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STATE OF WASHINGTON

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NO. 34883-7

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

ECHO BAY COMMUNITY ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL
RESOURCES; RICHARD KAUPILLA; ANDY BLAIR;
RICKY BLAIR; and F/V PUGET LLC,

Respondents.

**RESPONSE BRIEF OF STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES**

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I. COUNTER STATEMENT OF THE ISSUES

A. Did the superior court err when it determined RCW 79.135.110 permits the Department of Natural Resources to lease a portion of the bed of Echo Bay to Richard Kaupilla, Andy Blair, Ricky Blair and F/V Puget (“the Lessees”) for aquaculture purposes?

B. Was the superior court in error when it ruled that the Lessees’ proposed herring net pens constitute an “other aquaculture use” as the term is used in RCW 79.135.110 based on the administrative definition of “aquaculture” found in WAC 332-30-106(4)?

II. STATEMENT OF THE CASE

A. Factual Background.

The Department manages the approximately 2.6 million acres of aquatic lands owned by the State of Washington.¹ Among these state-owned aquatic lands are, with minor exceptions, the beds of all navigable waters within the state,² also known as bedlands,³ including the bed of Echo Bay at issue here. Historically, the Department has

¹ *Aquatic Resources Policy Implementation Manual*, Record at 675.

² *Id.*

³ The pertinent part of RCW 79.105.060(2) defines “beds of navigable waters” as “those lands lying waterward of . . . the extreme low tide mark in navigable tidal waters” WAC 332-30-106(9), in turn, provides “[t]he term, “bedlands” means beds of navigable waters.”

maintained several aquaculture leases for herring net pens on state-owned aquatic lands in various locations.⁴

The instant case stems from a November 2002 aquaculture lease application filed by Andy Blair requesting authorization to install herring net pens in Echo Bay.⁵ Immediately before the application was filed, the bedlands that were the subject of the application were among those leased to the Washington Department of Fish and Wildlife (“DFW”) for delayed release salmon net pens.⁶ The delayed release salmon net pens were in place at the Echo Bay site from 1975 until August 2002 when the DFW removed them.⁷ Mr. Blair’s application called for a net pen with a 40 percent smaller footprint than the salmon net pens at the site for over 25 years.⁸ In May 2004, the State informed Mr. Blair that the Department

⁴ *Aquaculture Handbook*, Record at 507; *Aquatic Resources Program Activity Summary*, Record at 878.

⁵ *Supplemental Aquaculture Lease Application Form*, Record at 1.

⁶ Record at 293. The lease for the delayed release salmon net pens included tidelands owned by the state. *Supplemental Designation of Clerk’s Papers, Exhibit 2*. The 30-year DFW net pen lease in Echo Bay began in 1975. Record at 298; *Id.* The aquaculture leasing statutes now codified in RCW 79.135 did not authorize leasing beds for “other aquaculture uses,” such as net pen aquaculture, until 1979. Laws of 1979, Ex. Sess., ch. 123, § 1. Because the aquaculture statutes only authorized leases for oyster and shellfish cultivation in 1975, the authority to issue the net pen lease to DFW came from the bedlands leasing statute, RCW 79.130.010 (then codified at RCW 79.16.530). The DFW lease was not related to the aquaculture statutes, which are the subject of this dispute.

⁷ *May 25, 2004 Letter*, Record at 298.

⁸ *Biological Evaluation*, Record at 114.

had accepted his application and would issue a lease to him if he obtained all necessary permits for the herring net pens.⁹

Based on the application, the Department issued an aquaculture lease to Andy Blair, Richard Kaupilla and Ricky Blair (the Lessees) in September 2005.¹⁰ The net pens permitted under the lease will occupy an area 100 feet wide by 100 feet long,¹¹ approximately 500 feet from the shore of Fox Island and 600 feet from the shore of Tanglewood Island.¹²

The lease calls for wild-caught herring to be placed in the net pens for a period of approximately two weeks without food.¹³ The starvation process produces herring that are a better product for salmon bait.¹⁴ Herring held in the pens have less fat and, therefore, are firmer and stay on the fish hook better.¹⁵ In addition, the process empties the herrings' digestive tracts of bacteria that would hamper preservation of the fish in the freezing process.¹⁶ After approximately two weeks, the herring are

⁹ *Id.*

¹⁰ *DNR Decision/Action Summary Report*, Record at 45.

¹¹ *Substantial Development Permit*, Record at 196.

¹² *Substantial Development Permit*, Record at 196; *Echo Bay Parcel Map*, Record at 98 (showing former DFW net pens).

¹³ *Plan of Operations*, Record at 80; *DNR Decision/Action Summary Report*, Record at 45.

¹⁴ *Substantial Development Permit Report & Decision*, Record at 172.

¹⁵ *Echo Bay Community Ass'n. v. Pierce County*, No. 05-027, 2006 WL 1047010 (SHB 2006); *December 30, 2004 letter, Thomas Oldfield*, Record at 309.

¹⁶ *Aquatic Resources Program Activity Summary*, Record at 878; *Plan of Operations*, Record at 80; *DNR Decision/Action Summary Report*, Record at 45.

removed from the pen and frozen for bait.¹⁷ The process authorized by the lease is consistent with the description of the standard industry practice provided to the Department by the Department of Fish and Wildlife in conjunction with the lease.¹⁸

In addition to obtaining a lease from the Department, the Lessees obtained a shoreline substantial development permit and a conditional use permit from Pierce County.¹⁹ The Community Association challenged Pierce County's issuance of the permits, disputing, among other things, that the herring net pens constituted an "aquacultural practice" for purposes of the Pierce County Code.²⁰ In upholding the issuance of the permits, the hearing officer determined that the proposed net pens constituted an aquacultural practice under Section 20.24.010 of the Pierce County Code.²¹ The biological evaluation conducted for the permits resulted in a determination of non-significance for the herring net pen proposal.²² The evaluation concluded that the herring net pens would not alter shoreline or upland conditions in the action area.²³ The decision of

¹⁷ *Plan of Operations*, Record at 80; *DNR Decision/Action Summary Report*, Record at 45.

