No. 314090

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

BRUCE M. BEATTY,

Appellant,

v.

WASHINGTON FISH & WILDLIFE COMMISSION, *et al.*,

Respondents,

BRUCE M. BEATTY'S AMENDED OPENING BRIEF

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Introduction

This is an appeal of a decision of the Superior Court of Kittitas County upholding the Pollution Control Hearing Board's Findings of Fact, Conclusions of Law and Order concerning a hydraulic permitting decision by the Washington Department of Fish and Wildlife. Appellant sought to exercise federal statutory rights on federal land to prospect and mine using a suction dredge to pump small quantities of material from the bottom of the stream, run it over a "riffle" to remove gold, and returning the balance of the dredged material to the stream. Appellant had participated in a contentious process to develop agency rules of general application (a "Gold and Fish Pamphlet"), which had singled out "his" creek for unusual restrictions limiting mining to only two weeks a year, but provided the right to seek a variance from those restrictions by individual permit application. The Department, despite overwhelming evidence of no adverse impact to fish from Appellant's activities, refused to expand the two-week "work window". Appellant appealed to the Pollution Control Hearings Board (PCHB), which upheld the Department, and thence to the Kittitas County Superior Court, which upheld the PCHB.

Assignments of Error

1. The trial court erred in entering its judgment of January 7, 2013 (CP779-81[1]) insofar as that judgment (a) upheld the decision of the PCHB (CP780); (b) denied any constitutional infirmity in the permitting statute (CP775-76) and (c) dismissed Appellant's challenge to the Department's Mitigation Policy (CP780).

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[1] All document included in the Index to Clerk's Papers are cited as "CP___".

2. The PCHB erred in upholding the Department's decision, specifically with respect to the following portions of its Findings of Fact, Conclusions of Law and Order of November 30, 2012:[2] Findings of Fact ¶¶ 2, 6-7, 9-10 & 16-17 and Conclusions of Law ¶¶ 1, 5 & 9-17).

3. The PCHB erred in both severely limiting the time of the hearing and then refusing to consider certain hearsay declarations.

Issues Pertaining to Assignments of Error

1. Does RCW Chapter 77.55 protecting fish life to the extent of requiring no risk to any single fish egg, without regard to the practical absence of any damage to fishery resources (Conclusion of Law ¶ 10)?

2. Were the permit conditions reasonable and not out of proportion to the impact of Appellant's proposed activity (Conclusion of Law ¶ 17) given the impact issues, including:

(a) Does substantial evidence support the proposition that bull trout were present in Fortune Creek (Findings ¶¶ 2 & 7)?

(b). Does substantial evidence support the finding that Appellant could not avoid appreciable damage to redds he might encounter while mining? (Findings ¶ 11-12.)

(c). Did the PCHB err in excluding evidence that no miner had ever injured a redd? (CP140:12-13)

(d). Was the rejection of expert testimony showing no appreciable risk supported by substantial evidence? (Findings ¶¶ 6-7, 13-15.)

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[2] Item 21 in the certified Administrative Record prepared by the PCHB, and filed in Superior Court on January 27, 2012.

(e) Was there substantial evidence to support the timing restrictions, particularly with respect to spring-spawning fish? (Findings ¶ 7)

(f). Could evidence of infinitesimal risk be properly rejected on the ground that it related only to a rule challenge rather than not permit review? (Conclusions of Law ¶ 9 & 11-12; *see also* Findings ¶ 15 n.3.)

3. Can the Department lawfully condition permits based on impacts from future permit applications?

4. Can the Department lawfully ignore the requirement in its Mitigation Policy and RCW 77.55.231 that it determine the impacts of the proposed hydraulic project (Conclusion of Law ¶ 13)?

5. Can the Department lawfully apply its Mitigation Policy notwithstanding the Department's failure to follow procedural requirements in enacting it as a rule (CP780)?

6. Did the Department fail to use the least restrictive permit conditions as required by 1991 Wash. Laws Chap. 415, § 1?

7. Did the PCHB and trial court err in concluding that the exercise of federal property rights in mining claims on federal land did not constrain or influence the scope of state regulation in any way, because nothing short of a total ban on mining would interfere with the objectives of federal mining law (Conclusions of Law ¶ 5, ¶ 17; CP776)?

8. Does the statutory goal of "protection of fish life" provide constitutionally-guidance for permit writers, or did it foster unconstitutional discrimination against mining (Findings ¶¶ 16-17; Conclusions of Law ¶ 16; CP775-76)?

9. If the answer to Issue No. 7 is "no," should the burden of proof be reversed to sustain Departmental action because of the vagueness of the statute and the potential to contaminate decisions from collateral factors—such as the personal hostility between the Department's representatives and appellant arising during the rulemaking process (Conclusion of Law ¶ 1).

10. Was appellant foreclosed from obtaining any legal relief against the pervasive errors of the Department because, subsequent to the permit decision, the Department suggested that a site visit might permit at least some requested mining activity to proceed (Conclusion of Law ¶¶ 13-15)?

Statement of Facts and Procedural History

A. Regulatory and Procedural History.

Suction dredge mining has for many years been regulated under rules intended to protect to environmental and fishery interests, but up until 1987, there was no "work window" restriction at all on Fortune Creek; miners could suction dredge the Creek all year. (*See* CP 393:9-13.) The Department later declared that mining could not start until July 1st (*see* CP393:20-24) and in the next iteration of regulatory innovations which Appellant now seeks to vary, declared that the mining could not start until August 1st. This was imagined to protect common rainbow and cutthroat trout, the spring spawning fish. (CP190:5-12.)

The other end of the work window, requiring Appellant to vacate the stream after August 15th, was imagined to protect bull trout, a species formerly regarded as a pest fish but now given "threatened" status under the Federal Endangered Species Act (ESA).

(*See* 63 Fed. Reg. 31,647 (June 10, 1998) (ESA listing decision)). Notwithstanding the "threatened" listing, the bull trout are common enough that the Department continues to authorize fishermen to capture, kill and retain them. (*See* A16, at 5.[3])

The current general rules that cover suction dredge mining are set forth in WAC 220-110-200, -201, -202 & -206. The general rules provide extensive protective provisions (*see, e.g.,* A9[4] at 13-15 (24 numbered rules with subparts)) which are not challenged herein. Rather, Appellant sought to expand the two-week work window in the rules by application for an individual permit, a right afforded by WAC 220-110-200(2).

