NO. 102586-6

SUPREME COURT OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a Washington municipal corporation; BARRY CHRISMAN and KERRY CHRISMAN, individually and as husband and wife,

Respondents,

v.

STATE OF WASHINGTON; SIERRA PACIFIC INDUSTRIES DBA SIERRA PACIFIC INDUSTRIES, INC., a California corporation; PRECISION FORESTRY, INC., a Washington corporation; and JOHN DOE NOS. 1-10,

Petitioners.

STATE OF WASHINGTON'S PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

THOMAS E. HUDSON
Assistant Attorney General
WSBA #46855
PO Box 40126
Olympia, WA 98504
(360) 586-6300
OID #91023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

The Washington State Legislature enacted comprehensive statutory schemes to protect and promote Washington State's rich and diverse environment and to guide state administrative action. Those schemes include the Forest Practices Act (FPA), RCW 76.09, and the Administrative Procedures Act (APA), RCW 34.05. The published decision below threatens key provisions of those schemes that benefit the state's natural environment and provide certainty to the public regarding state agency decisions.

Here, contrary to precedent and plain statutory language, the Court of Appeals' opinion erroneously failed to apply the broad statutory immunity the FPA grants to the State, the Department of Natural Resources (Department), and landowners for trees left standing for the public benefit. *See* RCW 76.09.330. Additionally, the Court of Appeals' opinion erroneously disregarded the administrative finality of the Department's timber harvest permit under the APA, by allowing Plaintiffs to

collaterally challenge the permit's terms in a personal injury suit. *See* RCW 34.05.510.

This Court should accept review to clarify (1) that RCW 76.09.330 grants a broad immunity whenever a Department-designated "leave tree" causes damages or injury, and (2) that the Department's designation of such trees remains final absent an administrative challenge to the permit. Consequently, this Court should grant review because the opinion conflicts with the decision in *Ruiz v. State*, 154 Wn. App. 454, 225 P.3d 458 (2010), and also because upholding the legislative schemes that protect our state's environment and provide finality for administrative decisions is an issue of substantial public interest. *See* RAP 13.4(b)(2), (4).

II. IDENTITY OF PETITIONER AND DECISION

Washington State and its Department of Natural Resources petition for review of the published opinion in *Public Utility District No. 1 of Snohomish County v. State*, ___ Wn. App. 2d. ___, 534 P.3d 1210 (Sept. 5, 2023) (App. A). The

Department filed a motion for reconsideration, which the Court of Appeals denied on October 25, 2023. *See* Order (App. B).

III. ISSUES FOR REVIEW

1. Whether the Department has immunity pursuant to RCW 76.09.330, which provides that the State, the Department, and landowners "shall not be held liable for any injury or damages" resulting from riparian and upland trees left unharvested, where a tree left standing after a timber harvest later fell and caused injury?

2. Whether Plaintiffs can collaterally challenge the Department's final FPA permit and resulting leave tree designations through a personal injury lawsuit, even though the FPA and the APA require a timely administrative appeal and the appeal period has long passed?

/ / /

/ / /

/ / /

IV. STATEMENT OF THE CASE

A. The Department Administers the FPA and Manages Millions of Acres Subject to the FPA

The Department administers and enforces the FPA and forest practices rules, including the site-specific approval of riparian management zones (RMZs) through a permit approval process. *See* RCW 76.09.050(2); RCW 76.09.040(1)(c), .140(1); WAC 222-46-015; WAC 222-16-010; *see also Snohomish County v. State*, 69 Wn. App. 655, 665, 850 P.2d 546 (1993). RMZs are areas designated by the Department where trees should remain standing for the benefit of riparian environments. *See* WAC 222-30-021.

Approximately 12 million acres of State-owned and private forestlands are subject to the Department's Forest Regulation program. *See* Washington—DNR, *Forest Regulation*, *available at* https://www.dnr.wa.gov/programs-and-services/forest-practices (last visited on Nov. 26, 2023). One way the Department regulates forestlands is through issuing permits

that authorize and restrict timber cutting. If a Department-approved FPA permit becomes final without challenge to the Pollution Control Hearings Board, its terms are binding. RCW 76.09.050(4) (with exceptions not applying here, "forest practices shall be conducted in accordance with the forest practices regulations, orders and directives as authorized by this chapter or the forest practices regulations, *and the terms and conditions of any approved applications*") (emphasis added); RCW 76.09.110.

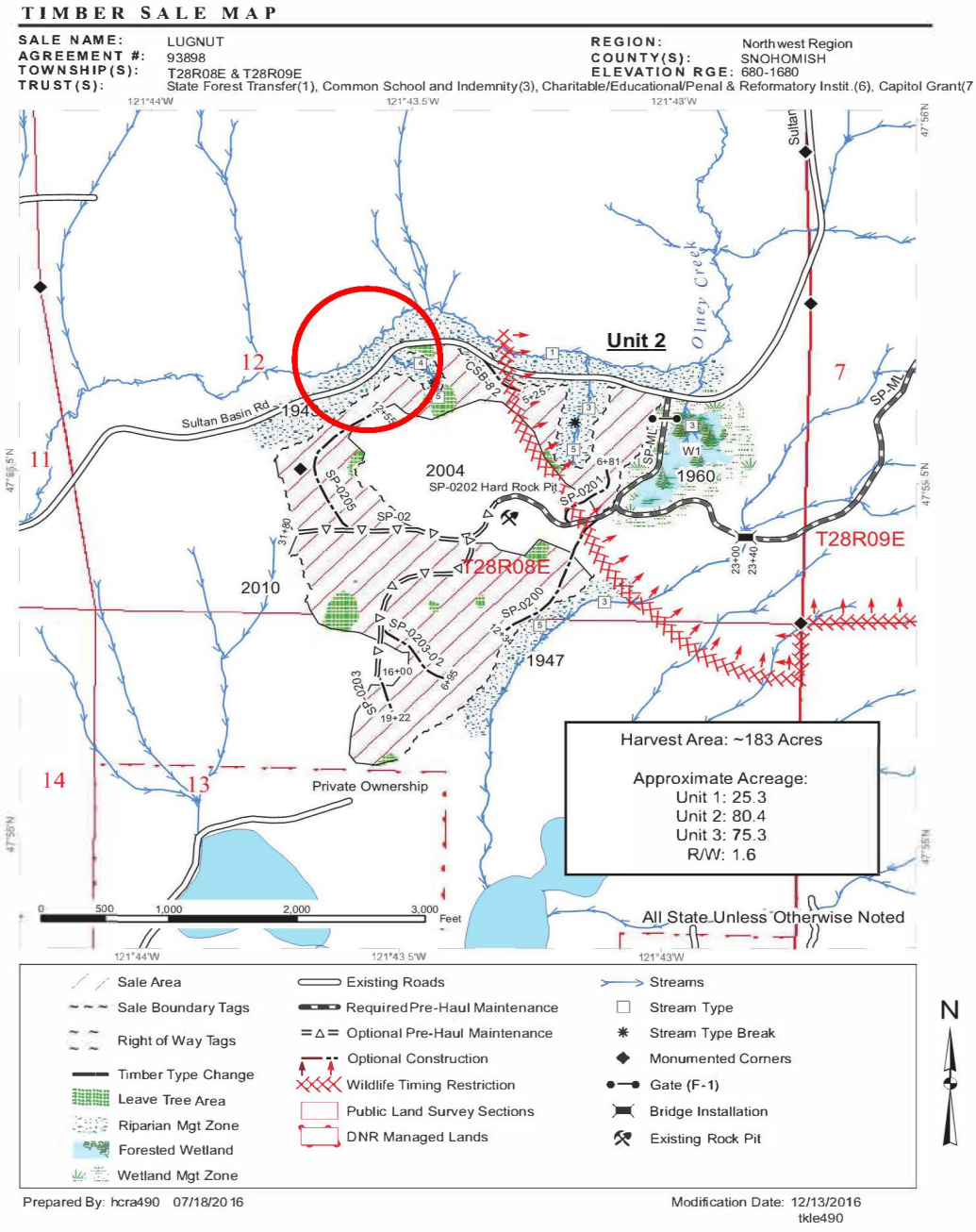
Additionally, the Department manages approximately 2.4 million acres of forestland. *See* Washington—DNR, *Forest and Trust Lands*, *available at* https://www.dnr.wa.gov/managed-lands/forest-and-trust-lands (last visited Nov. 26, 2023). The Department's forestry operations on that land are subject to the FPA and forest practices rules. *See Chuckanut Conservancy v. Dep't of Nat. Res*., 156 Wn. App. 274, 290, 232 P.3d 1154 (2010).