¹⁸ *October 14, 2004 DFW email*, Record at 324.

¹⁹ *Substantial Development Permit*, Record at 196.

²⁰ *Substantial Development Permit*, Record at 206.

²¹ *Substantial Development Permit*, Record at 206.

²² *Substantial Development Permit*, Record at 196.

²³ *Biological Evaluation*, Record at 118.

the hearing officer was affirmed by the Shorelines Hearings Board on April 14, 2006 in all material respects.²⁴

B. Proceedings Below.

On October 7, 2005, the Echo Bay Community association filed its appeal of the Department's issuance of the herring net pen lease to the Lessees. On cross-motions for summary judgment, the Pierce County Superior Court affirmed the Department's issuance of the Lease on May 19, 2006.

Judge Lee held that the Department had authority under RCW 79.135.110 to lease the beds of navigable waters to any person for aquaculture and that the authority was not compromised by RCW 79.130.010, which authorizes the Department to lease the beds of navigable waters to the owner or lessee of abutting tidelands. Judge Lee also held the relevant definition of "aquaculture" for purposes of RCW 79.135.110 is found in WAC 332-30-106(4), and the proposed herring net pen operation was an aquaculture practice under that definition because the net pens would be used to process herring.

On May 24, 2006, the Echo Bay Community Association filed the instant appeal to contest the superior court decision.

²⁴ *Echo Bay Community Ass'n v. Pierce County*, No. 05-027, 2006 WL 1047010 (SHB 2006). The Community Association did not appeal the decision of the Board.

III. SUMMARY OF THE ARGUMENT

The Legislature has delegated general management authority for Washington's state-owned aquatic lands to the Department.²⁵ The Department's authority to issue aquaculture leases is found in RCW 79.135. RCW 79.135.110(1) provides that the beds of all navigable waters are subject to lease for aquaculture. RCW 79.135.110(2) provides that the statute shall not prevent "any person from leasing more than one parcel, as offered by the department." RCW 79.135.120, in turn, provides that "any person desiring to lease tidelands or beds" may file an application to lease. As such, construing the statutes as a whole, any person may lease the beds of navigable waters for aquaculture.

The Department's issuance of an aquaculture lease is appropriate in this case because the proposed herring net pens satisfy the definition of aquaculture found in WAC 332-30-106(4). Under the definition, aquaculture practices include, among other things, the "processing of aquatic plants or animals." Here, the process of placing and holding the herring in net pens results in a product that is easier to preserve and stays on the fish hook better. As the net pens are used to process herring, the use of the net pens constitutes aquaculture for purposes of WAC 332-30-106(4).

²⁵ RCW 79.105.010.

The net pen lease fulfills the Department's management objectives provided by the Legislature. RCW 79.105.050 requires the Department to foster the commercial and recreational use of the aquatic environment. To do so, the statute authorizes the Department to improve production of sealife, including sealife "contained in aquaculture containers," such as the net pens at issue here.

DNR's issuance of the Lease is also consistent with the Legislature's intent that local government have "primary responsibility" for planning and regulating the use of the state's shorelines under the Shoreline Management Act.²⁶ The Department's definition of "aquaculture" in WAC 332-30-106(4) mirrors the definition of "aquacultural practices" found in the Pierce County Code.²⁷ The Department's issuance of the Lease is consistent with the county's determination that use of the herring net pens constitute an "aquacultural practice" appropriate for Echo Bay under its shoreline master program.²⁸

IV. ARGUMENT

The Community Association argues that the Department acted without authority when it issued an aquaculture lease for herring net pens in Echo Bay. The Community Association bases its argument on

²⁶ RCW 90.58.050.

²⁷ PCC § 20.24.010(B).

²⁸ *Substantial Development Permit*, Record at 206.

RCW 79.130.010, which provides the Department “may” lease bedlands to the owners or lessees of the abutting tidelands²⁹ and the definition of “aquaculture” found in Title 15 of the Revised Statutes of Washington.³⁰ The Community Association has misconstrued the Department’s authority to lease bedlands by failing to properly take into account the Department’s aquaculture leasing authority and its administrative definition of the term “aquaculture.”

As explained below, the Department has the authority to issue the Lessees an aquaculture lease on bedlands for herring net pens because (1) RCW 79.135.110 and .120 authorize any person to lease bedlands for aquaculture; (2) the legislative history of the bedlands statute, RCW 79.130.010, demonstrates that the Legislature did not intend it to apply to aquaculture; and (3) herring net pens are “aquaculture” for purposes of RCW 79.135.110.

A. DNR May Lease Beds to Any Person for Aquaculture.

RCW 79.135.110 provides DNR with statutory authority to lease bedlands for aquaculture. Under the plain meaning of the statute, any person is eligible to lease bedlands for aquaculture. In addition, even if there were doubt regarding the plain meaning of the statute, the rules of

²⁹ *Brief of Appellant* at 9.

³⁰ *Brief of Appellant* at 16.

statutory construction make clear that RCW 79.135.110 authorizes the Department to lease bedlands to anyone for aquaculture.

1. The Plain Meaning of RCW 79.135.110 Establishes That the Beds of All Navigable Waters are Open for Aquaculture and Any Person May Lease Them.