Appellant submitted his permit application on January 25, 2011. (A31, at 1.) On March 1, 2011, the Department issued what they called a Hydraulic Project Approval, which refused to extend the work window. (A33.) Appellant timely appealed the decision to the PCHB. The hearing was held on October 31 and November 1, 2011, and on November 30, 2011, the Board issued its Findings of Fact, Conclusions of Law and Order.

Appellant timely filed this Petition for Review on December 29, 2011, and the Superior Court issued a memorandum decision November 14, 2012 (CP773-78) and judgment on January 7, 2013 (CP757-72). This appeal followed.

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[3] Fishermen are allowed to kill and keep bull trout in many water bodies throughout the State, albeit not, as far as Appellant can tell, in this Creek. The statewide regulations are available at http://wdfw.wa.gov/fishing/regulations/.

[4] "A___" refers to Appellant's Exhibits before the PCHB, contained in two binders in the certified Administrative Record. "R__" refers to the Department's Exhibits, contained in one binder.

B. The Nature of Fortune Creek.

Fortune Creek is not a creek of any recognized importance in fish production, or even recreational fishing. It is poor fish habitat, which is "typical of high gradient, high elevation, cold water streams". (CP307:18 to 231:1 (independent expert Dr. Crittenden summarizes the results of habitat surveys); *see also* CP180:21-24.[5]) The Department does not regard the area as important enough for fish production to have any idea how many fish there are or how much fishing occurs (*see* CP180:15-19), but will let unregulated numbers of fishing visitors kill two trout a day (CP220:5-15).

The only fish subject to special protections, which the Department thinks *might* be in Fortune Creek is bull trout (*see* CP222:19-22); they are listed under the ESA, Exhibit A28 summarized the results of surveys for the trout, which came up empty-handed. Mr. Meyer testified that he had never seen one in the Fortune Creek system (CP223:1-4), despite direct night survey experience (CP433:20 to 434:5). He did, however, think that he had "read a piece of paper that says someone found one" (CP223:10-11), which appeared to refer to the last page of Exhibit R16 (*see* R16 & CP458:5). The PCHB (Finding of Fact ¶ 2) relied upon this single page and a *draft* report, Exhibit R27, which was later summarized in A28 as "unknown what species of redd, likely bull or brook". (*See also* CP475:4 to 478:5 (on cross-examination, Mr. Meyer admits that the redds could have been brook trout).) Exhibit A28 also summarizes R16 as showing the presence of brook trout, not bull trout.

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[5] The federal government notes that preferred spawning habitat for bull trout is "low gradient streams". 63 Fed. Reg. at 31,648.

The total amount of stream bed Appellant proposed to disturb constituted a miniscule percentage of the overall watershed. As Appellant made clear in the application, he was seeking to dig in 300 lineal feet of stream over a period of five years, or about sixty feet per year. (A31, at 9; *see also* CP154:6-13.) This would typically take the form of holes in the streambed about the size of a hearing room table (*see* CP163:1-3), akin to pools in a stream.

C. Miners Can and Do Avoid Redds.

The case centers on the risk that Appellant might dredge into a fish nest in the gravel (called a "redd") and damage some or all of the thousands of eggs typically deposited by a spawning fish. The record reflects no evidence that any miner in the State of Washington, or indeed any other Western State, has ever actually dredged into a redd and destroyed it. Appellant testified that he has personally been dredging for ten years without ever encountering a redd. (CP134:3.) There are two primary reasons that miners do not actually injure redds: they mine in different areas than fish like to spawn, and they can stop immediately in the extraordinarily-unlikely event that the dredge uncovers a redd, because they are underwater, with their heads just inches from the dredge nozzle, and visually and closely controlling what goes into the nozzle.

1. Evidence that Miners Avoid Redd Areas.

A mining expert engaged by Appellants, Mr. Thomas Kitchar, testified that miners do not typically explore for gold in the smaller gravels that fish can move with their tails to build a redd. (CP124-125; *see also* CP131:5-7 (Appellant confirms his lack of interest in such material, referring to the right hand side of A19); CP133:19-20 ("I'm not

going to hit any eggs because I avoid those areas").) The Department does not and cannot dispute that "the fish are looking for an area that has gravels that are well sorted and loose enough that they can move [the gravel] with their tails". (CP216:6-8.) However, "[g]enerally miners work on a rule of thumb, the bigger the rocks, the bigger the gold." (CP127:24-25.) This is not just the view of miners, but also the view of the National Marine Fisheries Service, which has so found in formal ESA decisionmaking concerning suction dredging. (A37, at 3.)

The PCHB agreed that miners and fish tended to focus on different areas, but found that "a conflict in use could arise" in areas with pockets of gravel behind large bounders. (Findings ¶ 6.) As set forth below, the Department has frequently issued permits simply instructing miners to stay out of such areas.

2. Miners Can Avoid Injury to a Redd Even If They Encounter It.

A Youtube video in the record can quickly introduce this Court to the actual mining process.[6] As Appellant explained, because Fortune Creek is shallow,

> "A: . . . I will be lying prone on the gravels and the cobbles, and my head is right down there with the suction nozzle, visually inspecting everything that goes into that suction nozzle."
>
> "Q: Now, are you going to be able to -- what will happen if you pick up a rock and you find some eggs under it?"
>
> "A: Well, all you have to do is pull your suction nozzle away and move your equipment elsewhere."
>
> "Q: Isn't that, in fact, what the rules require?"

[6] The video is posted at http://www.youtube.com/watch?v=2lPYg5U4P6s, and admitted under a stipulation that the audio and captions are not part of the record (A73).

"A: That's what the rules require, and I can quote the rule if you want or the source of it."

(CP134:15-25 (referring to WAC 220-110-202(22) ("If you observe or encounter redds, or actively spawning fish when collecting or processing aggregate, you must relocate your operations").)