/ / /

B. The Lugnut Timber Sale was Finalized in 2017 Without Objection

In February 2017, the Department held the "Lugnut" timber sale for the right to harvest timber in state-owned lands in Snohomish County. *See* CP 1384, ¶ 4; CP 1504, ¶¶ 3.1–3.2. Sierra Pacific Industries (Sierra) purchased the rights, and contracted with Precision Forestry (Precision) to harvest the timber. CP 1384, ¶ 4; CP 1504, ¶ 3.2.

The Lugnut Sale included an area of Sultan Basin Road, which runs through an administratively designated RMZ located between Olney Creek and the timber harvest boundary. CP 1381. The map below shows the Lugnut Sale. CP 1381. The map's key defines relevant features, including Sultan Basin Road, the RMZ (blue dots), and the harvestable region edge (black tildes). The subject incident where a tree fell onto Mr. Chrisman's vehicle occurred on Sultan Basin Road at approximately the red circle location (added to the original picture for illustrative purposes).


TIMBER SALE MAP
SALE NAME: LUGNUT
AGREEMENT #: 93898
TOWNSHIP(S): T28R08E & T28R09E
TRUST(S): State Forest Transfer(1), Common School and Indemnity(3), Charitable/Educational/Penal & Reformatory Instit.(6), Capitol Grant(7
REGION: Northwest Region
COUNTY(S): SNOHOMISH
ELEVATION RGE: 680-1680
Unit 2
Olney Creek
Sultan
Sultan Basin Rd
T28R08E
T28R09E
2004
SP-0202 Hard Rock Pit
1960
1947
2010
1945
Private Ownership
Harvest Area: ~183 Acres
Approximate Acreage:
Unit 1: 25.3
Unit 2: 80.4
Unit 3: 75.3
R/W: 1.6
All State Unless Otherwise Noted
Sale Area
Sale Boundary Tags
Right of Way Tags
Timber Type Change
Leave Tree Area
Riparian Mgt Zone
Forested Wetland
Wetland Mgt Zone
Existing Roads
Required Pre-Haul Maintenance
Optional Pre-Haul Maintenance
Optional Construction
Wildlife Timing Restriction
Public Land Survey Sections
DNR Managed Lands
Streams
Stream Type
Stream Type Break
Monumented Corners
Gate (F-1)
Bridge Installation
Existing Rock Pit
N
Prepared By: hcra490 07/18/2016
Modification Date: 12/13/2016
tkle490

CP 1381.

The Department designates RMZs through administrative processes to protect environmental interests. *See* WAC 222-30-010. A regulation requires landowners to leave trees standing within an RMZ. WAC 222-30-021. This harvesting restriction serves the legislative purpose of benefitting endangered salmonids and protecting public resources. *See* RCW 76.09.330; RCW 76.09.010(1); (2)(b) and (g); RCW 77.85.180(1)(a)(i); (1)(b); (2), and (3).

In October 2016, a Forest Practices Application for the Lugnut Sale (Lugnut Application) was submitted to the Department for review. *See* CP 219, ¶ 4. The Department approved the Lugnut Application, and as part of that process designated an area as the RMZ. *See* CP 219, ¶ 7.

On November 23, 2016, the Department issued its final decision approving the Lugnut Application (Lugnut Permit). The Department's decision was not appealed. *See* CP 220, ¶¶ 11–13; RCW 76.09.205. Thus, the Department's RMZ designation became final and subject to all FPA enforcement provisions. *See*

CP 221, ¶ 14; RCW 76.09.050(4); RCW 76.09.110; RCW 76.09.170.

C. An RMZ Tree Fell on Mr. Chrisman's Vehicle

On March 13, 2018, Plaintiff Barry Chrisman drove a Snohomish County Public Utility District (District) vehicle along Sultan Basin Road between Olney Creek and the RMZ boundary. CP 1374, ¶ 3. Precision's harvesting operations in that area had concluded, and a wind-blown tree fell and struck Mr. Chrisman's vehicle on Sultan Basin Road in the middle of the RMZ. CP 1374, ¶ 3; *see also* CP 1384, ¶¶ 7–8. Because Precision had removed all non-RMZ trees in the area, only RMZ trees were left standing when the collision occurred. *See* CP 638; 977, ¶ 22; 1381; 1384 ¶¶ 8–9.

D. Summary Judgment at the Superior Court

Mr. Chrisman and his spouse sued the State, Sierra, and Precision to recover for personal injuries and loss of consortium. *See* CP 1506, ¶¶ 5.2–5.3; CP 1474, ¶ 2. The District also sued the State, Sierra, and Precision, seeking to recover its expenses and

losses related to Mr. Chrisman's injuries, as well as the self–insured workers' compensation benefits received by Mr. Chrisman. *See* CP 1447–55.

The superior court consolidated both actions. CP 1473–77. Thereafter, Defendants moved for summary judgment. The Department argued that its liability was precluded by RCW 76.09.330's broad immunity for any damages caused by blown down RMZ trees. CP 1391–94. Plaintiffs responded, arguing that the Department's RMZ was larger than required by rule. CP 409–36; 918–70. The Department replied that, under the APA and FPA, Plaintiffs could not collaterally challenge the permit's RMZ width in a tort lawsuit. CP 247–57. The superior court granted summary judgment to all Defendants. CP 115–18; 1112–34; 1335–69; 1388–98.

E. The Court of Appeals' Opinion

The Chrismans and the District appealed. CP 5–8, 1921. On September 5, 2023, the Court of Appeals issued an opinion reversing summary judgment as to all Defendants.

Pub. Util. Dist. No. 1 of Snohomish County, 534 P.3d at 1221 (the opinion).

The opinion held that, "under the plain language of RCW 76.09.330, only [the] act of leaving a tree is immunized." *Id.* at 1218. The opinion determined that the acts Plaintiffs complained of—that the State had permitted Sierra and Precision to log the trees in an adjoining area and had designated an RMZ without a wind buffer—were "distinct from the decision to leave the RMZ trees standing, and, under the plain language of the statute, are not immunized." *Id.* at 1218–19.

Additionally, the opinion held that, "[u]nder RCW 34.05.510(1), the [Plaintiffs] may challenge the designation of the RMZ through this suit, rather than through an administrative proceeding." *Id.* at 1219. That statute provides an exception to APA judicial review where "the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." RCW 34.05.510(1). The opinion concluded that

exception applied because (1) Plaintiffs brought a claim for money damages; (2) the parties cited no precedent providing the Department authority to determine the claim for damages; and (3) requiring Plaintiffs to challenge the RMZ through the administrative process, two years before the incident, would create absurd results. *Id.* at 1219.