“If the language of a statute is clear on its face, courts must give effect to the statute’s plain meaning and should assume the Legislature meant exactly what it says.” *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000). Generally, the plain meaning of a statute is discerned from the language of the statute and related statutes which disclose legislative intent. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

RCW 79.135.110 describes the lands that may be leased for aquaculture. The statute provides “the beds of all navigable tidal waters in the state lying below extreme low tide, except [beds lying beyond outer harbor lines] shall be subject to lease for the purposes of planting and cultivating oyster beds . . . or for other aquaculture use”³¹ RCW 79.135.120, in turn, defines the class of people who may apply to lease the beds of navigable waters for aquaculture. The statute provides that “any person desiring to lease tidelands or beds” may file an application to lease.

³¹ The term “beds of navigable waters” means bedlands. WAC 332-30-106(9).

Reading RCW 79.135.110 together with its companion, RCW 79.135.120, the Legislature's directive to the Department is plain: "the beds of all navigable waters" are available for aquaculture and "any person" may lease them.³² As such, the Department has unambiguous statutory authority to issue an aquaculture lease on bedlands to any person.

Despite the clear intent that the beds of all navigable waters be open to any person for aquaculture leasing, the Community Association argues that only a limited class of the population is eligible for such leases: those who own or lease tidelands.³³ The Community Association reasons that RCW 79.130.010, which authorizes the Department to lease bedlands to abutting tideland owners or lessees, must be read into RCW 79.135 or be rendered superfluous.³⁴ This is simply not true. The Department's authority to lease beds to any person for aquaculture would not prevent the owner of the tidelands from leasing bedlands abutting his or her property. Consistent with the plain meaning of RCW 79.130.010, the owners of tidelands may lease abutting bedlands for a host of purposes such as mooring vessels, placement of recreational swim rafts and docks,

³² This analysis is supported by RCW 79.135.110(2), which provides that "[n]othing in this section shall prevent *any person* from leasing more than one parcel, as offered by the department." (Emphasis added.)

³³ *Brief of Appellant* at 12. More than 70 percent of Washington's tidelands are privately owned. Record at 675. As a result, under the Community Association's reading of RCW 79.130.110, tideland property owners could effectively cut off the right of the public at large to lease beds for aquaculture or other purposes authorized by the Legislature, essentially locking up the beds for private property owners.

³⁴ *Brief of Appellant* at 14.

the establishment of commercial operations, such as marinas or boat repair facilities, or aquaculture. RCW 79.135.110 simply makes the right to lease bedlands for aquaculture a right tideland owners share with any person.

2. The Department's Policy Statements Follow the Plain Meaning of RCW 79.135.110 and 79.130.010.

The Community Association points to the Department's Policy Implementation Manual for the proposition that the Department itself has pronounced aquaculture leasing to be subject to the restrictions of RCW 79.130.010.³⁵ The Community Association has misunderstood the Policy Implementation Manual. Even if it had not, the Policy Implementation Manual has no legal or regulatory effect.

The bedlands provision of the Policy Implementation Manual ("Manual") to which the Community Association refers is little more than a restatement of RCW 79.130.010.³⁶ As RCW 79.130.010 does not address the interplay between aquaculture leasing and bedlands leasing, neither does the commentary on RCW 79.130.010 in the Manual. If one turns to the aquaculture provisions of the Manual, a similar restatement of RCW 79.135 can be found.³⁷ Notably, the aquaculture section of the Manual makes no reference to bedlands leasing. A land manager

³⁵ *Brief of Appellant* at 11 (citing page 709 of the Record).

³⁶ *Policy Implementation Manual*, Record at 709.

³⁷ *Policy Implementation Manual*, Record at 700-701.

confronted with an aquaculture application who referred to the aquaculture section of the Manual for guidance would not learn that the literal meaning of “any person” in RCW 79.135.120 should be disregarded. The implication is that the Department has taken the position that aquaculture leasing is not subject to the leasing restrictions in RCW 79.130.010.

The information the Department provides to prospective aquaculture lessees also shows that the Department has consistently taken the position that aquaculture leasing is not subject to the restrictions of RCW 79.130.010. For prospective aquaculture lessees, the Department lists the relevant statutory and regulatory provisions related to aquaculture on the Department’s website.³⁸ The Department does include any reference to the bedlands leasing statutes. Similarly, in explaining the process for prospective lessees, the Department does not state that one needs to own or lease tidelands to be eligible for an aquaculture lease on bedlands.³⁹

Even assuming for purpose of argument that the Department once took the position that aquaculture leasing under RCW 79.135 is subject to bedlands leasing restrictions, the Department’s past position has no legal or regulatory effect. *See Washington Ed. Ass’n v. Washington State*

³⁸ *Aquaculture Leasing Statutory and Regulatory Framework*, Record at 460-463.

³⁹ *Aquaculture Leasing*, Record at 458-459.

Public Disclosure Comm'n, 150 Wn.2d 612, 80 P.3d 608 (2003) (finding agency guidelines interpreting campaign finance laws without legal or regulatory effect). The Manual acknowledges as much, stating “[t]his manual does not create or change laws or policies.”⁴⁰ Accordingly, the Manual cannot make aquaculture leasing subject to RCW 79.130.010 when the Legislature has said otherwise.

3. The Rules of Statutory Construction Support the Department’s Interpretation of RCW 79.135.110 and 79.130.010.

Because the language of RCW 79.135.110 is unambiguous, the Court should apply the statute’s plain meaning without additional statutory construction. *State v. Nolan*, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). However, even if the Court were to find the language of RCW 79.135.110 ambiguous, the rules of statutory construction would support the Department’s reading of the statute.

