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No. 95029-6

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

SPOKANE COUNTY, PIERCE COUNTY, DOUGLAS COUNTY,
LEWIS COUNTY, and KITSAP COUNTY,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF FISH
AND WILDLIFE,

Respondent.

**AMICUS BRIEF OF THE SWINOMISH INDIAN TRIBAL
COMMUNITY, SQUAXIN ISLAND TRIBE, NISQUALLY INDIAN
TRIBE, STILLAGUAMISH TRIBE OF INDIANS, SAUK-
SUIATTLE INDIAN TRIBE, AND SKOKOMISH INDIAN TRIBE**

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I. INTRODUCTION

For 75 years, Washington law has required construction projects that affect State waters to be conducted in a manner that protects fish life. Laws of 1943, ch. 40, § 1 (currently codified as amended at RCW 77.55.021). To accomplish this purpose, the State adopted a Hydraulic Code (Code), chapter 77.55 RCW. The Code requires, among other things, that project proponents obtain a pre-construction hydraulic project approval (HPA) permit from the Washington Department of Fish and Wildlife (WDFW). HPAs must ensure “the adequacy of the means proposed for the protection of fish life.” RCW 77.55.021(1). The HPA program is an essential component of the State’s efforts to protect Washington’s critically depleted fisheries.

In this case, the Appellants (Counties) seek to restrict WDFW’s HPA permitting authority to activities that occur below the ordinary high water line (OHWL). This interpretation violates the plain language of the Hydraulic Code and the entire statutory scheme. Moreover, the Counties’ argument ignores an inconvenient truth: impacts from shoreline construction do not stop at the water line. Because activities both below *and* above the OHWL affect State waters and adversely impact fish and fish habitat, the Counties’ arguments, if accepted, would end the State’s

longstanding regulation of construction projects in or near State waters in order to protect fish life.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

Amici Swinomish Indian Tribal Community, Squaxin Island Tribe, Nisqually Indian Tribe, Stillaguamish Tribe of Indians, Sauk-Suiattle Indian Tribe, and Skokomish Indian Tribe (Tribes) are federally recognized Indian tribes with treaty rights to harvest salmon and other fish in their respective usual and accustomed fishing areas (U&As) in Puget Sound and rivers and streams draining to it. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). The Tribes have vital interests in ensuring that State statutes and regulations intended to protect fish and fish habitat, including those that govern the HPA program, are honored, implemented and enforced, so that they can continue to co-manage fisheries resources effectively and exercise their federal treaty rights to take fish.¹

Since time immemorial, the Tribes and their ancestors have occupied lands and waters in Puget Sound. Fishing for salmon and other fish was and continues to be “not much less necessary to [their] existence than the atmosphere they breathed,” *United States v. Winans*, 198 U.S. 371, 381 (1905), and plays a central and enduring role in the Tribes’ economies

¹ The Tribes’ arguments in this case rest solely on state law. The Tribes make no claim based on their federal treaty rights to take fish, or any other federal right, and expressly reserve all claims and arguments arising under federal law.

and cultures. In 1854 and 1855, the Tribes entered into treaties with the United States. In exchange for relinquishing large swaths of land, the United States guaranteed certain rights to the Tribes in perpetuity, including “the right of taking fish, at all usual and accustomed grounds and stations . . . with all citizens of the Territory.” *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 661-62 (1979). The treaties guarantee the Tribes not just the right to dip their nets in the water, but also the right to take up to half of the harvestable salmon and other fish in their respective U&As. *Id.* at 674-85.

Since the late 1970s, the Tribes and State have co-managed their respective fisheries, and strive to cooperate in discharging their respective authorities under their respective laws, joint fishery plans, and federal court orders. *United States v. Washington*, 19 F. Supp. 3d 1252, 1256-57 (W.D. Wash. 1997). Actions taken by one party often affect the others. *Id.*; see also AR at 536-38.²

Before settlers arrived, returning salmon were abundant in Pacific Northwest streams. See *Fishing Vessel*, 443 U.S. at 667-69. Now, however, “many of the salmon stocks [in State waters] are critically reduced from their sustainable level”,³ RCW 77.95.010, which has led to corresponding

² “AR” refers to the administrative record filed in this case.

³ Over the past several decades, salmon populations have declined dramatically. AR at 605. Many stocks are now listed as threatened or endangered under the Endangered

declines in Tribal harvest levels. *See Fishing Vessel*, 443 U.S. at 669-70. The Tribes and their members continue to devote themselves to salmon fishing when harvestable levels of salmon return to their respective U&As, eat salmon as an important part of their diet, and use salmon in religious and cultural ceremonies. However, the dramatic reduction in Tribal harvests has “damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm.” *United States v. Washington*, 853 F.3d 946, 961 (9th Cir. 2017).