Indeed, in other contexts the Department has specifically recognized and relied upon the ability of suction dredge miners to dredge without injuring fish; Appellant testified about an operation on the Columbia River where miners were asked to "come down and rescue literally thousands of coho salmon by using their suction dredges" when "a marina flushed sand and silt to the point there was approximately in some places up to 18 inches of sand and silt that were smothering these alevins[[7]]". (CP141:6-17.) In that context, the Department

> ". . . called the miners in because they knew that the miners could discriminate what they were doing on the water and get rid of that sand and not injure any more fish. And, sure enough, they were able to excavate that sand off of those fishes, and the fish came swimming up, and they literally saved thousands. They didn't save every one, but the important thing is that the suction nozzle did not suck those fish out of the sand; it just removed the sand. They could stop as soon as they saw the alevins."

(CP141:18-65:3.)

All this testimony about the actual experience of miners was corroborated by testimony that miners must pay very careful attention to what is going into the vacuum hose because they had powerful incentives to do so. These incentives included that "the worst most frustrating thing that can happen is a plug-up" (CP108:12-14), which could take half an hour to clear (CP108:15-16); that failure to pay close attention could result in injuries

[7] An "alevin" is a young fish still showing a yolk sac attached, sometimes called sac fry.

(CP109:5-7); that there was a need to feed material to the dredge smoothly to make it function (CP109:25 to 110:6); and, of course, the need to pay attention to find the gold itself. The PCHB agreed that miners pay "close attention to material entering the hose". (Finding of Fact ¶ 4.)

The Department's representatives countered with assertions that the eggs were "very, very tiny" and that "it's virtually impossible for oftentimes even trained biologists to sight these redds before they've been dug into". (CP280:10-13.) There is no evidence that any redd has ever been "dug into." The Department's representative also acknowledged that authorities in fact count assertedly undetectable redds *by helicopter*. (CP388:22-390:7.[8])

In any event, to the extent it might be difficult to identify redds in Fortune Creek, this statement applies to redds that have been sitting for a while: "if they're young, you can find them. I mean, they really stand out". (CP319:15-16; *see also* CP430:9-3 (Mr. Meyer explains that redds become difficult to see after a high flow event that flattens them).) This means that miners might not be able to detect older redds of the common trout in the spring, but they can certainly see the newer redds of the fall-spawning fish.

The only specifically-protected fish (if even present) are the fall-spawning bull trout. Appellant only sought permission to mine until September 30th, so the redds, if they even existed, would be fresh and easily avoided. In all likelihood, the Rule's requirement that Appellant relocate if he moves to a location with "actively spawning fish"

[8] The Department later attempted to distinguish Fortune Creek as a "closed canopy" system such that redds could not be seen from a helicopter (CP428:24), but the photographs show that much of the stream is not covered by trees, particularly in the lower reaches covered by the mining claims (*e.g.*, R24).

(WAC 220-110-202(22)) would avoid all problems, because in the extraordinarily unlikely event that any bull trout appeared and began to spawn, Appellant would avoid them even before any redd was built.

Moreover, the ability to detect redds is an entirely different question than the ability to detect eggs. (CP329:19 to 330:6.) As noted above, if a miner begins to dig into a redd, he can and would spot the eggs and stop. The record contains photographs and preserved samples of actual eggs are in the record to refute the notion that they are too tiny to see. They are, in fact, about the size of BBs; the Department's position amounts to stating that one cannot see "a couple hundred eggs in a very tightly concentrated area". (*See* CP282:20 to 283:14.) And as Appellant pointed out, the miner's head is inches away, and "when you're underwater and you have one of those snorkel masks on, everything is slightly more magnified" (CP142:25 to 143:2). Moreover, the eggs are "round, perfectly spherical;" unlike any of the other material in the streambed. (CP142:15-17.) Exhibit A49 consists of a photograph of (dyed) bait eggs lying on the streambed, which shows the contrast in shape. (A46; CP143:12-23; *see also* CP378:3-7 (ordinary eggs are pale orange or yellow).) While vigorously disputing Appellant's ability to minimize damage if he encountered a redd, the Department could not and did not refute the evidence that it had brought suction dredgers to rescue redds buried by sediment *precisely because they could stop in time* (CP141-142).

D. Risks of Encountering a Redd Are Miniscule.

Appellant engaged an independent consulting biologist, Dr. Robert Crittenden, who received his doctorate at the University of Washington Center for Quantitative Sci-

ences in fisheries and forestry, with special expertise in quantifying biological parameters relating to fish: "I'm essentially a fisheries biometrician." (CP285:24-25.) Dr. Crittenden presented to the Board a "back of the envelope" calculation of risk that although simple, was in some sense irrefutable, and the Department did not even attempt to refute it.

The starting point was to compare the extent of stream bed Appellant proposed to disturb with the total streambed in the system. Depending on the extent of his activities, Appellant proposed to disturb "somewhere between a 100^{th} and $1{,}000^{th}$"of the length of the stream. (CP291:5; *see also* CP324:13-20.) The next step was to estimate the fraction of the streambed that contained redds, and, again, this might be between 100^{th} and 1000^{th} of the length of the stream. (CP292:13.)

If Appellant picked sites randomly, then the probability that he would encounter a redd would be the product of these two tiny fractions, or on the order of 1 in 10,000 and one in a million. (CP293:10.) These fractions would apply assuming that the fish and Appellant are picking locations independently. (CP293:10-15.) They are, over a wide range of assumptions explored by the Department in its cross-examination of Dr. Crittenden, "miniscule" probabilities of redd damage. (CP326:11-14.)

Moreover, as Dr. Crittenden pointed out, the process of selecting locations is not independent; they are "negatively correlated" to the extent that the miners don't tend to dredge where the redds are and the fish don't tend to spawn in the heavier materials. (CP293:17-25.) This has a dramatic effect in terms of quantitatively decreasing the risk. If there were a complete negative correlation, the risk would be zero, and in general, there

is what Dr. Crittenden termed "negligible risk" under any reasonable assumptions. (*See* CP294:1.)

This level of analysis assumes that miners mine throughout the year. However, Appellant only sought to mine from June through September. (CP468:13-14 (Mr. Meyer testifies concerning Appellant's limitation of application, which originally asked for May as well).) As Dr. Crittenden pointed out, this means that the risk is very significantly minimized for the fall-spawning fish with winter redds (CP294:18 to 295:15)—the less common bull trout. As to the spring redds, it should also be noted that destroying late-emerging fish has essentially no impact on the fishery resource, because they are doomed anyway; they will have to compete against larger, earlier fish for food and "will probably lose out". (CP287:13 to 289:9.)