When a statute is ambiguous, the court’s task is to ascertain and effectuate legislative intent. *City of Olympia v. Drebeck*, 119 Wn. App. 774, 83 P.3d 443 (2004). In order to effectuate the intent of the Legislature, the court has a duty to interpret the statute in a way that makes the statute “purposeful and effective.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986). Courts

⁴⁰ *Policy Implementation Manual*, Record at 674.

should avoid statutory interpretations that “would render an unreasonable and illogical consequence” *Id.*

The Community Association’s interpretation of the Department’s aquaculture leasing authority would result in an illogical construction of RCW 79.135.120. RCW 79.135.120 provides “any person” may file an aquaculture application. Under the Community Association’s construction, the statute would in effect provide that “any person” may file an aquaculture application – but only one who possesses abutting tidelands may obtain an aquaculture lease. This absurd result should be avoided. The Legislature would not create the right to file an application without a corresponding right to lease.

The Community Association’s construction of the aquaculture statutes would also lead to an unreasonable construction of RCW 79.135.100, which sets the lease rates for aquaculture leases. The statute provides that rent for aquaculture leases shall be established through competitive bidding or negotiation. If aquaculture leases on bedlands could only be issued to the owner or lessee of the abutting tidelands, there could be no “competitive bidding” because the only person who could place a bid would be the owner or lessee of the tidelands. In short, there would be no competition under the Community Association’s construction. Similarly, negotiation of lease rates would be

impractical if the only person who could lease the property was the owner or lessee of the adjacent property.⁴¹

When possible, courts should read statutes together to achieve a harmonious construction that maintains the integrity of all of the respective statutes. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). Under the Department's construction, the bedlands and aquaculture leasing statutes are not mutually exclusive; either can be applied without rendering the other superfluous. Consistent with the plain meaning of "the department may lease to the abutting tidelands or shorelands owner or lessee, the beds of navigable waters," RCW 79.130.010 acts as an authorization to lease, not a prohibition. RCW 79.130.010 authorizes the Department to lease bedlands to the owner or lessee of abutting tidelands. If the abutting property is not improved, RCW 79.130.010(2) authorizes the Department to lease the bedlands to any person for log booming. RCW 79.135.110, in turn, is a separate statutory authorization to lease bedlands to any person for aquaculture. None of the statutes needs to prohibit the others to be

⁴¹ Compare RCW 79.105.240, which sets lease rates for water-dependent uses of state-owned aquatic lands as a percentage of the assessed value of the upland tax parcel used in conjunction with the aquatic lands. Lease rates for nonwater-dependent uses of state-owned aquatic lands are set at fair market rent and cannot be less than the rate that would be charged for the same parcel if it were used for a water-dependent use. RCW 79.105.270.

effective; all are valid authorizations.⁴² As such, under appropriate circumstances, the Department may lease bedlands for aquaculture or log booming, or to the abutting owner or lessee.

If the court interpreted the statute, as the Community Association suggests, so that “bedlands may only be leased to owners or lessees of abutting tidelands” for aquaculture,⁴³ portions of RCW 79.135 would be rendered superfluous. Specifically, RCW 79.135.110(2), which provides that “[n]othing in this section shall prevent any person from leasing more than one parcel . . .”, would be without meaning. Under the Community Association’s construction, the only person who could lease a parcel of bedlands would be the owner or lessee of the abutting tideland parcel. If this construction were correct, there would be no need for the Legislature to protect the right of “any person” to lease more than one bedland parcel. RCW 79.135.110(2) must mean that “any person” has a right to lease bedlands for aquaculture; otherwise, the section would be superfluous.

The Community Association argues that had the Legislature intended to exclude aquaculture from the bedlands leasing statute it would

⁴² This reading is supported by the fact the Legislature has authorized other uses on bedlands. RCW 79.14.020 authorizes the Department to lease lake beds, tide and submerged lands for oil and gas. The Community Association’s reading of RCW 79.130.110 would in effect give tideland owners or lessees the exclusive rights to lease beds for oil and gas and other valuable minerals.

⁴³ *Brief of Appellant* at 11.

have done so expressly, as it did with the beds of Port Gardner Bay.⁴⁴ The Community Association fails to recognize that the aquaculture and bedlands leasing statutes are leasing alternatives; neither excludes the other. In contrast, RCW 79.130.010 excepts the beds of Port Gardner Bay from the general rule that a tideland owners or lessee may lease abutting bedlands. The bedlands statute refers to RCW 79.130.060, which reserves the beds of Port Gardner Bay for a 30-year lease by the Navy, because the beds of Port Gardner Bay are not available for lease by abutting owners. There is no reason for RCW 79.130.010 to refer to aquaculture leasing, because aquaculture leasing does not make beds unavailable for lease to abutting owners. Aquaculture is simply a possible alternative use of the beds. Beds may be leased to the abutting tideland owner or to anyone for aquaculture.

In the event that the Court finds the statutes cannot be reconciled, the aquaculture leasing statute should be given effect. When two statutes that pertain to the same subject matter cannot be harmonized, the more specific statute should be applied. *Estate of Kerr v. Bennett*, 134 Wn.2d 328, 337, 949 P.2d 810 (1998); *Bowles v. Washington State Employee Retirement Systems*, 121 Wn.2d 52, 77, 847 P.2d 440 (1993). If the Community Association's construction of the bedlands leasing statute

⁴⁴ *Brief of Appellant* at 15.

were correct, RCW 79.130.010 would apply to all uses of bedlands by any person. Thus, RCW 79.135.110, which deals only with leasing bedlands for aquaculture, would be more specific than RCW 79.130.010. As such, to the extent the statutes are in conflict, RCW 79.135.110 should be given effect and RCW 79.130.010 should not when aquaculture leasing is concerned.

B. Legislative History.

If the Court finds that RCW 79.135 remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids of construction, including legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). As set forth above, The Department believes that the intent of the statute is plain and is not ambiguous; however, the Department provides the following legislative history for consideration by the Court should it determine that the statute is ambiguous.

The legislative history of the Bedlands Leasing Act, Laws of 1953, ch. 164 (Bedlands Act), establishes the Legislature did not intend the Act to affect statutes, including the predecessor to RCW 79.135.110, relating to oyster cultivation. Although the relevant statutes have been re-codified since the enactment of the Bedlands Act, the application of the statutes remains unchanged.