A primary cause of the decline in salmon stocks is “damage or destr[uction] [of] habitat that supports fish life.” WAC 220-660-050(2); *see also* AR at 346-48, 603-613, 626-33. Pacific salmon are anadromous, meaning they are born and rear in fresh water, migrate to the ocean to mature, and return to their waters of origin to spawn. *Fishing Vessel*, 443 U.S. at 662. As a result, all salmon species need good quality habitat in freshwater, estuarine, and marine environments to survive. AR at 603-607.

Species Act, 16 U.S.C. § 1531 et seq., or have special status listings under State law. 50 C.F.R. §§ 17.11(h), 223.102(e); RCW 77.85.005; WAC 220-610-020, 030; AR at 603-609. Washington’s Legislature declared the fishery to be in a “state of emergency” and stated that “immediate action is required to restore . . . fisher[ies].” RCW 77.95.010.

Construction projects and other activities located in or near the water can damage or destroy these essential habitats.⁴ AR at 346-48, 626-33.

Simply put, failure to adequately protect fish and fish habitat in Washington injures the Tribes' economies and cultures and undermines their fishing rights. The Counties' argument that activities above the OHWL are exempt from HPA permitting violates the statutory scheme, undermines longstanding protections the Legislature mandated to protect fish life, and will harm important Tribal interests in fish life, giving the Tribes a direct, legally protected interest in this case.

III. STATEMENT OF THE CASE

The Tribes concur with and adopt the statement of the case set forth in WDFW's Response to Counties' Opening Brief at pp. 2-6.

IV. ARGUMENT

The Hydraulic Code requires HPA permits for projects that "use, divert, obstruct or change the natural flow or bed" of state waters. RCW 77.55.011(11), .021. Section A describes how the Code's plain language does not limit WDFW's regulatory authority to in-water projects. Sections

⁴ Projects located in the water, such as dredging or dock construction, destroy fish habitat, disturb substrate, and degrade water quality through increased sedimentation. AR at 626-629. Projects located near the water's edge also negatively impact fish habitat. These impacts include changes to the light and shade regimes from overwater structures; habitat alteration due to shoreline armoring; and increases in erosion and sedimentation from construction in the riparian zone and removing riparian vegetation. AR at 626-633.

B and C illustrate, respectively, how projects that are exclusively landward of the OHWL, and “mixed” projects that cross the OHWL, “change” the bed or natural flow of state waters. Section D explains how the Code expressly authorizes WDFW’s jurisdiction above the OHWL, and how its provisions that require permits for above OHWL work are not just exceptions to a general rule. Finally, Section E explains that the Code contains provisions that place reasonable limits on WDFW’s permitting authority.

A. The Hydraulic Code Requires HPA Review for Any Project that Will “Change” the Bed or Natural Flow of State Waters.

Chapter 77.55 RCW requires that an entity intending to undertake a “hydraulic project” must first “secure the approval of [WDFW] . . . as to the adequacy of the means proposed for the protection of fish life.” RCW 77.55.021(1). Once a hydraulic project triggers WDFW’s authority, protection of fish life is the standard that WDFW applies when reviewing the project’s impacts. RCW 77.55.021(7)(a) (“Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned.”). Any conditions that WDFW imposes must reasonably relate to the project and be proportional to its impact. RCW 77.55.231(1). Because RCW 77.55.021(7) empowers WDFW to either deny a permit or impose reasonable conditions on projects that would otherwise fail this fish

protection standard, HPA permitting plays an essential role in statewide efforts to address Washington’s critically depleted fisheries.