The next level of analysis involved taking this 1/10,000 to 1/1,000,000 risk (attenuated further by the timing restriction), and assessing what sort of impact a strike on a single redd would have to the fishery resource. For fish that spawn only once, each redd produces on average of two adult fish, [9] but most of the fish here spawn multiple times (*see also* CP179:25 to 180:4), so striking a redd produces "correspondingly less" impact (CP296:15). Factoring in multiple years of spawning, and the possibility of multiple redds, Dr. Crittenden estimated conservatively that the risk of killing the two adult-equivalents should be further reduced by a factor of 0.4. (CP297:19 to 298:1.)

[9] If more than two survived on a consistent, long-term basis, the earth would exponentially fill with fish; if less than two survived on a consistent, long-term basis, the species would eventually go extinct. (CP296:16-25.)

Yet another factor tending to mitigate risk relates to "bottlenecks" in the life cycle. As Dr. Crittenden explained,

> "Trout tend to be limited by the amount of rearing habitat; that is, how many eggs survive up to the coming out of the gravel to emergence is fairly unimportant because they occupy all the territory in the stream, and they're very competitive, and the amount of available habitat actually limits what their population will be. So to some degree, survival of the eggs is fairly irrelevant."

(CP298:20 to 299:3; *see also* A56 (published study corroborates Dr. Crittenden's testimony; "recruitment is limited by available rearing habitat").) In other words, the available egg supply is typically substantially in excess of the numbers needed to fill the rearing habitat, and the destruction of a single redd is unlikely to have any impact whatsoever on the fishery resource.

Another factor mitigating risk is the degree to which eggs passing through a dredge would continue to survive and hatch. While the Department disparaged this notion, modern suction dredges use a technology which "doesn't get the impact of high mortality". (CP301:1-2.[10]) The dredge simply discharges the eggs back onto the streambed, and some unknown fraction of them will survive. (CP301:3-12.) The Board declared that the eggs would not be "deposited in an environment that would allow the eggs to develop and hatch" (Findings ¶ 10), but this finding is contrary to the specific testimony that they could fall between cracks in the gravel (CP301:9-11) and that some of the species in fact spawn in precisely this fashion by just dropping eggs on top of the gravel (CP283:20 to 284:5).

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[10] Even the older dredges tested in the laboratory context did not cause significant damage to eggs except during certain delicate egg stages, short in temporal duration ("uneyed eggs"). (*See, e.g.,* A54 ("The 19% mortality of eyed eggs of hatchery rainbow trout . . . after ten days was similar to that of the control group").)

Finally, of course, another factor tending to mitigate risk is the degree to which miners can simply stop mining when they encounter eggs or redds, as the rules require. That would, of course, reduce the risk essentially to zero. (CP299:23 to 300:9.)

Putting all these factors together produces a risk that ought to be considered so minimal as to remove any argument for restricting Appellant's ability to mine from June through September:

> "Q: So, now if we put together all of these risk factors that we've been talking about, is it fair to say that the risks that Mr. Beatty is proposing to fish in this creek are so vanishingly small as to not really be of any regulatory significance whatsoever?"
>
> "A: It certainly appears that way to me, and a number of the other studies you have cited have found the same thing."

(CP301:13-20.)

Dr. Crittenden noted in particular a comprehensive and detailed study in the Siskiyou National Forest that found no statistically-significant relationship between suction dredge mining and fish populations, even including the effect of unlawful mining. (CP301:21-302:4 (discussing A63).) This is not just the study of the impacts of a single permit, but of an entire forest full of suction dredge miners. Numerous other studies confirm the absence of any impact to the fishery resource. (*See, e.g.,* A50; A52, A62; A58, at 9; A57, at 7-8.) It should be remembered that salmon runs persisted at extremely high levels through the extraordinarily-intensive mining during the Gold Rush, only plummeting after commercial harvest of salmon sent canned Northwest salmon throughout the world. Given this scientific backdrop, and theoretical reasons to believe risk is vanishingly small, responsible agencies have determined that dredges with up to four-inch noz-

zles have *de minimis* impact insufficient even to trigger regulatory attention. (A61 (U.S. Army Corp of Engineers determination).)

E. The Department's Limitations Based on Temperature and Timing Lack Evidentiary Support.

The ostensible basis of the two-week work window was a simple mathematical model of fish emergence, relating water temperature to egg development times, to conclude that at least some eggs would persist outside the October through May period when Appellant did not seek to mine. Although the Department suggested in conclusory testimony that the model was "very accurate" (CP352:21), cross-examination confirmed that the Department acknowledges fundamental problems with the model and the data. The model does not fit the observed pattern of fish emergence at all—where redds are deposited weeks apart, the fish will emerge at times that are not weeks apart, but closer. (CP176:19-25.) The Department used data concerning the development times for fish in hatcheries, rather than high altitude cold mountain streams; hatcheries do not raise fish in gravel, so there is no hatchery data concerning when fish emerge from gravel. (*See* CP182:21-183:7.)

More importantly, as Dr. Crittenden explained, the model ignores entirely fundamental and elementary biological issues. The first area overlooked by the model is the biological phenomenon of "acclimation": "the fish . . . when it's put into a different regime, will produce enzymes that are more appropriate for those conditions". (CP286:22-24.) In particular, the problem is that you have

> ". . . fish in a very cold stream, and they're going to induce the enzymes appropriate for those temperatures and will develop faster than you would predict from the

> TU [temperature unit] system, which is for fish in hatcheries under fairly warm conditions."

(CP287:7-12.) This is a dramatic effect, which changes emergence time from generation to generation. (CP309:23 to 310:16 (Chilko Lake example).) Indeed, as Dr. Crittenden noted, the scientific literature itself reports that the model "doesn't work very well under 5 degrees Centigrade and tends to overestimate the development time". (CP286:18-20 (referring to A69).) Confronted with this evidence, Mr. Harvester seemed unable even to understand it. (CP396:20-24.) Obviously, overestimating development time means that the eggs will be imagined to be immature, and the fish still in the gravel, when they are not.