1. Enactment of the Bedlands Leasing Act Did Not Affect Aquaculture Leasing.

The bedlands leasing statute, currently codified as RCW 79.130.010, was enacted in 1953 in essentially the same form it appears today.⁴⁵ The statute was enacted as section one of the five-section Bedlands Act.⁴⁶ Section five of the Bedlands Act provided:

Nothing in this act is intended to modify or repeal any existing statutes providing for the leasing of beds of navigable waters of the state for oyster cultivation or extraction of minerals or petroleum and gas.⁴⁷

As such, as of 1953, the Legislature had made clear that the Bedlands Leasing Act was not to affect statutes that permitted bedlands leasing for oyster cultivation.

The aquaculture statute at issue, RCW 79.135.110, was originally enacted in 1899 as part of the Deep Water Oyster Act.⁴⁸ Because the statute was an “existing statute providing for the leasing of beds of navigable waters of the state for oyster cultivation” in 1953, nothing in the Bedlands Act modified DNR’s authority to lease bedlands to “any person” under the statute.

In 1979, the Legislature amended the aquaculture leasing statute to increase the area of bedlands subject to aquaculture leasing and expand the

⁴⁵ Laws of 1953, ch. 164, § 1.

⁴⁶ Laws of 1953, ch. 164.

⁴⁷ Laws of 1953, ch. 164, § 5.

⁴⁸ Laws of 1899, ch. 136.

uses authorized on such lands.⁴⁹ Before 1979, DNR could not lease bedlands in front of first-class tidelands; i.e., those tidelands in front of incorporated cities,⁵⁰ for aquaculture. In 1979, the Legislature was concerned that the growth of cities would reduce the bedlands available for aquaculture leasing.⁵¹ As a result, the Legislature narrowed the class of bedlands reserved from aquaculture leasing. After amendment, only established harbor areas were reserved.⁵² The 1979 amendment also expanded the reach of the aquaculture leasing statute by authorizing the Department to lease beds for “other aquaculture uses” as well as “cultivation of oysters, clams, or other edible shellfish.”

At the time of the 1979 amendments to the aquaculture leasing statute, the bedland leasing statutes continued to provide that “[n]othing in this act is intended to modify or repeal any existing statutes providing for the leasing of beds of navigable waters of the state for oyster cultivation” RCW 79.16.530 (1979). If a statute refers to another Washington statute, the reference includes any amendments to the referenced statute unless the Legislature clearly expresses an intent that

⁴⁹ Laws of 1979, Ex. Sess., ch. 123, § 1.

⁵⁰ Except with regard to harbor areas, first-class tidelands are those state-owned aquatic lands lying between extreme low and ordinary high tide within two miles of the boundaries of an incorporated city. RCW 79.105.060(4).

⁵¹ *Bill Report* HB 913 (1979).

⁵² *Id.*

amendments are not to be included. RCW 1.12.028.⁵³ As such, in 1979, the express intent of the Legislature was that bedlands could be leased for aquaculture, including “other aquaculture uses,” irrespective of the bedlands leasing statutes.

2. Recodification of the Bedlands and Aquaculture Statutes Has Not Affected Their Application.

All aquatic lands statutes were recodified in 1982, just three years after the Legislature expanded aquaculture leasing on bedlands.⁵⁴ In recodifying the entirety of the aquatic lands statutes, the Legislature did not reenact its note on construction of the bedlands statutes, Section 5 of Chapter 164 of the Laws of 1953 quoted above;⁵⁵ however, this had no effect on the application of the bedlands statutes. Generally, when a statute is repealed and recodified without substantial change, the provisions of the statute must be construed as continuations of the original statute. RCW 1.12.020. In the case of the 1982 recodification, the Legislature specifically provided that it was not intended to affect “any

⁵³ See also *Corkey v. Hinkle*, 125 Wn. 671, 677, 217 P. 47 (1923) (when a statute “refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken, or proceedings are resorted to”) (discussing numerous authorities).

⁵⁴ Laws of 1982, 1st Ex. Sess., ch. 21.

⁵⁵ The Legislature did not repeal chapter 164, Section 5 of the Laws of 1953, but simply failed to reenact the provision. Laws of 1982, 1st Ex. Sess., ch. 21, § 183 (identifying sections repealed by Act). Had the Legislature intended to fundamentally alter the way that the bedlands and aquaculture leasing statutes were construed, it is likely that the provision would have been expressly repealed.

existing right acquired under the statutes repealed, decodified, or amended . . .” RCW 79.135.900 (formerly RCW 79.96.901). As such, the interpretation to be given the aquatic lands statutes was not affected by the recodification.

When construing “revised statutes and connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was not contemplated by the legislature.” *Amburn v. Daly*, 81 Wn.2d 241, 246, 501 P.2d 178 (1972). In order to construe revised statutes correctly, the whole of the revised statute and the acts of amendment and repeal must be examined in the context of the known purposes for which the revision was made. *State ex rel. Duvall v. City Council of Seattle*, 71 Wn.2d 462, 465, 429 P.2d 235 (1967). The primary purpose of the 1982 recodification was to establish separate chapters for the various subjects of aquatic lands laws.⁵⁶ There is no evidence of legislative intent to make aquaculture leasing subject to bedlands leasing restrictions through recodification.⁵⁷

⁵⁶ *Legislative Digest and History of Bills*, 47-4824, 1st Ex. Sess., at 719 (Wa. 1982). S.B. 4824 had four purposes relating to aquatic lands: (1) establishing separate chapters; (2) setting maximum rental rate increases for aquatic lands; (3) establishing fees for recreational docks on state-owned aquatic lands; (4) convening a joint legislative committee on aquatic lands. Had the Legislature intended to change 30 years of leasing practice by bringing aquaculture leasing under the rubric of bedlands leasing, it likely would have put aquaculture leasing in the bedlands leasing chapter.