This case turns on the statutory provision that triggers HPA review: the definition of “hydraulic project.” RCW 77.55.011(11), .021(1). The Hydraulic Code defines “hydraulic projects” based on whether the proposed activity will impact (i.e., “use, divert, obstruct, or change”) state waters, not on where the project is located relative to the OHWL. RCW 77.55.011(11). Nevertheless, the Counties argue that only projects (or portions of projects) below the OHWL can be “hydraulic projects.” Counties’ Opening Brief at 9-10. This interpretation conflicts with the plain language of the statute, beginning with the Counties’ attempt to trivialize and redefine the word “change.” As described in Sections B and C, hydraulic projects or portions thereof that are located above the water line “change” streamflows and streambeds.⁵

As noted, hydraulic projects are those that “use, divert, obstruct or change the natural flow or bed” of state waters. RCW 77.55.011(11). The Counties, likely recognizing that certain activities above the water line “change” streamflows and beds, urge the Court to ignore the word’s ordinary broad meaning – i.e., “[t]o make or become different . . . ; [to]

⁵ For convenience, this brief refers to streamflows and streambeds. In many instances, the arguments also apply to marine waters and beds underlying them.

alter.”⁶ Instead, they argue for applying the *ejusdem generis* canon such that “change” merely modifies the prior three words in the statute (use, divert, obstruct) – which the Counties assert can only apply to in-water activities.⁷ Counties’ Opening Br. at 9-10. For the following reasons, the Court should reject application of this canon.⁸

First, courts only resort to canons of statutory construction after conducting a plain meaning analysis and determining that a statute is ambiguous. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 600, 278 P.3d 157, 164 (2012). Here, the Counties neither argue that the Hydraulic Code is ambiguous nor rebut WDFW’s assertion that it is unambiguous. Response to Counties’ Opening Br. at 1, 12-14. Using a canon of construction to interpret the word “change” is therefore inappropriate. Instead, since the Legislature has not defined the term, the Court should give “change” its

⁶ Oxford Living Dictionary, <https://en.oxforddictionaries.com/definition/change> (Accessed March 18, 2018).

⁷ The Counties cite no support in the record for this assumption. As discussed in Section B, *infra*, flood control projects above the water line also “divert” and “obstruct” the natural flow of floodwaters. RCW 77.55.011(11). Indeed, this is the very purpose of flood control projects.

⁸ The Court should also reject the Counties’ argument that a “plausible reading” of the Hydraulic Code is that the Legislature intended for hydraulic project to have *both* an adverse impact on *and location in* state waters. Counties’ Reply Brief at 5. Had the Legislature wanted that outcome, it could have defined “hydraulic project” differently, such as “the construction or performance of work *below the ordinary high water line* that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” See RCW 77.55.011(11). Courts, however, do “not add words where the legislature has chosen not to include them”. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283, 1288 (2010).

dictionary definition. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 609-10, 998 P.2d 884, 890 (2000).

Second, if the court determines *sua sponte* that the Code is ambiguous, it should reject the Counties' invitation to apply the *ejusdem generis* canon. That canon requires interpreting general statutory terms as only suggesting items similar to specific terms. *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244, 1248 (1972). The Counties cite *Dean v. McFarland*, in which the canon was properly applied to a list of terms in RCW 60.04.040. Counties' Opening Br. at 10. RCW 60.04.040 allowed a lien against someone who supplied equipment for "clearing, grading, filling in, or otherwise improving any real property". (Emphasis added.) The *McFarland* court found that because the general phrase "or otherwise improving any real property" modified the specific verbs "clearing, grading [and] filling in", it did not cover hauling away debris. 81 Wn.2d at 221.

The Hydraulic Code is written differently. "[U]se, divert, obstruct or change" are all terms that equally and directly describe different ways in which hydraulic projects may impact streamflows and streambeds. See RCW 77.55.011(11). Accordingly, the Court should afford all four terms the full effect of their plain language meaning. See *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (courts must

give effect to the plain meaning of statutory terms as an expression of legislative intent).

Finally, as WDFW points out, applying the *ejusdem generis* canon conflicts with the principle that a statute should be construed as a whole, and no word – i.e., “change” – should be construed as superfluous. Response to Counties’ Opening Br. at 14 (citing *Ralph v. Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342, 345 (2014)).

B. Projects that are Exclusively Landward of the OHWL “Change” the Bed or Natural Flow of State Waters.

The Counties’ argument that chapter 77.55 RCW only applies to projects below the OHWL rests on the assumption that the impacts of upland activities on state waters and fish life are only a “mere possibility.” Counties’ Opening Br. at 11, 20-21. This is simply incorrect. Some exclusively upland activities “use, divert, obstruct, or change” the flow or bed of state waters. RCW 77.55.011(11); AR at 346-48, 626-33.