The model is also anti-Darwinian, in the sense of ignoring evolutionary biology. As Dr. Crittenden explained,

> ". . . there's a fairly strong selective force towards early emergence if you have a very short time window available for feeding. Of course, you don't want to emerge too early, but the fact is that there's a lot of selectivity there, and that will include strong selection for having the right enzymes for that temperature regime."

(CP287:21 to 288:2.)

As to the data, there was no available temperature data for Fortune Creek during the times eggs would develop in the spring. (*See* CP184:18 to 185:2.) There was also no actual data for fish spawning times, with the possible exception of some fall data.[11] (CP185:5-11.)

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[11] The Department misused this data, "the Judy de la Vergne 2000 draft report," to say that bull trout commenced to spawn in late August. (CP186:9-11.) The report itself says no such thing. (*See* A28 ("unknown what species of redd; likely bull or brook").)

Mr. Harvester thus developed an August 1st-15th in-water work limitation for Fortune Creek based on analogies to other streams. With respect to the spring spawners, he described the development as a simple process that added 90 days to an imagined peak spawning period of about May 1st to produce an August 1st start date. (CP353:20 to 354:13.) In his testimony, Mr. Harvester made repeated reference to cold water temperatures in July, but during the litigation, the U.S. Forest Service produced additional temperature data suggesting that the temperatures were significantly higher than imagined by Mr. Harvester. (CP396:25 to 398:14.) Mr. Harvester was unable to offer any coherent explanation of why this additional data shouldn't move the start time earlier using the model. (CP398:19 to 401:14.)

With respect to the fall spawners, the cut-off date of August 15th is based on an imagined start of spawning of August 15th. In fact, the Department regards the chance of redds being in the area creeks in August as so miniscule that it has almost never conducted spawning surveys in in August at all, and when it has, it has found no redds. (*See* A30 (listing survey dates and results); *see* CP188:10-22.) Nevertheless, the Department claims that it is the result of these surveys that produced the decision to close the Creek on August 15th. (CP424:4-9.)

F. Evidence that the Department Retaliated Against Appellant.

Appellant was "one of the five at-the-table stakeholders" representing mining interests in a long and acrimonious rulemaking process. (CP144:1-16.) During one of the public meetings held in connection with the process, there was a personal conflict between the Department employee directly involved with the Fortune Creek rule develop-

ment (and the permit application), Mr. Perry Harvester, and Appellant's wife. (CP144:19-25.) Appellant complained to the Director of the Habitat Division, who apologized for Mr. Harvester's behavior. (CP145:1-11; A17.) Mr. Harvester claimed the episode had "nothing to do with Mr. Beatty". (CP205:18.)

While Mr. Harvester noted during the rulemaking process that most in-water work times for small, headwater streams *increased* (A1; CP189-190), as noted above, the in-water work time for Fortune Creek, where Appellant was known by Mr. Harvester to mine (CP194:22 to 195:3), *decreased* dramatically. Nothing in writing exists to explain the changes in restrictions, and Mr. Harvester was unable adequately to explain them before the Board. (CP195-196 ("verbal testimony during one of the technical work group meetings" might exist); *see also* CP190-192.)

Mr. Harvester subsequently had direct involvement in Appellant's permit process. (CP172:15 to 174:8.[12]) Mr. Harvest was the "habitat program manager" overseeing (with an assistant manager) the particular biologist assigned to process the permit, Mr. William Meyer. (CP174:9-18.)

Appellant testified that he believed he was discriminated against, citing "other miners getting increased work windows for suction dredging in rivers and creeks all across the State of Washington" (but not him) as evidence of such discrimination. (CP145:12-21.) Indeed, there are creeks that are closed to mining all year, but opened by permit. (CP208:7-9.)

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[12] While Mr. Harvester's testimony tended to minimize his role (CP382:13-24), the Department, pursuant to CR 30(b)(6), identified him as one of the two people most knowledgeable about the permitting process in this particular case. (*See* CP173:3-7.)

Perhaps most significantly, Mr. Meyer himself issued a permit to another miner to work the Cle Elum River from July 16th to August 31st of each year, *immediately downstream from where Appellant sought to work ("to the confluence of Fortune Creek"), where bull trout are present.* (*See* A78.) This miner and many others received the full five year permit duration (A78), while Appellant was limited to two years (A33, at 1).

Summary of Argument

The fundamental state law question presented by this appeal is whether the PCHB's refusal to relax the timing restriction constituted a reasonable permit condition, or was out of proportion to the impact of the dredging activity. In fact, there would have been no appreciable impact upon fish life whatsoever from Appellant's proposed activities. He would dig some small holes in the bottom of a fast moving creek that would disappear thereafter without a trace, and not injure a single fish in the process.

All of the factual findings made by the PCHB in an attempt to find risk were not supported by substantial evidence. There was no substantial evidence establishing the presence of a single bull trout in Fortune Creek, refuting Appellant's ability to minimize any harm to fish, or supporting the PCHB's attack upon the only expert evidence presented. As for the PCHB's peculiar notion that it could not even consider the evidence of insignificant risk because it amounted to a disguised attack upon the Gold and Fish Pamphlet, no law permits the PCHB to ignore evidence that permit conditions are unreasonable. Nor does the law permit the PCHB to uphold denial of a permit because other, future permit applicants might cause harm.

The idea that the hydraulic permitting statute must provide absolute protection for every fish egg in Washington is not supported by any sound interpretation of the statute, and appears to actually represent the "law" only insofar as Appellant was concerned. Nor can the Department lawfully refuse to assess impact in favor of simple "don't let them take the action" Mitigation Policy approach to "mitigating" effects on fish. Moreover, the Mitigation Policy the Department here employed, pursuant to which its permit writers shut down activity first irrespective of impact, is in substance a rule which must be voided for failure to comply with the Administrative Procedure Act.

The Legislature has specifically required, with respect to mining activities, that the Department utilized the least restrictive alternative for regulation, and although the Department did so with respect to many other miners, it refused to do so here, and the PCHB refused to even consider its duty to do so.

While the timing restrictions were unlawful as a matter of state law alone, they also represented a material interference with mining on federal land that cannot stand as a matter of federal law under the Supremacy Clause of the United States Constitution. The conclusions of the PCHB and trial court that only a total ban could interfere with federal mining law and policy were simply wrong.