⁵⁷ The Legislature itself designated the separate headings for each aquatic lands chapter. Laws of 1982, 1st Ex. Sess., ch. 21. As such, the headings of the chapters are evidence of legislative intent. The Legislature’s decision to put aquaculture leasing and

In the 1982 recodification, the Legislature made very few amendments to the statutes related to bedlands and aquaculture leasing.⁵⁸ The amendments that were made support the conclusion that the Legislature intended aquaculture leasing to remain separate from bedlands leasing. RCW 79.135.120 currently provides that “any person desiring to lease *tidelands or beds*” for oyster cultivation shall file an application with DNR (emphasis added). Before the 1982 recodification, the predecessor to RCW 79.135.120⁵⁹ provided that “any person desiring to lease *lands* for oyster cultivation” shall file an application with DNR (emphasis added). Thus, the Legislature made clear that the lands that “any person” could apply to lease for aquaculture included bedlands.⁶⁰ Significantly, in making this amendment, the Legislature did not make any reference to bedlands leasing under RCW 79.130 (formerly RCW 79.95). If the intent was to tie aquaculture leasing to the Bedlands Act, the Legislature would

bedlands leasing into separate chapters entitled “Beds of Navigable Waters” and “Oysters, Geoduck, Shellfish, and other Aquaculture Uses” evinces its intent that the aquaculture leasing statutes provide separate and distinct authority for leasing beds.

⁵⁸ That few changes were made supports the argument that the Legislature simply intended to recodify the statutes without changing their application. Generally, it is accepted that where the entire legislation affecting a particular subject matter has undergone recodification, the recodified sections will be presumed to bear the same meaning as the original sections. *See U.S. v. Sisco*, 262 U.S. 165, 43 S. Ct. 511 (1923); *Vielma v. Eureka Co.*, 218 F.3d 458 (5th Cir. 2000); *Government Employees Ins. Co. v. Hall*, S.E.2d 615 (Va. 2000).

⁵⁹ RCW 79.01.572 (1981).

⁶⁰ The predecessor to the statute’s companion, RCW 79.135.110, has required “the beds of all navigable waters” to be open for aquaculture leasing since enactment in 1899. Laws of 1899, ch. 136.

have done so expressly when it clarified that the lands “any person” could lease for aquaculture included bedlands.

When the Legislature enacted the Bedlands Act in 1953, it expressly stated the Act did not modify the State’s authority to lease bedlands for aquaculture. Nothing in the legislative history of the bedlands or aquaculture leasing statutes since 1953 indicates that the Legislature has changed its mind.

C. Herring Net Pens are an “Other Aquaculture Use” Under RCW 79.135.110.

The Community Association argues that the Department has no authority to issue an aquaculture lease for herring net pens because a herring net pen is not an “other aquaculture use” contemplated by RCW 79.135.110.⁶¹ The Community Association is incorrect. The relevant definition of “aquaculture” is found in WAC 332-30-106(4) promulgated by the Department. Herring net pens satisfy the Department’s definition because the net pens will be used to “process aquatic plants or animals.”

1. The Lessees’ Use of Herring Net Pens Constitutes Aquaculture.

The term “aquaculture” is not defined in RCW Title 79, which governs the Department’s land management activities. Accordingly, the

⁶¹ *Brief of Appellant* at 16.

Department defined the term in WAC 332-30-106(4). Courts give considerable deference to the statutory interpretation made by the agency charged with enforcing a statute. *S. Martinelli & Co., Inc. v. Dep't of Revenue*, 80 Wn. App. 930, 937, 912 P.2d 521 (1996), citing *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992). See also *Clam Shacks of America v. Skagit County*, 45 Wn. App. 346, 352, 725 P.2d 459 (1986) (finding relevant definition of "aquaculture" for Shoreline Management Act was County's shoreline master program definition). Additional deference should be given to an agency's interpretation when the Legislature has amended a statute without altering the agency interpretation. *S. Martinelli*, 80 Wn. App. at 937. In this case, the Department's definition of "aquaculture" was adopted in 1980. WAC 332-30-106(3) (1980). In 1993, the Legislature amended the aquaculture leasing statute, RCW 79.96.010 (now 79.135.110), without altering the administrative definition of aquaculture. Laws of 1993, ch. 295, § 1. As such, WAC 332-30-106(4) is entitled to deference.

WAC 332-30-106(4) provides as follows:

'Aquaculture' means the culture and/or farming of food fish, shellfish, and other aquatic plants and animals in fresh water, brackish water or salt water areas. Aquaculture practices may include but are not limited to hatching, seeding or planting, cultivating, feeding, raising, harvesting of planted crops or of natural crops so as to maintain an

optimum yield, *and processing of aquatic plants or animals.* (Emphasis added.)

Under the definition, processing of aquatic animals, such as herring, constitutes an aquaculture practice.⁶²

Under the lease issued by the Department, the Lessees will use net pens to process herring. Herring caught in the commercial sport bait fishery will be placed in the net pens for a period of two weeks. While in the net pens, the herring are held without food in order to prepare the herring for preservation and use as bait by removing bacteria from the digestive tract.⁶³ This process improves the herring product. Herring that have been held in the pens have less fat, are firmer and stay on the fish hook better.⁶⁴ Accordingly, the period during which the herring are in the net pens is a component of the herring bait production process. Once the herring are removed from the pens, processing of the herring is completed at an upland facility where the herring are frozen.