For example, upland flood control measures change streamflows and reshape streambeds.⁹ See AR at 627-29. Dike and levee projects, which are often constructed entirely above the OHWL, stabilize banks and

⁹ See National Marine Fisheries Service, ESA - Section 7 Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Consultation: Proposed Qualification of the Regional Road Maintenance Program [. . .], NMFS Tracking No.: 2003/00313 (Aug. 15, 2003) (Bio. Op.) at 20-28, available at <http://www.kingcounty.gov/~media/depts/transportation/roads/projects-plans-reports/esa/BiologicalOpinion.ashx?la=en> (accessed March 21, 2018).

channelize flows in order to prevent floodwater from spilling over the banks into the natural floodplain. *See* Attorney General Opinion No. 6 (2016) at 4;¹⁰ Bio. Op. at 17, 28. Because the natural course of a river or stream includes its floodplain, *id.* at 17, constraining floodwaters to a narrower channel “change[s]” the natural flow by “obstruct[ing]” floodwaters from overflowing the channel. *See id.* at 18, 28; RCW 77.55.011(11).¹¹ Channel constriction measures also “change” streambeds. Bio. Op. at 28. Additional water from flooding, prevented from spreading into the floodplain and constrained to smaller channels, increases the weight of water on the beds and the velocity of water across them. *See id.* at 17-18, 28. This phenomenon reshapes the beds, alters fish habitat,¹² and directly harms fish by scouring egg-filled spawning beds (known as “redds”) from the protective sand and gravel. *See id.* at 31; *see also* AR at 612.

¹⁰ Attorney General Opinion No. 6 (2016), *available at* <http://www.atg.wa.gov/ago-opinions/regulatory-authority-under-hydraulic-project-approval-process-related-activities-above> (accessed March 21, 2018) (“[P]lacement of structures in a floodway above the ordinary high water line can redirect flood flows causing catastrophic change to fish habitat in river beds.”)

¹¹ Bridge construction has similar impacts. Shoreline abutments constructed near but above the water line “restrict the flow of streams and rivers and/or affect the movement . . . of wood and sediment” via channel constriction. AR at 629. Bridge work is one of the most common HPA project types. AR at 169, 493 (“Water crossing structures” generated 32 percent of HPA applications from 2008-2012).

¹² Among other impacts, bank stabilization and channelization prevents stream channel migration, thus depriving fish life of essential side channel habitat normally created by natural changes to the watercourse. Bio. Op. at 17; *see also* AR at 628.

Similarly, above-water erosion control measures like marine bulkheads shape the near-shore saltwater sea floor in a manner that harms fish life. Bio. Op. at 20; *see also* AR at 631-33. Bulkheads reflect wave energy away from shoreline property and thus wash away small gravel and sand, exposing heavier stones below and creating a coarser nearshore habitat. Bio. Op. at 20; *see also* AR at 631. As above, this “change[s]” the natural flow and bed of state waters, harming fish life that depends on finer gravel and sand as egg laying habitat. Bio. Op. at 20; RCW 77.55.011(11).

There is no support in the record for the Counties’ repeated assertion that “most” bridge HPAs are for exclusively upland maintenance work. Counties’ Reply Br. at 1, 3, 8. WAC 220-660-190 is not limited to bridge maintenance, but to any project involving a water crossing structure over fish-bearing waters. Of the 810 bridge HPAs referenced in the record (AR at 493), the Counties identify only two for maintenance, neither of which were issued under the challenged rule: roadway resurfacing in Chelan County (CP at 44-48) and a temporary bridge construction project involving “bridge abutments and associated armoring” of the type discussed above (CP at 50). Counties’ Reply Br. at 1. Even where bridge maintenance involves no in-water work, projects that would change natural flows or beds (due to falling debris or other byproducts, for example) still require a permit.

See RCW 77.55.011(11), .221 (five-year permit agreements for bridge repair).

Finally, the Counties' interpretation, if adopted, incentivizes project proponents to skirt HPA review simply by moving their activities a few inches landward of the OHWL.¹³ This unintended consequence will inflict harm on fish life. The Counties' concession that the "Legislature enacted the Hydraulic Code with the important goal in mind of protecting fish life", Counties' Reply Brief at 2, is inconsistent with its argument to deny WDFW the jurisdiction that it needs to do so.

