenge. CP 3632-33.

Under the APA, a person has standing to challenge agency action if they are aggrieved or adversely affected by it. RCW 34.05.530. WDFW explained in superior court briefing that persons can assert procedural rights

without meeting normal standards for redressability and immediacy, but must have a “concrete interest” at stake. *Allan v. Univ. of Washington*, 140 Wn.2d 323, 330, 997 P.2d 360 (2000). “A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016), as revised (May 24, 2016).

To establish associational standing, CBD had pointed to two CBD members who claimed recreational and aesthetic injury. CP3553; CP3584. But as WDFW noted at oral argument, neither declarant mentioned the existence of the challenged guidance documents, much less did they identify a concrete interest in WDFW’s guidance documents. RP Aug. 9, 2019, (Merits Hearing) at 53. It was CBD’s burden to demonstrate standing for each of its claim. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 861, 351 P.3d 875 (2015). CBD failed to demonstrate standing to proceed on Claim 4, and the superior court’s order was based on both CBD’s lack of standing and the failure of the merits of Claim 4. CP3753.

An appellate court “will not consider arguments that a party fails to brief.” *Sprague v. Spokane Valley Fire Dep’t*, 189 Wash. 2d 858, 876, 409 P.3d 160, 172 (2018); *see also Riley v. Iron Gate Self Storage*, 198 Wash. App. 692, 712, 395 P.3d 1059, 1071 (2017) (“We need not consider arguments that are not developed in the briefs and for which a party has not

cited authority.”). CBD’s Opening Brief does not assign error or present any argument related to CBD’s standing to bring the procedural challenge in Claim 4. Thus, CBD has waived this key threshold issue. Because CBD has failed to argue any alleged error in the superior court’s decision finding that it lacked standing, CBD’s attempt to dispute the superior court’s decision denying the Amended Petition as to Claim 4 (Opening Br. at 34-41) must fail.

**E. CBD’S Request for Attorneys’ Fees and Costs Should Be Denied.**

CBD should not be awarded attorneys’ fees and costs. As explained above, WDFW’s challenged rules were promulgated with statutory authority, and WDFW reasonably considered all material before it during the challenged rule-making. Moreover, CBD has waived numerous issues on which it did not prevail before the superior court. CBD improperly attempts to remake its case by expanding its sole-remaining rule-making claim to recapture arguments in the already-dismissed Claims 1 and 2 (2018 Permits). In addition, CBD has filed duplicitous and overlapping motions relating to the agency record in the superior court and before this appellate court. In light of all these circumstances, even if CBD did obtain some relief under the APA, this Court should deny its request for attorneys’ fees and costs.

## VI. CONCLUSION

This Court should affirm the orders of the superior court.

RESPECTFULLY SUBMITTED this 6th day of February, 2020.

ROBERT W. FERGUSON  
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*s/ Amy J. Dona*  
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## DECLARATION OF SERVICE

I declare that on February 6th, 2020, I caused the foregoing to be filed with the Clerk of the Court, Washington State Court of Appeals, Division II via the CM/ECF system, which will send notification of such filing to the following:

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

DATED this 6th day of February, 2020, at Olympia, Washington.

s/ Jeanne Roth  
JEANNE ROTH, Legal Assistant

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

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