Constitutional defects also arise from the utterly standardless nature of the Department's regulatory authority. While the Supreme Court has previously upheld the hydraulic permitting statute from a charge of unconstitutional delegation of regulatory power in at least some contexts, more recent precedent calls that conclusion into doubt, especially given the evidence of both a hostile motive and strikingly disparate treatment

of Appellant. At the least, the standardless nature of the regulatory apparatus requires this Court to shift the burden of proof onto the Department and Board to support their regulatory restrictions.

Finally, the notion that Appellant should be denied relief because he was unable to cooperate in a site visit lacks any support in law. No statute or rule requires such a visit, it was pointless under the circumstances, and the errors of law discussed above had to be corrected before Appellant could have any chance of a lawful decision no matter what additional information were provided to the Department.

Argument

Under the Administrative Procedure Act, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of the nine standards delineated in RCW 34.05.570(3)". *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 779 (2008). "An agency's conclusions of law, including its interpretations of statutes, are reviewed 'de novo' under an 'error of law' standard that permits [the court] to substitute its judgment for that of the agency". *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42 (2001).

The Board's factual determinations are reviewed for substantial supporting evidence, which evidence is "substantial if it is sufficient to persuade a fair-minded person of the truth or correctness of the order". *Raven v. Dep't of Social & Health Services*, 167 Wn. App. 446, 461 (2012). While the burden of proof is ordinarily on one seeking to set aside agency action, as we explain below, because the agency has standardless authority invading property rights, the burden should shift to the agency to justify its position. This

is particularly important to avoid circumstances, such as those present here, where personal hostilities can and did result in this Appellant being restricted far more than others similarly situated.

I. THE HYDRAULIC PERMITTING STATUTE CANNOT BE CONSTRUED TO REQUIRE ZERO RISK TO ANY SINGLE FISH EGG WITHOUT REGARD TO THE ABSENCE OF ANY POSSIBLE DAMAGE TO THE FISHERY RESOURCE (Issue No. 1).

A. Proper Construction of the Hydraulic Permitting Statute.

The governing statutory scheme has been grossly misinterpreted by the Department and the PCHB to afford the Department unlimited discretion to halt in-water projects based on any level of risk to so much as a single fish egg. To Appellant's knowledge, the hydraulic permitting statute and related materials have never been the subject of judicial review on this question. All the pertinent provisions of law must be read in *pari materia* "to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes". *Hallauer v. Spectrum Properties, Inc.,* 143 Wn.2d 126, 146 (2001) (quoting *State v. Houck*, 32 Wn.2d 681, 684-85 (1949)). Doing that compels the conclusion that the Department's proper focus is upon protection of fish as a resource, not protection of individual fish, and that while protection is required, activities adversely affecting fish life are supposed to be permitted.

The Department's general mandate is to "conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource". RCW 77.04.012. The Department (or more precisely the Commission) has broad general authority to enact rules "specifying the times when the taking of . . . fish . . . is lawful or unlawful". (RCW 77.12.047(1)(a)). It sets such fishing seasons based on the populations

of fish, and the ability of such populations to persist despite very large numbers of fish that are killed for sport or commerce. As the Supreme Court has explained, "the overriding purpose of the statutes is to provide for *wise use of the resource*, which is the broadest possible definition of conservation". *Northwest Gillnetters Association v. Sandison*, 95 Wn.2d 638, 643 (1981) (upholding challenge to commercial fishing regulation; emphasis added). These authorities suggest that the overriding purpose of the statutes focuses upon fish *as a resource*, on a population level, and not on conservation of *individual fish.*

The particular statute involved here is RCW Chapter 77.55, provides for regulation of "hydraulic projects," meaning "the construction or performance of any work that will use, divert, obstruct or change the natural flow or bed of any of the salt or freshwaters of the state". RCW 77.55.011(8). The permitting statute necessarily contemplates that applicants may perform work in the rivers and streams of Washington that will actually "use, divert, obstruct, or change the natural flow or bed" of such bodies of water. *Id.* Inasmuch as such bodies of water contain fish life and constitute fish habitat, *the Legislature necessarily intends that activities resulting in some level of adverse impact on fish life and habitat be permitted,* just as it intends that fish be killed directly for sport or commercial harvest.

In this particular case, miners have the option of proceeding under general rules, or seeking a permit departing from such rules. *See* RCW 77.55.091 (no permit for mining in accordance with rules); WAC 220-110-200(2) (exceptions to rules may be permitted). Where applicants apply for a permit, "[p]rotection of fish life is the only ground upon which approval of a permit may be denied or conditioned". RCW 77.55.021(7)(a).

The statute does not define "protection", "fish" or "life" (RCW 77.55.011 (definitions)).[13] Given the statutory context just discussed, it is not reasonable to construe "protection of fish life" as protection of each and every fish egg, but rather protection of fish "resources", RCW 77.04.012, that being the species as a whole, or significant groups of fish.

RCW 77.55.021(7)(a) provides that "[a]pproval of a permit may not be unreasonably withheld or unreasonably conditioned." The Legislature has provided additional guidance as to reasonability in RCW 77.55.231, which provides: "The permit conditions must ensure that the project provides proper protection for fish life, but *the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.*" (Emphasis added.) This statutory language necessarily implies that the project is to be permitted to go forward notwithstanding adverse impacts, with reasonable and proportionate conditions being imposed, if necessary to mitigate adverse impacts to the fish resources.

The implementing regulations add no clarity, merely providing that the permit shall be denied, "when, in the judgment of the Department, the project will result in direct or indirect harm to fish life, unless adequate mitigation can be assured by conditioning the HPA or modifying the proposal". WAC 220-110-030(14); *see also* WAC 220-110-020(79) (regulations which define "protection of fish life" to mean "prevention of loss or injury to fish or shellfish, and protection of the habitat that supports fish and shellfish

[13] The regulations define "fish life" expansively as "all fish species, including but not limited to food fish, shellfish, game fish, and other unclassified fish species and all stages of development of those species". WAC 220-110-020(36). They define "protection of fish life" as "prevention of loss or injury to fish or shellfish, and protection of the habitat that supports fish and shellfish populations". WAC 220-110-020(79). Again, no degree of protection is specified.

populations. To the extent the regulations are construed to forbid any incremental risk of impact to any single fish of any magnitude whatsoever, they do not represent a reasonable construction of the statute.