C. "Mixed" Projects that Cross the OHWL "Change" the Bed or Natural Flow of State Waters.

The Counties' reply brief takes a different course than their opening brief. Their opening brief strongly implies that only projects located entirely in the water require an HPA permit. Counties' Opening Br. at 1 ("Only work within the ordinary high water line always meets this test."), 9 ("All projects built below the ordinary high water line automatically meet this simple test."). In contrast, their reply brief presents an expanded view

¹³ There is an important distinction between receiving an unconditioned HPA permit and avoiding HPA review entirely. Because a project's classification as a "hydraulic project" is the sole trigger for HPA review, excluding entirely upland projects from the definition of "hydraulic project" would mean those projects would receive no WDFW scrutiny whatsoever. RCW 77.55.011(11), 021(1). WDFW would not even be aware of upland projects, including those that would be detrimental to fish life, because such activities would not require an HPA application in the first place.

of WDFW authority by asserting that, “[m]ixed projects do require permits for the portion of the work below the OHWL” and “the Counties agree that [W]DFW can regulate both projects that are constructed exclusively in state waters and the in-water portion of a mixed project partially located below the water line.” Counties’ Reply Br. at 3, 9. However, the Counties’ latest interpretation of the statute is no less inconsistent with the Code’s plain language and the entire statutory scheme.

First, the statutory text specifically requires that WDFW’s HPA review encompass the entire project. RCW 77.55.021(2)(a)-(c) requires applicants to provide WDFW with:

- (a) General plans for the overall project;
- (b) Complete plans and specifications of the proposed construction or work within the mean higher high water line in saltwater or within the ordinary high water line in freshwater;
- (c) Complete plans and specifications for the proper protection of fish life[.]

At minimum, the Counties’ interpretation nullifies the requirement that applicants submit “general plans for the overall project”. RCW 77.55.021(2)(a); *Ralph*, 182 Wn.2d at 248 (“We must interpret a statute as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant.”). If WDFW’s jurisdiction abruptly stops at the water’s edge, then there is no need for it to consider the “overall

project.” *See* RCW 77.55.021(2)(a). Moreover, the Counties offer no explanation for the Legislature’s omission of the narrowing phrase “within the [OHWL]” from subsection (c), which requires submitting “complete plans and specifications for the proper protection of fish life.” RCW 77.55.021(2)(c). The implication is clear: plans for the proper protection of fish life are not “complete” unless they include measures both above and below the OHWL.

The Counties themselves advance a related statutory interpretation argument, asserting that to require an HPA permit for any project with no in-water work would render RCW 77.55.021(2)(b) superfluous. Counties’ Opening Br. at 20-23. The Counties misunderstand the plain meaning of this provision, which is that applicants need not submit plans for in-water work if none is contemplated, but must submit “complete plans and specifications” if in-water work is planned. Subsection (b) is facially irrelevant to projects that propose no in-water activity.

Second, the Counties’ interpretation is unworkable and will preclude meaningful project review. WDFW cannot effectively assess the adequacy of measures to protect fish life by splitting a single proposed project into its component parts, and then analyzing only a subset of those components while ignoring the rest. The Counties’ interpretation, for example, would require WDFW to consider the impacts of a bridge’s in-

water pylons but not its shoreline abutments, and require an HPA permit for a marina's pillars but not the associated shoreline armoring. Under the plain language of RCW 77.55.011(11), these landward components of hydraulic projects are subject to HPA review for the same reason as the entirely land-based projects discussed above: i.e., they "divert, obstruct, or change" state waters. RCW 77.55.011(11).

Third, restricting WDFW's jurisdiction to below the OHWL will undermine the agency's ability to protect fish life from project impacts that cross the water line. Large construction projects require large equipment; when the project is located in a river or stream, it is often necessary to clear riparian vegetation to allow site access for equipment and supplies. *See, e.g., Bio. Op. at 22* (discussing impacts of earth clearing and riparian vegetation removal); *see also AR at 628-29*. Riparian vegetation, however, is critical to fish life. *AR at 216; WAC 220-660-100* (included in "Freshwater habitats of special concern"). In particular, trees provide a source of large woody debris that fall into waterways and create essential fish habitat. *Bio. Op. at 28-29*. Only if WDFW's jurisdiction extends to the entire project can it protect fish life, and the habitat fish need, by imposing the reasonable permit condition that project proponents avoid cutting down mature trees when clearing a path to the project site. If WDFW's authority ends at the water line, it cannot. The Counties' cramped

interpretation of WDFW's jurisdiction, if adopted, would prevent the agency from fulfilling its legislative mandate to ensure the adequate protection of fish life. *See* RCW 77.55.021(1).

D. Chapter 77.55 RCW Expressly Authorizes WDFW to Exercise HPA Jurisdiction Above the OHWL.

In order to fulfill its mandate to protect fish life, WDFW must regulate both in-water and near-shore work that affects state waters. The plain language of Washington's Hydraulic Code confirms that WDFW's HPA jurisdiction extends above the OHWL by explicitly requiring HPA permits for four types of above-water projects: dike vegetation management (RCW 77.55.131), marine bulkheads (RCW 77.55.141), certain marina work (RCW 77.55.151), and stream bank stabilization (RCW 77.55.011(23), .021(9)-(12)).