Further, the opinion concluded that, "[u]nder the plain language of RCW 76.09.330, immunity attaches only where a forestland owner must leave a tree standing in order to comply with the relevant regulations." *Id.* at 1220. Thus, the opinion stated "immunity only attaches if the RMZ is properly drawn." *Id.* Because the opinion agreed with Plaintiffs that there was a question of material fact as to whether the fallen tree was properly located in an RMZ under FPA regulations and the State's Habitat Conservation Plan, it held that summary judgment was improper. *Id.* at 1220–21.

Thereafter, the Court of Appeals denied the Department's motion for reconsideration. *See* Order (App. B).

V. REASONS REVIEW SHOULD BE GRANTED

A. The Opinion Nullified the FPA Framework that Allows Trees to Fall Naturally for Public Benefit

The opinion misinterprets RCW 76.09.330 by erroneously denying immunity for damages resulting from a Department-designated leave tree and by limiting immunity to cover only the specific act of leaving a tree. The opinion encourages landowners to cut every last tree possible, replacing the legislative policy encouraging landowners to leave trees for environmental benefit by providing liability protection for only required trees. This conflicts with the statute's express language, which indicates that leave trees "*may be* required." RCW 76.09.330 (emphasis added).

This holding also creates a conflict with *Ruiz*, which confirmed the broad scope of RCW 76.09.330's immunity on facts almost identical to this case. Additionally, this holding contradicts the legislative recognition that leave trees protect Washington's natural resources for the public benefit—an FPA

purpose. Accordingly, this Court should accept review. *See* RAP 13.4(b)(2), (4).

1. The FPA confirms RCW 76.09.330 was intended to provide robust immunity for injuries caused by riparian and upland trees left standing

The FPA confirms the Legislature's focus on the importance of protecting forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty. RCW 76.09.010(1). In RCW 76.09.330, the Legislature recognized the benefits of leaving riparian and upland trees unharvested, i.e. leave trees, to protect the environment:

> The legislature hereby finds and declares that riparian ecosystems on forestlands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that *leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits* including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that *leaving upland areas unharvested for wildlife and leaving snags and green trees for future snag recruitment*

> *provides benefits for wildlife*. Forestland owners *may be* required to leave trees standing in riparian and upland areas to benefit public resources. *It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species.*

RCW 76.09.330 (emphases added). Thus, as the Legislature found, leaving riparian and upland trees unharvested so that they may fall naturally promotes healthy riparian and upland ecosystems that benefit fish, wildlife, and water quality.

The Legislature expressly recognized that leave trees may blow down, and in exchange for that environmental benefit provided for broad immunity from liability for any resulting damage or injury:

> Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, *the landowner, the Department, and the state of Washington shall not be held liable for any injury or damages resulting from these actions*, including but not limited to wildfire, erosion, flooding, personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character *resulting from the trees being left*.

Id. (emphases added). This immunity applies to all leave trees left standing within an RMZ, plus all other upland trees left standing to benefit wildlife, fish, and water quality. *See* WAC 222-30-20(12)(b) (discussing wildlife reserve trees).

The 1999 change from former RCW 76.09.330 (1992) to current RCW 76.09.330 confirms the Legislature's intent to grant an extremely broad immunity for injuries resulting from falling leave trees. The amendment strengthened the policy justifications for leaving trees and added language broadening immunity to include all forms of damages caused by any leave tree. *Compare* former RCW 76.09.330 (1992) *with* RCW 76.09.330; *see also Ruiz*, 154 Wn. App. at 460. This coincided with major "Forests and Fish Report" amendments to the FPA, geared towards enhanced riparian protections for salmonids. *See* RCW 77.85.180.

2. *Ruiz* confirms the broad scope of RCW 76.09.330's immunity on facts almost identical to this case

Ruiz involved facts and legal issues analogous to the present case. In *Ruiz*, a plaintiff was injured when a tree broken off by high winds struck his vehicle on a state highway. 154 Wn. App. at 456. The tree had been left standing within an RMZ abutting a recently logged area. *Id.* at 457. After the incident, the trees at the site within 120 feet of the highway, including those within the RMZ, were cut for public safety. *Id.*

The plaintiff argued that RCW 76.09.330 immunity should not apply, alleging that both the Department and the harvester knowingly created a dangerous condition that proximately caused his injuries. *Id.*

The Court of Appeals upheld summary judgment because of RCW 76.09.330's broad immunity. *Id.* at 461–62. The *Ruiz* Court examined RCW 76.09.330's legislative development, including the 1999 amendments. *Id.* at 459–60. In doing so, the *Ruiz* Court recognized the immunity provision's "very broad sweep," but concluded the Legislature intended such a result when weighing competing public policies, *i.e.*, the public benefit

of leaving areas unharvested versus the public safety risk of leaving exposed trees along a road at an RMZ edge. *Id.* at 458–61. Having acknowledged that the extent to which the State "waives its sovereign immunity or retreats from that waiver" was "completely within the ken of the legislature," the *Ruiz* Court concluded: "It is clear that the State has asserted its immunity and extended that immunity to those required to obey its dictates in the area of forest practices." *Id.* at 459–60.

3. The opinion erroneously denied the Department immunity by narrowly interpreting RCW 76.09.330 to cover only the specific act of leaving a tree

RCW 76.09.330 twice expressly recognizes that RMZ trees may blow down and injure others. There is no exception from immunity simply because RMZ trees fall down after other trees near them were cut.

In reasoning that it is the cutting of other trees, rather than the leaving of the tree that fell, that can cause liability, the opinion ignores this plain statutory language, creates a conflict

with *Ruiz*, and eviscerates the statute. *Ruiz* explicitly confirmed that cutting down surrounding trees, without leaving a wind buffer along the RMZ's edge, does not vitiate immunity:

> Ruiz agrees that the immunity provision is clear, but argues that [defendants] are prohibited from asserting that immunity because they *created a dangerous condition by leaving exposed trees at the edge of a riparian zone*. He argues in essence that because the RMZ was near a road, it was foreseeable that trees would fall resulting in damage and, thus, [defendants] should have considered this and waived any environmental regulations. While this argument has some attraction, particularly on the facts here that underscore a collision between the important policy of public safety and that of environmental protection, these public policy choices, however, are for the legislature not this court.

Ruiz, 154 Wn. App. at 459 (emphasis added).

Thus, *Ruiz* explicitly held that where a harvester cut all the surrounding trees and left the RMZ trees standing without protection, thereby causing them to blow over onto a plaintiff, immunity nonetheless protected the Department and warranted summary judgment. That result was compelled by the statute's plain language immunizing the Department from liability for

"injury or damages of any kind or character resulting from the trees being left." RCW 76.09.330.

Many activities that occur in the vicinity of leave trees could affect leave trees' stability. These activities range from acts affecting the soil, water flow, and wind travel. If immunity applies only in the absence of any act that might have contributed to the falling of the tree, the resulting immunity would be overly narrow, contrary to RCW 76.09.330's grant of broad immunity from liability "for any injury or damages . . . of any kind or character resulting from the trees being left."

The opinion erroneously held that the specific act of leaving a tree was entitled to immunity, but only if no other acts—like cutting trees outside the RMZ—are involved. This holding renders the immunity statute practically meaningless. *See Freedom Found. v. Dep't of Soc. & Health Servs.*, 197 Wn.2d 116, 127–28, 480 P.3d 1119 (2021) (appellate courts interpret statutes to avoid rendering any part meaningless). Here, Mr. Chrisman was not injured by the trees that were cut, removed

from the site, and manufactured into wood products. Rather, he was injured by a blown-down leave tree. The opinion ignores this reality and is contrary to RCW 76.09.330's plain meaning. Accordingly, this Court should accept review. *See* RAP 13.4(b)(2), (4).