There is no definition of "adequate" mitigation. "Fish life" in turn means "all fish species, including but not limited to food fish, shellfish, game fish, and other nonclassified fish species and all stages of development of those species". WAC 220-110-020(36). These regulations too should be construed to refer to damage to the resource—"fish life" construed as something well beyond a single fish or fish redd—to be consistent with the statute. And "adequate mitigation" is not reasonably construed as provisions ensure that there is essentially zero risk to a single egg, fish or redd.

B. The Departmental/PCHB Construction.

In the absence of any statutory or regulatory guidance, the Department's employees, and more specifically the one charged with issuing the permit under review, have adopted an extreme interpretation:

> "Q: So the department's position is that because there are so many things going on, we cannot have any quantitative evaluation of risk, and we must protect every single egg; is that the gist of what you're saying here?"
>
> "A: Yes. There's a lot of variety out there."

(CP15-20 (Mr. Harvester); *see also* CP246:22 to 247:1 (Mr. Meyer).) The Department's view was that any theoretical risk, of any magnitude, to so much as a single egg, justified forbidding mining is not a reasonable interpretation of the statutes.

Hydraulic permits arise in a wide variety of contexts, including enormous interstate highway construction projects that are routinely permitted notwithstanding significant impacts on even federally-listed endangered species.

> "Q: Let's talk about other activities. People do things in streams other than mining, correct?"
>
> "A: Correct."
>
> "Q: Many times these in-water work windows are changed for those type of activities, correct?"
>
> "A: Correct."
>
> "Q: And people in particular, they're given permits that allow them to dry out creeks, to pour tons of gravel into the creek, to cover up bridge abutments, to armor the shoreline or riverbank so their property doesn't wash away. That's the type of thing that's granted under hydraulic permit applications all the time, right?"
>
> "A: Correct."
>
> "Q: And these rivers and streams where this occurs, these are all over Washington, and it's fair to say that rainbow trout are all over Washington, correct?"
>
> "A: Correct."

(CP248:15 to 249:7; *see also* A72 & CP265:6 to 266:15 (permits to dump rip rap).) As Mr. Harvester explained, "it's always a judgment call". (CP201:5-6.) As far as Appellant can tell, the "every single egg" view of the statute applied to his case alone.

C. The Alleged Presence of Endangered Species Does Not Support the "Every Egg" Construction.

The Department's interpretation of the statute, as applied to Appellant, and to a lesser extent others similarly situated, makes it more restrictive than even the ESA. Under that Act, for federal agencies may proceed with "agency action", and private permits

obtained to "take" listed species, so long as "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild". *See* 16 U.S.C. §§ 1536(a)(2); 1539(a)(2)(B)(iv). It is impossible to conclude that the Washington Legislature, by passage of the hydraulic permitting statue in 1943, intended to impose far more stringent conditions that would forbid risk to even a single fish egg, without regard to any quantitative assessment of risk to the fishery resource. To the contrary, the Legislature demanded permitting "consistent with the state's fish management objectives and the federal endangered species act". 1991 Wash. Laws Chap. 415, § 1.

Notwithstanding even federal endangered species act protections, activities such as draining 1,000 feet of river and kill listed species are commonly approved within the State of Washington. (*E.g.,* A12, at 7; *see also* A13-14.) In the highway construction context, activities such as "placement or removal of small quantities of material (*e.g.*, wood or rock)" are generally recognized to be insignificant. (*See* A12, at 13.) The Department's conduct cannot remotely be characterized as the application of "law" when sometimes an activity is insignificant, and sometimes it must be forbidden entirely, based on whether it is a private miner or a public construction project.

The spring spawning fish upon which the Department relied to restrict mining before August 1st were described by Mr. Meyer as "common", and indeed, one is permitted to target and kill up to two of them a day in Fortune Creek. (CP219:5-15.) In a context where the mining is restricted to prevent risk of injury to a single egg, under circumstances where such risk is vanishingly small, this alone demonstrates that the pre-August 1st permit restriction is unreasonable. No responsible exercise of judgment will balance

risk in this manner. (*Cf.* CP484:10 to 486:19 (Mr. Meyer unable to explain why killing a redd would be worse than killing an adult fish about to spawn).) The statutes cannot be harmoniously construed to conclude that Legislature intended that the same agency authorize one citizen to kill a fish, and forbid another from the exercise of private property rights in a fashion that poses less than a 1/1,000,000 chance of killing the same fish.

As to the fall spawning bull trout, although ostensibly protected under the Endangered Species Act, they are subject to recreational fishing. Even assuming the bull trout were present, restricting mining work based on a 1/1,000,000 chance of injury to a fish that is not generally present is not a condition commensurate with project impact. The PCHB essentially refused to consider any and all argument concerning proper interpretation of the statutes on the basis that "[t]he argument that fish protection should only be considered at the resource level is an attack on WDFW's work window regulations, not a justification for an individual extension of the rules based on site specific conditions". (Conclusion of Law ¶ 10.) This holding was incomprehensible; the Department is an agency, a creature of statute, and its rulings cannot stand if premised on a misconstruction of the law—whether or not it has committed the same error elsewhere in fashioning rules. The Superior Court did not specifically address this issue other than to hold that "[t]he agency did not commit any errors of law" (CP774).

II. THE PCHB AND TRIAL COURT ERRED WITH RESPECT TO RISK TO FISH (Issue No. 2).

Whether or not the permit conditions were reasonable, or out of proportion to the impact of Appellant's activity depends most significantly upon the degree of impact. Because the PCHB erred in every facet of its findings of fact and conclusions of law con-

cerning impact, and even refused to consider relevant evidence refuting any impact, the permit conditions are manifestly unsupportable.

A. The PCHB Erred in Finding Bull Trout in Fortune Creek (Issue No. 2(a)).

As set forth in Statement § B, there was no direct evidence of any bull trout inhabiting Fortune Creek, and the PCHB's finding that bull trout "are known to reside in the creek" was not supported by substantial evidence.