The Counties, in order to align with their argument that WDFW's jurisdiction is limited to activities below the OHWL, assert that these four instances are merely "exceptions" to the general rule. Counties' Opening Br. at 25, 28 ("[T]hese requirements are appropriately read as express statutory exceptions to the general rule that no permit is required for upland work"). Their argument, however, runs headlong into the canon against creating exceptions beyond those specified by the Legislature. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141

Wn.2d 245, 280-81, 4 P.3d 808, 827-28 (2000); Philip A. Talmadge, *Statutory Interpretation in Washington*, 25 SEATTLE L. REV. 179, 196 (2001). The Legislature knows how to create exceptions; it did so in the Hydraulic Code thirteen times using the word “exception” or its derivative, six times using the word “unless”, and one time using the word “exempt.”¹⁴ The four statutory provisions listed above do not state that they are exemptions to a so-called general rule that precludes WDFW’s jurisdiction above the OHWL. Had the Legislature intended these four instances to be an “exception” from the “general rule” posited by the Counties, it could easily have said so, as it did nearly two dozen times elsewhere in the Code.

E. Chapter 77.55 RCW Imposes Limits on WDFW’s Authority by Linking Permit Conditions to Project Impacts.

The Counties argue that allowing WDFW to regulate above the OHWL would create a slippery slope and afford the agency nearly unfettered permitting authority. *See* Counties’ Opening Br. at 21. This argument ignores the important, restrictive sideboards on WDFW’s regulatory authority that the Legislature included in the Hydraulic Code.

First, the Code explicitly forbids WDFW from imposing HPA permit conditions for any reason other than fish protection. RCW

¹⁴ Word search results based on full text of the Hydraulic Code, chapter 77.55 RCW, located at <http://app.leg.wa.gov/RCW/default.aspx?cite=77.55&full=true>.

77.55.021(7)(a). Second, any permit conditions that the agency does impose:

must be reasonably related to the project. The permit conditions must ensure that the project provides proper protection for fish life, but the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.

RCW 77.55.231(1) (emphasis added). Thus, permit conditions must be both “reasonably related” to the project and proportional to its impacts. *Id.* Tellingly, the Counties’ briefs never cite to this important provision that curbs WDFW’s authority.

To emphasize their point, the Counties present an extreme example: the upland construction of a coal-fired power plant, which could contribute to global warming, change rainfall patterns, and thus indirectly make substantial changes to the “natural flow” of state waters and require an HPA permit. Counties’ Opening Br. at 21. They cite for support portions of WDFW’s Final Programmatic Environmental Impact Statement (Final PEIS) that evaluated proposed changes to the Hydraulic Code Rules. *Id.* (citing AR at 616, 652-54 (PEIS, at 3-14, and 4-28 to 4-30)).

The Counties’ reliance on the Final PEIS, however, is misleading. The document does not say that all projects that contribute to global warming and/or change rainfall patterns require a hydraulic permit. Rather, the cited sections generally discuss the impacts of climate change on

hydraulic projects and fish life in the context of describing the natural and built environments potentially affected by WDFW's proposed rule changes. *Id.* Accordingly, there is no support in the administrative record for the Counties' extreme example. Moreover, even assuming *arguendo* that the coal plant was in sufficient proximity to state waters to qualify as a "hydraulic project", any permit conditions would have to be reasonably related to the project and proportional to the coal plant's actual impact on fish life. *See* RCW 77.55.231(1).

V. CONCLUSION

For the above reasons, the decision below should be affirmed.

Respectfully submitted this 22nd day of March, 2018.



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DECLARATION OF SERVICE

Wendy Otto declares as follows:

1. I am a resident of the State of Washington, residing or employed in La Conner, WA.
2. I am over 18 years of age, and not a party to the above entitled action.
3. I declare that on March 22, 2018, I caused the foregoing document to be filed with the Washington State Appellate Court's Secure Portal for Electronic Filing, which generates a transmittal letter to all active parties in the case; including a copy of all uploaded files.

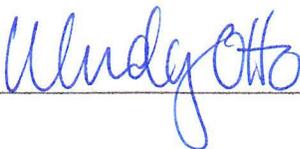
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of March, 2018, at La Conner, Washington.



SWINOMISH INDIAN TRIBAL COMMUNITY

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