Despite the use of the net pens to transform the herring into a marketable product, the Community Association argues that no processing

⁶² The aquaculture practices listed in WAC 332-30-106(4) illustrate what is meant by “culture and/or farming of food fish, shellfish, and other aquatic plants and animals.” Because herring net pens are used to process herring, the pens fall under the enumerated aquaculture practices. As the herring net pens are an aquaculture practice, they are “culture and/or farming” of aquatic animals for purposes of WAC 332-30-106(4). The Department considers herring net pens to be floating culture of herring. *Aquaculture Handbook*, Record at 507.

⁶³ *Aquatic Resources Program Activity Summary*, Record at 878.

⁶⁴ *Echo Bay Community Ass’n v. Pierce County*, No. 05-027, 2006 WL 1047010 (SHB 2006); *December 30, 2004 letter, Thomas Oldfield*, Record at 309.

occurs in the net pens. The Association argues because the herring will be processed after they are removed from the pens, the fish cannot be processed while in the pens.⁶⁵ This is incorrect. That additional processing, such as freezing, occurs at upland facilities does not alter the fact the herring are also processed in net pens. The net pen procedure is squarely within the plain meaning of the term “processing.” The term processing is not defined in WAC 332-30-106. As such, the Court may resort to the dictionary definition for the term’s ordinary meaning. *State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002). *Webster’s Third New International Dictionary* defines the verb “process” as follows:

To subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result.

Webster’s Third New International Dictionary 1808 (1993).

Here, the net pens are a system of preparation designed to produce herring that are more easily preserved for sale as bait.⁶⁶ The net pens prepare the herring for preservation and use as bait.

The Community Association also argues that herring net pens are not within the definition of “aquaculture” in WAC 332-30-106(4) because

⁶⁵ *Brief of Appellant* at 20.

⁶⁶ *Aquatic Resources Program Summary*, Record at 878; *DNR Decision Summary*, Record at 47.

the Policy Implementation Manual excludes them.⁶⁷ The Policy Implementation Manual does nothing of the kind. The brief discussion of aquaculture in the Policy Implementation Manual lists some uses that fall under the administrative definition of aquaculture. The words “aquaculture includes” at the beginning of the sentence partially quoted by the Community Association demonstrates the list is intended to be illustrative, not exhaustive.⁶⁸ This is clear from the aquaculture uses not mentioned. In addition to herring net pens, notably absent from the list is the harvesting of marine aquatic plants, defined in RCW 79.135.400, a practice that meets the “harvesting of planted crops or of natural crops” portion of the definition of aquaculture in WAC 332-30-106(4). Like the use of herring net pens, harvesting of marine aquatic plants is considered aquaculture by the Department.⁶⁹

The Department’s established policy is that herring net pens are “aquaculture” under WAC 332-30-106(4). The Department has expressly stated that herring net pens are aquaculture in its Aquatic Resources Program Activity Summary provided to the federal government.⁷⁰ The

⁶⁷ *Brief of Appellant* at 20, citing *Policy Implementation Manual*, Record at 697.

⁶⁸ *Policy Implementation Manual*, Record at 697, providing as follows:
Aquaculture includes harvesting of existing shellfish, cultivating shellfish in artificial beds, cultivating shellfish on floating rafts, and raising fin fish in floating net pens.

⁶⁹ *Aquatic Resources Program Summary*, Record at 877.

⁷⁰ *Aquatic Resources Program Summary*, Record at 877.

Program Summary states “net pen aquaculture includes salmon aquaculture and herring operations.” In addition, the Department’s Aquaculture Handbook lists herring net pens as an aquaculture use.⁷¹ According to the Aquaculture Handbook, the Department has leased state-owned aquatic lands for herring net pens since 1989.⁷²

Just as the Department’s definition of the term “aquaculture” is entitled to deference, so, too, is the Department’s interpretation of its definition. Deference to an agency interpretation is particularly appropriate where its own regulations are concerned. *Postema v. Dep’t of Ecology*, 142 Wn.2d 68, 11 P.3d 726 (2000). Courts will “uphold an agency’s interpretation if it is plausible and not contrary to legislative intent.” *Pitts v. Dep’t of Social & Health Servs.*, 129 Wn. App. 513, 522, 119 P.3d 896 (2005); see also *Friends of Columbia Gorge v. Forest Practices Appeals Bd.*, 129 Wn. App. 35, 49, 118 P.3d 354 (2005) (deference accorded agency so long as interpretation is part of its established policy and not in direct conflict with the applicable law).

The Department’s construction of its administrative definition of aquaculture is reasonable. As set forth above, the use of herring net pens satisfies the plain meaning of WAC 332-30-106(4) because the pens are used to process herring.

⁷¹ *Aquaculture Handbook*, Record at 507.

⁷² *Id.*

The Department's construction of WAC 332-30-106(4) is also consistent with legislative intent. Legislative intent is determined primarily from the words of the statute itself. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). The Department's construction does not contravene any of the language of RCW 79.135.110 or other aquaculture leasing statutes. In fact, the Department's interpretation of WAC 332-30-106(4) furthers the Legislature's aquatic land management objectives set forth in RCW 79.105.050. Under the statute, the Department must manage aquatic lands to "foster the commercial and recreational use of the aquatic environment for production of food, fibre, income, and public enjoyment" RCW 79.105.050. To accomplish this objective, the Legislature authorizes the Department to "develop and improve production and harvesting of seaweeds and sealife . . . contained in aquaculture containers" *Id.* By providing a lease for herring net pens, the Department is fostering the commercial use of aquatic lands as well as developing and improving the production and harvesting of sealife from aquaculture containers.

The relevant definition of "aquaculture" is found in WAC 332-30-106(4). Under the plain meaning of WAC 332-30-106(4), the Lessees' use of herring net pens is aquaculture because it constitutes

processing of aquatic animals. In addition, because the Department's established interpretation of its administrative definition of aquaculture is "plausible" and "not inconsistent with legislative intent," its interpretation is entitled to deference.