4. The opinion erroneously denied the Department immunity for damages resulting from a Department-designated leave tree

RCW 76.09.330's plain language confirms that *all* trees left standing under an approved forest practices permit—as with the Lugnut Permit—are within the statutory immunity's scope. As noted in the statute, "leaving riparian areas unharvested" and "leaving upland areas unharvested" provides a multitude of environmental benefits including habitat for endangered species and enhanced water quality protection. To encourage leaving riparian and upland areas unharvested, the statute immunizes landowners, the Department, and the State from "injury or damages of any kind or character resulting from the trees being

left."[1] Accordingly, the statute entitles the Department to immunity from liability for all trees left standing within the Lugnut Permit RMZ, which were required leave trees.

The statute encourages all landowners to provide wildlife and aquatic habitat and other public benefits that forest lands confer by leaving areas unharvested when the FPA authorizes timber harvesting. Nothing in RCW 76.09.330 limits the immunity to trees that the rules expressly require to be left. The statute says only that forestland owners "*may be* required to leave trees standing in riparian and upland areas to benefit public resources." If a landowner elects to leave extra trees unharvested under the terms of an approved forest practices permit, the landowner is still entitled to immunity from liability "resulting

---

[1] Here, the different parts of the Department acted both as a landowner/applicant subject to the FPA, RMZ rules, and permit terms, and the regulatory authority that approved the Lugnut Permit RMZ. RCW 76.09.330's immunity applies to both roles.

from the trees being left," regardless of whether the landowner was required to do so.

Additionally, even if the court finds that a leave tree must be required in an approved application, RCW 76.09.330's immunity would still apply here. It is undisputed that the subject tree was within an RMZ designated in the Lugnut Permit. The forest practices rules required trees to be left standing within an RMZ. WAC 222-30-021. The subject tree was thus "required."

Here, the opinion erroneously refused to apply RCW 76.09.330 immunity to trees left unharvested under the Lugnut Permit. To the extent the opinion or Plaintiffs relied on the Habitat Conservation Plan to establish a genuine issue of material fact as to the RMZ's proper designation in the Lugnut Permit so as to preclude summary judgment, this reliance is misplaced. First, even if the Lugnut Permit erroneously designated leave trees, that outcome would not abrogate RCW 76.09.330's immunity. Second, because the Plan creates no rights in others, it cannot be used to support Plaintiffs' claims.

See Implementation Agreement for the Washington State Department of Natural Resources, *Habitat Conservation Plan* at B.17, ¶ 30.6, *available at* https://www.dnr.wa.gov/publications/lm_hcp_app_b.pdf.[2]

When the opinion states that "[t]he plain language of the statute is unambiguous and protects only 'these actions:' leaving a riparian tree *as required*," it overlooks the statute's actual words, "*may be* required." *Compare Pub. Util. Dist. No. 1 of Snohomish County*, 534 P.3d at 1218 (emphasis added) *with* RCW 76.09.330 (emphasis added). The focus in interpreting the statute should be on "these actions," *i.e.*, leaving upland or riparian trees after harvest. By changing the immunity statute's focus, the opinion fails to interpret the statute in a manner that furthers the general legislative goals of the comprehensive FPA

[2] The Court can take judicial notice of this publicly available implementation agreement as a legislative fact. *See Wyman v. Wallace*, 94 Wn.2d 99, 102–03, 615 P.2d 452 (1980).

regulatory scheme, as well as the specific legislative goals of RCW 76.09.330.

B. The Opinion Undermines Administrative Finality by Allowing Collateral Attacks on Final Agency Decisions through Tort Lawsuits

A second reason that the opinion warrants review is that it undermines administrative finality for all State agencies by allowing Plaintiffs to challenge any state administrative decision, even years after it was made, through a tort suit for damages. A Department RMZ designation in an approved forest practices application may be challenged *only* through a timely appeal to the Pollution Control Hearings Board, and further to state courts, pursuant to the APA. *See* RCW 76.09.205 ("A person aggrieved by the approval or disapproval of an application to conduct a forest practice . . . may seek review from the appeals board by filing a request for the same within thirty days from the date of receipt of the decision."); RCW 43.21B.110(1)(i); RCW 43.21B.160; RCW 43.21B.180; RCW 34.05.510

("This chapter establishes the exclusive means of judicial review of agency action, except [in three limited circumstances.]").

With three narrow exceptions, a superior court cannot exercise jurisdiction to adjudicate an agency action outside of a timely APA appeal. *See Skagit Survs. & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (a superior court does not obtain jurisdiction over an appeal from an agency decision unless the appealing party timely petitions for review in superior court). Thus, final permit terms established under the Department's FPA authority cannot be challenged later in tort. *See Duffy v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 673, 679–80, 585 P.2d 470 (1978) (an administrative determination "is subject to judicial review under RCW 34.04.130 upon only the traditional grounds of judicial review of administrative action; the courts cannot relitigate the issue and substitute their judgment for that of the administrative agency.").

The APA's strict remedy procedures support the finality of land use decisions, a strong public policy affirmed in the FPA.

See RCW 76.09.110 ("Unless declared invalid on appeal, a final order of the department or a final decision of the appeals board shall be binding on all parties."); *see also Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 55, 26 P.3d 241 (2001) (noting "the strong public policy favoring finality in land use decisions."). Even where the Department's final permit is based on a wrongful assertion of jurisdiction, it cannot be challenged in a subsequent proceeding. *See Simon's Way Dev., Inc. v. Clark County*, 16 Wn. App. 2d 1003, 2021 WL 37556, at *5 (2021) (unpublished) (approved forest practices application was binding despite error in approving an access road over agricultural field where the Department lacked regulatory authority).[3]

As previously noted, the Lugnut Permit was appealable to the Pollution Control Hearings Board for 30 days after its

[3] The Department cites this unpublished opinion for its persuasive value only, per GR 14.1.

issuance in 2016. RCW 76.09.205. No challenge was made. Thus, pursuant to RCW 76.09.110, the permit's terms became final, including the subject RMZ boundary.

The opinion erroneously determined that Plaintiffs are now able to collaterally challenge that final agency action under RCW 34.05.510(1)'s exception, which states:

> The provisions of this chapter for judicial review do not apply to litigation in which the *sole issue* is a claim for money damages or compensation *and* the agency whose action is at issue does not have statutory authority to determine the claim.

RCW 34.05.510(1) (emphases added).

Plaintiffs' collateral challenge fails the exception's first prong because this suit does not involve *solely* a request for monetary damages. Rather, Plaintiffs' claims constitute a challenge to the Department's RMZ designation in the Lugnut Permit. *See Blue Spirits Distilling, LLC v. Liquor & Cannabis Bd.*, 15 Wn. App. 2d 779, 787, 478 P.3d 153 (2020) (identifying two prong test to RCW 34.05.510(1) exception); *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204–05, 95 P.3d 337 (2004) (suit

failed the first prong of RCW 34.05.510(1) because it included a request for injunctive relief). This remains true despite Plaintiffs couching their challenge in a tort suit for damages. Additionally, Plaintiffs' collateral challenge fails the exception's second prong because the Department has full statutory authority to determine the RMZ through approving the Lugnut Permit. *See* RCW 76.09.140(1), .040(1)(c); WAC 222-46-015; *see also* WAC 222-16-010; *Snohomish County*, 69 Wn. App. at 665.

The opinion wrongly interprets RCW 34.05.510(1) to allow plaintiffs to challenge final administrative agencies in tort suits for damages. Accordingly, this Court should accept review to correct this additional error. *See* RAP 13.4(b)(4).