2. RCW 15.85.020 is Not Relevant to the Department's Land Management Decisions.

Because the term "aquaculture" is not defined in RCW 79.135, the Community Association points to RCW 15.85.020, which defines "aquaculture" for the Department of Agriculture, as a source for the definition. The Community Association is mistaken. Whether the herring net pens meet the definition of aquaculture in RCW 15.85.020 is irrelevant to the case at bar.⁷³

The text of RCW 15.85.020 states that the definitions included in the statute are intended to apply to RCW 15.85. By implication, the definitions are not intended to apply to other RCW chapters. It is especially clear that the definitions should not apply to the Department. To fulfill aquatic-land management objectives, the Legislature has specifically authorized the Department to manage aquatic lands "to improve the production and harvesting of seaweeds and sealife . . .

⁷³ The Department asserts that the herring net pens could meet the definition of aquaculture in RCW 15.85.020. The Department considers herring net pen aquaculture to be a form of floating culture. *Aquaculture Handbook*, Record at 507. As such, the herring produced from net pen process could be a "private sector cultured aquatic product" for purposes of RCW 15.85.010(3).

contained in aquaculture containers.” RCW 79.105.050. In so doing, the Legislature provided that the Department’s authority to improve production and harvesting of sealife does not alter “the responsibility of other state agencies for their normal management of fish, shellfish, game, and water.” *Id.* As the Department’s aquatic land management authority and objectives are unique, RCW 15.85.020, which governs the Department of Agriculture, has no application here.

RCW 15.85 relates to aquaculture marketing. It has no land use or land management provisions. In contrast, RCW 79.135.110, and the related aquaculture leasing statutes in RCW 79.135, are essentially land use statutes. As such, if the Court references a definition of “aquaculture” not contained in RCW Title 79 to glean legislative intent regarding the use of the term in RCW 79.135.110, the Court should look to other land use statutes such as the Shoreline Management Act.

Through the Shoreline Management Act, the Legislature has given local government the primary responsibility for planning and regulating the use of the State’s shorelines. RCW 90.58.050. Accordingly, the Shoreline Management Act and shoreline master program planning are the primary means for identifying and providing appropriate uses of state-owned aquatic lands. WAC 332-30-107. To this end, the Department participates in local shoreline management policy making to

coordinate its management of state-owned aquatic lands with local jurisdictions. *Id.* As a result, the Department's definition of aquaculture in WAC 332-30-106(4) is consistent with Pierce County's definition⁷⁴ and the Department of Ecology's definition⁷⁵ for purposes of the Shoreline Management Act.⁷⁶

V. CONCLUSION

The Department's issuance of an aquaculture lease for herring net pens on Echo Bay bedlands was in accordance with the law. Under RCW 79.130.010, the Department may lease the beds of navigable waters to the owner or lessee of abutting tidelands. The Department also may

⁷⁴ Section 20.24.010(B) provides the following definition of "Aquacultural Practices":

The hatching, cultivating, planting, feeding, raising, harvesting, and processing of aquatic plants and animals, and the maintenance and construction of necessary equipment, buildings, and growing areas. Methods of aquaculture include but are not limited to fish pens, shellfish rafts, racks and longlines, seaweed floats and the culture of clams and oysters in tidal and other shoreline areas.

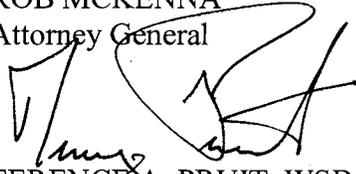
⁷⁵ WAC 173-26-241(3)(b). It should be noted that Ecology's calls for a broad interpretation of the term aquaculture. The definition states "[t]he technology associated with some forms of present-day aquaculture is still in its formative stages and experimental. Local shoreline master programs should therefore recognize the necessity for some latitude in the development of this use. . . ."

⁷⁶ Pierce County concluded that the use of herring net pens at issue constitutes aquaculture under Pierce County's shoreline master program. *Substantial Development Permit*, Record at 206. The Shorelines Hearings Board did not disturb the County's holding. *Echo Bay Community Ass'n v. Pierce County*, No. 05-027, n.3, 2006 WL 1047010 (SHB 2006). The County's conclusion provides support for a finding that the net pens are "aquaculture" for purposes of WAC 332-30-106(4) because the use of term was intended to be consistent with its use in local shoreline master programs.

lease bedlands for aquaculture to any person under RCW 79.135.110. The plain meaning and legislative history of these statutory authorities establish they are alternatives; neither precludes the other. The issuance of an aquaculture lease to the Lessees was appropriate. Herring net pens are used to process herring and therefore constitute aquaculture under the plain meaning of the Department's administrative definition of the term. Accordingly, the ruling of the Pierce County Superior Court in this matter should be affirmed.

RESPECTFULLY SUBMITTED this 18th day of October, 2006.

ROB MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Terence A. Pruit", is written over the typed name and title of the Assistant Attorney General.

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STATE OF WASHINGTON

NO. 34883-7

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

yn
IDENTITY

ECHO BAY COMMUNITY
ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES; RICHARD KAUPILLA;
ANDY BLAIR; RICKY BLAIR; and
F/V PUGET, LLC,

Respondents.

**CERTIFICATE OF
SERVICE**

I certify that on the 18th day of October, 2006, I caused a true and correct copy of **RESPONSE BRIEF OF STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES** and this **CERTIFICATE OF SERVICE** to be served upon the parties herein, in the above-entitled action, as indicated below:

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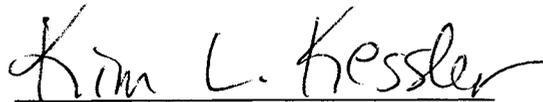
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 18th day of October, 2006, at Olympia, Washington.



KIM L. KESSLER
Legal Assistant