C. The Court Should Accept Review Because the Petition Raises Two Issues of Substantial Public Interest

First, the opinion threatens the substantial public interest of environmental protection by abrogating RCW 76.09.330's broad immunity for all damages caused by all Department-designated leave trees in favor of an erroneously narrow

immunity protecting only the specific act of leaving a tree that is "required" to be left.

The FPA covers *12 million acres* of forestland in Washington, and *thousands* of landowners. *See* Part IV.A, *supra*. Rather than incentivizing these landowners to leave trees standing for environmental benefit as the legislature intended, the opinion incentivizes landowners to harvest as many trees as possible to avoid liability for naturally falling trees.

And yet, leaving these trees to fall naturally is critical to protecting upland and riparian environments. *See* RCW 76.09.330. The only way to secure these public environmental benefits is to hold that immunity applies to damages caused by any naturally falling leave tree, regardless of what actions or processes caused those damages to occur.

Second, the opinion threatens the substantial public interest of administrative finality by allowing Plaintiffs to challenge final agency regulations in tort suits for damages. This eventuality undermines the public's ability to act in reliance on a

regulatory decision without fear that a tort suit will retroactively subject their actions to liability.

The threat to finality includes but extends far beyond the Department and land use issues under the FPA. Based on the opinion's reasoning, *any* plaintiff could use a tort suit to undermine the finality of *any* agency action or regulation on *any* issue, irrespective of APA processes. A plaintiff could do this even many years after the regulations' finalization, when witnesses and evidence concerning permitting decisions may be unavailable. The only way to protect administrative finality is to hold that the APA precludes Plaintiffs from challenging a finalized regulation in a tort suit for damages.

Accordingly, to protect the environment and the ability of Washington State agencies to govern, this Court should grant this petition.

VI. CONCLUSION

The opinion ignores express statutory language and the legislative intent of the FPA generally, and RCW 76.09.330

specifically. The opinion harms the environment by providing landowners a disincentive to leaving trees unharvested for environmental benefit, as well as harming the interests of all forestland owners across 12 million acres subject to the FPA in this state.

Further, the opinion disregards RCW 76.09.330's application to *all* Department-designated leave trees and *all* damages resulting from Department-designated leave trees. It also misapplies the finality doctrine by improperly expanding RCW 34.05.510(1)'s limited exception to the APA's exclusive judicial review process for agency action.

Accordingly, this Court should accept review under RAP 13.4(b)(2) and/or (4), reverse the opinion, and affirm the trial court.

///

///

///

///

This document contains 4,871 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of November 2023.

ROBERT W. FERGUSON
Attorney General

/s/ Thomas E. Hudson
THOMAS E. HUDSON
WSBA #46855
Assistant Attorney General
Attorneys for State of Washington
P.O. Box 40126
Olympia, WA 98504-0126
(360) 586-6300
OID #91023

CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES' PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

Attorneys for Appellant Public Utility District No. 1 of Snohomish County:
Kit W. Roth
Christopher Huck
Goldfarb & Huck Roth Riojas, PLLC
925 Fourth Ave, Suite 3950
Seattle, WA 98104

roth@goldfarb-huck.com
huck@goldfarb-huck.com
ritchie@goldfarb-huck.com
trinh@goldfarb-huck.com

Attorney for Appellants Barry and Kerry Chrisman:
Raymond J. Dearie
Drew V. Lombardi
Dearie Law Group
2025 First Avenue, Suite 1140
Seattle, WA 98121

rdearie@dearielawgrup.com
dlombardi@dearielawgroup.com
jzvers@dearielawgroup.com

Attorneys for Respondent Sierra Pacific Industries:
Daniel Kirkpatrick
Zachary Parker
Wakefield & Kirkpatrick, PLLC
17544 Midvale Ave N, Suite 307
Shoreline, WA 98133

dkirkpatrick@wakefieldkirkpatrick.com
zparker@wakefieldkirkpatrick.com
ebour@wakefieldkirkpatrick.com

Attorneys for Respondent Precision Forestry, Inc.:
Jeffrey P. Downer
Ashley M. Langley
Lee Smart, PS, Inc.
1800 One Convention Place
701 Pike St
Seattle, WA 98101

jpd@leesmart.com; dmy@leesmart.com; kxc@leesmart.com
jne@leesmart.com; pac@leesmart.com; smt@leesmart.com

Sydney J. Martinez
Hickman Menashe P.S.
4211 Alderwood Mall Blvd, Suite 204
Lynnwood, WA 98036

sydney@hickmanmenashe.com

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

DATED this 27th day of November 2023, at Olympia, Washington.

s/ Thomas Hudson
THOMAS E. HUDSON
Assistant Attorney General

APPENDIX

APPENDIX
TABLE OF CONTENTS

FILED
9/5/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a Washington Municipal corporation; BARRY CHRISMAN and KERRY CHRISMAN, individually and as husband and wife, Appellants, v. STATE OF WASHINGTON, SIERRA PACIFIC INDUSTRIES DBA SIERRA PACIFIC INDUSTRIES, INC., a California corporation, PRECISION FORESTRY, INC., a Washington Corporation, JOHN DOE NOS. 1-10, and ABC CORPORATIONS 1-10, Respondents.	No. 84166-1-I (consolidated with No. 84167-0-I) DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — Barry Chrisman and his spouse, along with the Snohomish County Public Utility District No. 1, appeal from summary judgment dismissal of their respective claims against the State and other involved entities following a tragic tree-fall accident which left Chrisman with devastating injuries. Because there is a genuine issue of material fact, and because the respondents are not entitled to statutory immunity as a matter of law, dismissal was improper. We reverse and remand for further proceedings consistent with this opinion.

FACTS

In 2017, the State of Washington, through the Department of Natural Resources (DNR), auctioned timber harvesting rights for an area named "Lugnut" in Snohomish County. Olney Creek runs through this area; the creek is classified as a Type S Stream requiring a riparian management zone (RMZ) under WAC 222-30-021. An RMZ is an area near a stream, set aside by the DNR, where timber harvesting is limited or excluded so the trees may fall naturally for the benefit of the wetland environment. WAC 222-30-010. The DNR sectioned Lugnut into three units; Sierra Pacific Industries (SPI) purchased the timber rights to Unit 2. The RMZ surrounding Olney Creek, as designated by the DNR, is located outside of the sale area.

SPI contracted with Precision Forestry (Precision) to fell and process the timber in Unit 2, pursuant to the constraints set out in the timber sale agreement between the State and SPI. Precision began harvesting activities in mid-February 2018 and completed all cutting "up to the timber sale boundary tags" in the beginning of March 2018. On March 13, 2018, around 8:30 a.m., Barry Chrisman, an employee of the Snohomish County Public Utility District No. 1 (PUD), was driving a PUD vehicle on Sultan Basin Road in this area. The wind speeds were "extremely high" at the time and had been throughout the morning. An uprooted tree fell, striking the PUD car, and caused catastrophic injuries to Chrisman. The PUD filed a complaint against the State, SPI, and Precision (collectively, the respondents), seeking compensation for property damage and for payments it made for Chrisman's injuries through workers' compensation.

Chrisman and his spouse also sued the respondents, seeking recovery for personal injuries and loss of consortium. The Snohomish County Superior Court consolidated the two cases.

The respondents all separately moved for summary judgment dismissal, arguing they were each immune from all claims under the Forest Practices Act of 1974 (FPA).[1] Precision additionally argued dismissal of all claims against it was warranted because there was no issue of material fact as to the elements of negligence or gross negligence, strict liability was inapplicable, and the nuisance claims of both appellants were duplicative of their claims for negligence. The parties offered a number of declarations in support of their respective positions on summary judgment. The State submitted a declaration from John Moon, a forester with the DNR who assisted in planning the Lugnut sale. The PUD responded with a declaration from Galen Wright, an expert in forestry and vegetation management, including riparian vegetation. Chrisman filed a declaration from Michael Jackson, a forester and expert on forestry practices. The court granted the respondents' motions for summary judgment and dismissed all of the claims based on statutory immunity. Chrisman and the PUD (collectively, the appellants) moved for reconsideration, which the court denied. Chrisman and the PUD timely appealed.

ANALYSIS

This court reviews a trial court's decision on summary judgment de novo, engaging in the same inquiry as the trial court. Davies v. MultiCare Health Sys.,

[1] LAWS OF 1974, 3rd Ex. Sess., c 137, § 1.

199 Wn.2d 608, 616, 510 P.3d 346 (2022). Viewing the evidence in the light most favorable to the nonmoving party, summary judgment is proper "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Dobson v. Archibald, 1 Wn.3d 102, 107, 523 P.3d 1190 (2023). The moving party bears the initial burden to show there is no issue of material fact; if it successfully does so, the burden shifts to the nonmoving party to demonstrate a material question of fact. Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A genuine issue of material fact exists when reasonable minds could reach different conclusions regarding evidence upon which the outcome of the litigation depends. Haley v. Amazon.com Servs., LLC, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022). "On summary judgment, the trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact." Id.

This court interprets the meaning of a statute de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our aim is to carry out the intention of the legislature, and "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Id. at 9-10. We first look to the text of the statute and context of the provision. Dobson, 1 Wn.3d at 107. Where a term is undefined by statute, we may rely on a dictionary definition to discern the plain meaning of the term. Nissen v. Pierce County, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). If there is more than one reasonable interpretation, we turn to the canons of statutory

construction, legislative history, and other case law to determine the legislative intent. Cockle v. Dep't of Lab. & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

"Statutes in derogation of the common law are construed strictly to apply only to those who fall within the terms of the statute." In re Gen. Receivership of EM Prop. Holdings, LLC, 199 Wn.2d 725, 734, 511 P.3d 1258 (2022).[2] "Strict construction is simply a requirement that, where two interpretations are equally consistent with legislative intent, the court opts for the narrower interpretation of the statute." Est. of Bunch v. McGraw Residential Ctr., 174 Wn.2d 425, 432-33, 275 P.3d 1119 (2012).

I. Immunity Under Forest Practices Act

The appellants contend the trial court erred by applying an overbroad interpretation of RCW 76.09.330 in holding that the immunity afforded by the FPA applies to any injuries caused by trees that are left, regardless of the allegedly wrongful act that constitutes a breach. RCW 76.09.330 provides:

> The legislature hereby finds and declares that riparian ecosystems on forestlands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that

[2] SPI argues that RCW 76.09.330 is not in derogation of the common law and, even if it is, the court is not required to construe the statute narrowly because the meaning is plain on its face. The relevant statute provides for immunity "[n]otwithstanding any statutory provision, rule, or common law doctrine to the contrary." RCW 76.09.330.

"Statutory grants of immunity in derogation of the common law are strictly construed." Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 600, 257 P.3d 532 (2011). Accordingly, the statute is construed strictly to the extent the language is not plain on its face.

> leaving upland areas unharvested for wildlife and leaving snags and green trees for future snag recruitment provides benefits for wildlife. Forestland owners may be required to leave trees standing in riparian and upland areas to benefit public resources. It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species. Further, it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons. Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, the landowner, the department, and the state of Washington shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion, flooding, personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character resulting from the trees being left.

A. Forestland Owner

Under the plain language of the statute, only the State of Washington, the DNR, and the relevant landowner are entitled to immunity under the FPA. The statute articulates in part that "[f]orestland owners may be required to leave trees standing in riparian and upland areas" and that "the landowner . . . shall not be held liable for any injury or damages resulting from these actions." RCW 76.09.330. While the statute operates to immunize landowners who leave riparian trees, as required, for the benefit of the ecological system, that immunity is limited to the State, the DNR, and the forestland owner. Id. "Forestland owner" is defined by statute as "any person in actual control of forestland, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner." RCW 76.09.020(16). Precision concedes it did not have the right to harvest in the RMZ, but argues it had the right to dispose of the timber and slash from Unit 2, giving it partial control and fulfilling the statutory

definition of forestland owner. SPI asserts that it had the right to sell or dispose of the timber in Unit 2 under the terms of the Bill of Sale with the State and, as such, was a forestland owner entitled to statutory immunity.

Under the Bill of Sale, SPI (and Precision, by extension through the Logging Agreement) had the "right to harvest and remove forest products from the timber sale area." The Bill of Sale defined the "Contract Area" as:

> All timber bounded by white timber sale boundary tags, adjacent young stands, the Sultan Basin Road and the SP-ML and SP-02 roads except cedar salvage (cedar snags, preexisting dead and down cedar trees and cedar logs), trees marked with blue paint on the bole and root collar, and forest products tagged out by yellow leave tree area tags in Unit #2.

The Timber Sale Map reveals sale boundary tags along the RMZ near Sultan Basin Road and establishes that the RMZ is not part of the sale area. In its brief, SPI admits that "[t]he only trees adjacent to Sultan Basin Road on March 13, 2018, near the accident to the south, were standing trees within the RMZ and outside the timber sale area." (Emphasis added.) The express terms of the Timber Sale Agreement exclude SPI and Precision from the RMZ. Consequently, they have no control over that zone and, thus, are not covered by the FPA. Based on the contractual language, SPI and Precision had no right to harvest or remove forest products from the RMZ and, therefore, are not forestland owners of that area under the statutory definition. Accordingly, they are not entitled to statutory immunity under the FPA, as to these claims, based on the plain language of the contract and the statute.

Precision alternatively contends immunity applies regardless of whether it had the right to harvest trees in the RMZ under Ruiz v. State. 154 Wn. App. 454,

225 P.3d 458 (2010). However, the appellant in Ruiz argued that the respondent was not a landowner within the meaning of the FPA because it was merely a management company for the landowner, not because it did not have possession or control of the area where the tree was left. Br. of Appellant at 28, Ruiz v. State, 154 Wn. App. 454, 225 P.3d 458 (2010), No. 63783-6-I.[3] This is distinct from the appellants' argument here, where they contend Precision and SPI are not forestland owners because they have no control or possession of the RMZ. As such, Ruiz is distinguishable and does not control; we instead look to the plain language of the statute.

Precision and SPI are not forestland owners required to leave trees standing in riparian areas—they were not involved in the decision regarding which trees to leave and which to harvest, and they had no control or possession outside of the timber sale area under the terms of the contract, independent of the DNR's reasoning for excluding the trees from the timber sale. Because Precision and SPI do not meet the statutory definition of "forestland owner," neither is entitled to statutory immunity as a matter of law. The trial court erred in dismissing the appellants' claims against those respondents under the Forest Practices Act.

B. Immunized Acts

In the original 1987 amendment, RCW 76.09.330 immunized landowners from "damages resulting from the leave trees falling from natural causes in riparian areas." LAWS OF 1987, ch. 97, § 7. In 1992, the legislature removed this

[3] https://www.courts.wa.gov/content/Briefs/A01/637835%20appellants.pdf.

language and amended the statute to read, "It is recognized that these trees may blow down or fall into streams . . . The landowner shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion, flooding, and other damages resulting from the trees being left." LAWS OF 1992, ch. 52, § 5. (emphasis added to amended portion). In 1999, the legislature again amended the statute, adding: "it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons. Notwithstanding any statutory provision, rule, or common law doctrine to the contrary," the applicable parties are immune from liability for injury or damages. LAWS OF 1999, 1st Spec. Sess., ch. 4, § 602. The 1999 amendments also added to the injuries listed, providing immunity for "personal injury, property damage, damage to public improvement, and other injury or damages of any kind of character" and expressly added the DNR and State to the list of parties or entities not liable for damages arising from these actions. Id.

These amendments reflect the clear aim of the legislature to protect entities who are required to leave riparian trees standing to protect valuable ecological systems, despite the risk of damage. While these legislative amendments expanded the provision of immunity, the legislature expanded only the acknowledged harms and protected parties, not the protected acts. In each iteration of the statute, only the act of leaving a tree, and the damage resulting therefrom, is shielded. The plain language of the statute is unambiguous and protects only "these actions:" leaving a riparian tree as required.

Under this plain language, SPI and Precision are not entitled to immunity as a matter of law. As Precision admits, neither it nor SPI had any authority to determine the RMZ or decide what trees would be cut and what trees would be left standing, regardless of the DNR's reasoning for such designation. Indeed, the area was already marked and the parameters of the RMZ set at the time the Bill of Sale was signed. Because these entities did not make the decision to leave the injury-causing tree standing, there is no act by them subject to immunity under the statute. SPI and Precision are not shielded from liability under RCW 76.09.330 as a matter of law because they are not forestland owners and because they had no part in deciding what trees would be left.

In contrast, the State (through the DNR) designated the RMZ, decided what trees would be harvested, and determined what trees would be left. Again, under the plain language of RCW 76.09.330, only this act of leaving a tree is immunized. While the State decided the injury-causing tree was required to be left, the State also elected to permit a successful bidder to strip Unit 2 up to the boundary of the RMZ despite the known risk of forest-edge effects. The choice to permit SPI and Precision to log all trees in Unit 2, and to designate an RMZ without a wind buffer,[4] rendered the RMZ trees vulnerable to forest-edge effects. These acts are distinct from the decision to leave the RMZ trees standing, and,

[4] Despite Precision's statement to the contrary at oral argument before this court, the record reflects that no wind buffer was included in the RMZ at issue here, though RMZs do generally include a wind buffer. Wash. Ct. of Appeals oral argument, Pub. Util. Dist. No. 1 of Snohomish County v. State, No. 84166-1-I (July 18, 2023), at 16 min., 00 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023071123.

Counsel for the PUD countered this assertion in rebuttal argument by quoting from the Forest Practices Application/Notification Addendum for the Lugnut Sale prepared by the DNR that clearly states, "'no wind buffers were applied' to Olney Creek's 162-foot RMZ." Wash. Ct. of Appeals oral argument, supra, at 21 min., 25 sec.

under the plain language of the statute, are not immunized. For these reasons, the State is not entitled to immunity under RCW 76.09.330 as a matter of law on these claims.

C. Designation of RMZ

The appellants also argue there is an issue of material fact as to whether the respondents were required to leave the injury-causing tree. They contend immunity under RCW 76.09.330 only applies if the forestland owner is required to leave the injury-causing tree standing. The appellants concede the tree that fell on Chrisman was within the State-designated RMZ, but they assert that the RMZ was erroneously measured and therefore the respondents were not legally required to leave the tree. As discussed previously, Precision and SPI were required to leave all trees designated by the State as outside of the Timber Sale Area and had no authority to determine the RMZ. See Section I.A, supra.

The State responds in its brief that the propriety of RMZ designations may only be challenged through the administrative process under the Administrative Procedure Act (APA)[5] and that the RMZ was accurately designated, or alternatively, that immunity applies to the DNR's allotment of the RMZ regardless of whether the classification is accurate.

i. Application of Administrative Procedure Act

The respondents contend the appellants can only challenge the RMZ specification through the administrative process under the APA, not through the present civil suit. The appellants respond that this court may choose to not reach

[5] Ch. 34.05 RCW.

this argument under the Rules of Appellate Procedure, or alternatively, that the APA explicitly makes an exception for personal injury claims from the limitations on judicial review.

Under RAP 9.12, we "will only consider evidence and issues called to the attention of the trial court." Here, the trial court explained in a supplemental letter decision that, in making its summary judgment ruling, it did not rely upon the APA argument advanced by the respondents in their reply. In the court's order granting summary judgment, it noted it had considered the reply memoranda by Precision in support of the respondents' motions for summary judgment without any limitations identified. However, this court may affirm a summary judgment dismissal on any ground supported by the record. Port of Anacortes v. Frontier Indus., Inc., 9 Wn. App. 2d 885, 892, 447 P.3d 215 (2019); see also Wolf v. State, 24 Wn. App. 2d 290, 303, n.7, 519 P.3d 608 (2022) (reaching merits of an issue raised in a reply supporting a motion for summary judgment).

The APA is the "exclusive means of judicial review of agency action" subject to three exceptions. RCW 34.05.510. The first exception is where "the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim." RCW 34.05.510(1). None of the respondents addressed this statutory exception before the trial court or this court. The appellants brought a claim for money damages; the parties cite no legal precedent providing the DNR authority to

determine this claim.[6] As the appellants note, a holding that the parties had to challenge the RMZ through the administrative process, two years before Chrisman was injured, would create absurd results.

Under RCW 34.05.510(1), the appellants may challenge the designation of the RMZ through this suit, rather than through an administrative proceeding. We determine that judicial review of the propriety of the RMZ designation, based on the claims presented, is proper.

ii. Immunity for Incorrectly-Drawn RMZ

The State argues immunity attaches for any damages caused by an RMZ-designated tree regardless of whether the DNR has measured the zone correctly. It cites no authority for this contention, nor does it engage in an analysis of the plain language of the statute.

RCW 76.09.330 states in relevant part:

> Forestland owners may be required to leave trees standing in riparian and upland areas to benefit public resources . . . the state of Washington shall not be held liable for any injury or damages resulting from these actions, including but not limited to . . . injury or damages of any kind or character resulting from the trees being left.

"Required" is not defined by the statute. Where a term is not defined by the legislature, this court may look to the context of the statute and dictionary definitions to determine the plain meaning of the word. Samish Indian Nation v. Dep't of Licensing, 14 Wn. App. 2d 437, 442, 471 P.3d 261 (2020). The dictionary definition of "require" includes "to demand as necessary or essential

[6] "Where no authorities are cited in support of a proposition, we are not required to search out authorities, but may assume that counsel, after diligent search, has found none." Helmbreck v. McPhee, 15 Wn. App. 2d 41, 57, 476 P.3d 589 (2020).

(as on general principles or in order to comply with or satisfy some regulation)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (2002).

Under the plain language of RCW 76.09.330, immunity attaches only where a forestland owner must leave a tree standing in order to comply with the relevant regulations. This interpretation is consistent with the general rule that this court strictly construes immunity in derogation of the common law. See Michaels, 171 Wn.2d at 600 ("Statutory grants of immunity in derogation of the common law are strictly construed."). Under the plain language of the statute, immunity only attaches if the RMZ is properly drawn.

iii. Genuine Issue of Material Fact as to Designation of RMZ

The appellants aver there is a question of material fact as to whether the tree was properly located in an RMZ. They argue Olney Creek is classified as a Class III stream that requires a 140-foot RMZ under WAC 222-16-010, while the RMZ designated by the DNR is 162 feet. Alternatively, the appellants argue that there is an issue of material fact as to whether a Channel Migration Zone (CMZ)[7] exists in the area, modifying the correct size of the RMZ. The State responds that 162 feet is the required width under the Habitat Conservation Plan (HCP) and aligns with the Incidental Take Permit. DNR expert Moon declared that the RMZ width of 162 feet "was determined based on HCP rules" and reflected the "required width under the HCP standard." While the appellants repeatedly rely on the standard for RMZ width in WAC 222-16-010, they did not address the

[7] A Channel Migration Zone is "the area where the active channel of a stream is prone to move and this results in a potential near-term loss of riparian function and associated habitat adjacent to the stream." WAC 222-16-010. Near-term is "the time scale required to grow a mature forest." Id.

width required under the HCP in the litigation at the trial court or in briefing on appeal. PUD expert Wright opined that only the first 140 feet of the RMZ was required under the FPA, but did not address the HCP requirements. Both appellants fail to address the expert opinion that the RMZ was measured not only under the FPA and WAC 222-16-010, but also under the HCP standard. The State established through Moon's uncontroverted expert testimony that the RMZ was the width required by the HCP.

The appellants alternatively argue there is a question of material fact as to whether a CMZ exists in the area, based on the opinions of their respective experts. PUD expert Wright opined that the tree that struck Chrisman was located 227 feet from the ordinary high-water mark of Olney Creek; outside of the 162-foot RMZ. He declared that there is "a topological break at Olney Creek," preventing a CMZ. Chrisman's expert Jackson adduced that there is no CMZ based on "the physical features at the site." He noted that on the top of the Olney Creek bank, there is a tree cut in the late 1800s, indicating that the bank has been in place since at least that time. However, DNR expert Moon's opinion was that there is a CMZ present and that the CMZ was delineated based on the Forest Practices Board Manual. But, he did not describe what that process is or what guidance the manual provides. An expert's opinion "'cannot simply be a conclusion or based on an assumption if it is to survive summary judgment.'" Strauss v. Premera Blue Cross, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) (quoting Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016)).

Viewing all facts in the light most favorable to the appellants, as we must, there is a genuine issue of material fact as to whether a CMZ exists in Olney Creek and, by extension, whether the tree that struck Chrisman was outside of the 162-foot RMZ. Even if the 162-foot RMZ is proper under the HCP, the appellants have raised an issue of material fact as to whether the tree is outside that zone based on the existence (or nonexistence) of a CMZ. We have decided DNR expert Moon's declaration reflects a mere conclusion, thus, without more, it is insufficient to demonstrate there is no genuine issue of material fact on this question. As such, summary judgment was improper as to the State.

II. Conclusion

Based on the plain language of the FPA and our summary judgment standard, dismissal of the appellants' claims was improper. SPI and Precision are not entitled to statutory immunity under the FPA as a matter of law because they do not meet the statutory definition of "forestland owner," nor were they involved in the only act protected by the statute. The State is not entitled to statutory immunity because its act of stripping the wind-barrier is not protected by the FPA. Further, there is a genuine issue of material fact as to whether the RMZ was correctly designated and, by extension, whether FPA immunity applies to the State on that alternate basis. For these reasons, summary judgment dismissal of the negligence claims under the FPA for all respondents was improper and we reverse.[8]

[8] Because the trial court erred in granting summary judgment, its denial of the motion for reconsideration was an error of law and therefore an abuse of discretion. See Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

We decline to reach the other bases for summary judgment raised by Precision. Precision moved for dismissal of Chrisman and PUD's claims on alternative grounds, arguing the appellants' negligence claims should be dismissed because it did not owe any duty to Chrisman, that the appellants' nuisance claims were duplicative of its negligence claims, that there was no genuine issue of material fact as to the slight care element of gross negligence, and that Chrisman's claim for strict liability was inapplicable to Precision. The trial court did not reach the merits of these claims as it determined they were mooted by its ruling on statutory immunity. We likewise decline Precision's invitation to analyze the merits of these issues.

We reverse the summary judgment dismissal and remand for further proceedings consistent with this opinion.

WE CONCUR:

FILED
10/25/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a Washington municipal corporation; BARRY CHRISMAN and KERRY CHRISMAN, individually and as husband and wife, Appellants, v. STATE OF WASHINGTON, SIERRA PACIFIC INDUSTRIES DBA SIERRA PACIFIC INDUSTRIES, INC., a California corporation, PRECISION FORESTRY, INC., a Washington Corporation, JOHN DOE NOS. 1-10, and ABC CORPORATIONS 1-10, Respondents.	No. 84166-1-I (consolidated with No. 84167-0-I) DIVISION ONE ORDER GRANTING MOTIONS TO JOIN, GRANTING MOTION TO STRIKE IN PART, DENYING MOTION FOR SANCTIONS, AND DENYING MOTION FOR RECONSIDERATION

Respondent, State of Washington, filed a motion for reconsideration on September 22, 2023. A panel of this court called for appellants, Public Utility District No. 1 of Snohomish County and the Chrismans, to file answers to the motion. Appellants each filed an answer to the motion for reconsideration on October 11, 2023.

Respondents, Precision Forestry and Sierra Pacific Industries, also filed unsolicited answers to the State's motion for reconsideration on October 11, 2023. Both Precision and Sierra's answers stated that they joined in the State's motion

for reconsideration, as neither had filed their own motions, and then provided additional argument toward that end.

The Chrismans filed a motion to strike the respondents' answers and for terms on October 12, 2023, arguing that the court did not call for answers from the respondents and that the briefs from Precision and Sierra were improper under RAP 12.4(d) which provides that a party "should not file an answer to a motion for reconsideration . . . unless requested by the appellate court."

On October 20, 2023, Sierra filed a response and Precision filed an answer to the Chrismans' motion to strike and for terms.

After review of the various filings, the panel has determined that, to the extent that the unsolicited October filings of Sierra and Precision were notice of intent to join the State's motion for reconsideration, those requests should be granted, but the Chrisman's motion to strike should be granted in part as to issues raised by Sierra and Precision which fall outside the scope of the State's motion for reconsideration, and that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that Sierra and Precisions motions to join the State's motion for reconsideration are granted; it is further

ORDERED that the motion to strike is granted as to the portions of Sierra and Precision's briefing that address additional issues outside of those raised in the State's motion for reconsideration; it is further

ORDERED that the motion for terms is denied; and it is further

ORDERED that the motion for reconsideration is denied as to all respondents.

FOR THE COURT:

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

November 27, 2023 - 1:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84166-1
Appellate Court Case Title:	Public Utility District No. 1 of Snohomish Co., et al., Apps v. State of Wa, et al., Resps
Superior Court Case Number:	21-2-01118-1

The following documents have been uploaded:

- 841661_Petition_for_Review_20231127133056D1493462_1046.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PetReview_FINAL.pdf

A copy of the uploaded files will be sent to:

- dkirkpatrick@wakefieldkirkpatrick.com
- dlombardi@dearielawgroup.com
- dmy@leesmart.com
- dringold@wakefieldkirkpatrick.com
- ebour@wakefieldkirkpatrick.com
- gcastro@cityoftacoma.org
- huck@goldfarb-huck.com
- jpd@leesmart.com
- jzvers@dearielawgroup.com
- kcox@cityoftacoma.org
- kxc@leesmart.com
- nsymanski@wakefieldkirkpatrick.com
- rdearie@dearielawgroup.com
- roth@goldfarb-huck.com
- sandy@fmwlegal.com
- torolyef@atg.wa.gov
- zparker@wakefieldkirkpatrick.com

Comments:

Sender Name: Beverly Cox - Email: beverly.cox@atg.wa.gov
Filing on Behalf of: Thomas Edward Hudson - Email: thomas.hudson@atg.wa.gov (Alternate Email: TortTAP@atg.wa.gov)

Address:
PO Box 40126
Olympia, WA, 98504-0126
Phone: (360) 586-6300

Note: The Filing Id is 20231127133056D1493462