B. The PCHB Erred in Finding that Appellant Could Not Minimize Damage to Eggs (Issue No. 2(b)).

As set forth in Statement ¶ C(2), even in the unlikely even that Appellant encountered a redd, he could easily mitigate damage. The PCHB raised questions as to Appellant's ability to identify redds and eggs (Findings of Fact ¶¶ 11-12), but the photos themselves, and the Department's prior engagement of miners to rescue fish, refute the PCHB's concerns. The PCHB also argued that "by the time the eggs are visible, the gravel of the redd would already be dismantled, resulting in damage and destruction of the eggs". (*id.* ¶ 11.) This does not refute significant mitigation of damage, and is entirely inconsistent with the simple fact that the fish themselves simply bat the rocks back over the eggs when they are done—*at a time when the eggs are much more sensitive because they have not yet hardened* (CP318:6-8).

C. The PCHB Erred in Excluding Evidence That No Miner Had Ever Injured a Redd (Issue No. 2(c)).

Appellant testified that during the rulemaking proceedings, hundreds of miners filed statements reporting their mining experience over many years, and swearing that

they had "never killed a fish, dredged up eggs or found any fish eggs or baby fish in the streambeds". (CP135:8-9; A41 (sample declaration).) The Board refused to consider the declarations as hearsay, even though it recognized that it did not "have to strictly observe the rules of hearsay". (CP140:12-13 (Ruling of Administrative Law Judge MacLeod).) In a context where the Board arbitrarily limited Appellant to merely six hours to make his case (CP84:1 (Judge MacLeod)), this ruling was error, as Appellant could not possibly present all of the miners as witnesses. That hundreds of miners risked perjury charges to deny any problem whatsoever—in a context where the Department had no evidence of any actual problem—has a very significant bearing on the reasonableness of the permit restrictions.

D. The PCHB Erred in Discounting Appellant's Expert Testimony Providing Quantification of Risk (Issue No. 2(d)).

As set forth in Statement ¶ D, the only Ph.D expert presenting evidence, Dr. Crittenden, testified that there was no appreciable risk whatsoever, a conclusion echoed by numerous other studies and findings. The Department's primary response to Dr. Crittenden's conclusions was to speculate that there might be small numbers of bull trout in the area (CP473:2 to 474:16). The Department then imagined that there might be a "population" of fish in the system; that it was entirely isolated (CP219:16 to 221:1); and that, contrary to fact, there is one last redd in the system; and that Appellant would destroy it entirely. The PCHB accepted this line of reasoning (Finding ¶ 13), but no one can explain why a 1/1,000,000 risk of killing nonexistent bull trout is here catastrophic when anglers can keep and eat them.

As the quantum of risk as estimated by Dr. Crittenden, the Department could offer no evidence whatsoever to dispute it other than: "I disagree". (CP490:1 to 498:5.) This is not substantial evidence when evaluated together with Dr. Crittenden's extraordinarily detailed explanation of why risk was non-existent. Not surprisingly, the PCHB's attacks on Dr. Crittenden's risk analysis lacked support in the record. For example, the PCHB took issue with Dr. Crittenden's initial assumption that the entire spawning reach was available for fish (Finding ¶ 15), but he presented a range of assumptions (10% to 100%), and Mr. Meyer at one point opined that 50-70% of the Creek "might have redds". (CP500:6-13.)

The PCHB also suggested that "insufficient evidence was presented that the activity of spawning and the activity of suction dredging were statistically independent variables" because "some areas are favored by both miners and spawning fish". (Finding ¶ 15;[14] *see also* Conclusion of Law ¶ 11.) No evidence was presented that the miners chose areas *dependent* on there being redds in them. If the entire stream were an area favored by miners and fish, the 1/1,000,000 risk would apply, and if there were some smaller faction of stream favored by both, the risk would increase but remain miniscule unless both miners and fish were both confined in a far smaller space than the evidence

[14] This Finding refers back to Finding ¶ 6, in which the PCHB declared that "both placer miners and fish that are building redds tend to like material that collects on the back side of large boulders. Meyer Testimony; Kitchar Testimony". Mr. Meyer did testify about what fish liked, and claimed that Mr. Kitchar (the only mining expert testifying) had said miners liked the same areas (CP244:5-9); in fact Mr. Kitchar said no such thing. The notion of some sort of preference for the same areas is utterly unsupported in the record; the only evidence is to the contrary, and the Department can easily include a permit condition requiring miners to stay out of such "pocket gravels".

supported. The only *evidence* was some degree of *negative* correlation, *and Dr. Crittenden's estimates found miniscule impacts even assuming zero correlation.*

E. The PCHB Erred in Upholding the Timing Restrictions Notwithstanding Serious Errors in the Model (Issue No. 2(e)).

As set forth in Statement ¶ E, the August 1st through 15th timing restrictions in the rules were based upon a model of fish egg emergence that was severely flawed. Most importantly, it was not based on any data concerning water temperature from Fortune Creek. That data only became available through these proceedings, and when confronted with it, the Department's own witness ultimately acknowledged that there would be "earlier emergence" (CP399:25), perhaps a full thirty days earlier (CP400:4-11 (shifting from 90 day testimony to 60 day testimony)). For this reason, there was no substantial evidence on which any trier of fact could affirm forcing Appellant to wait until August 1st to commence mining.

As to August 15th, the PCHB found it appropriate to close the Creek as early as August 15th because the PCHB regarded it as likely that redds observed in September "were likely constructed in August" (Findings ¶ 7). Given that repeated surveys never found any redds in August in Fortune Creek (*see* A30 (listing survey dates and results); *see* CP188:10-22), this finding is not supported by substantial evidence.

F. The PCHB Erred in Excluding Evidence of No Impact on the Ground That It Related to a Rule Challenge (Issue No. 2(f)).

Perhaps appreciating the force of Dr. Crittenden's reasoning, the PCHB held that Appellant was only allowed to "provide information showing that the requested activity would not harm fish life or habitat *based on the conditions specific to the operation or*

conditions specific to the stream involved. (Conclusion of Law ¶ 9 (emphasis added); *see also* Findings of Fact ¶ 15 n.3; *see also* Conclusion of Law ¶ 11.) It was error to discount evidence of no appreciable impact on the basis that the evidence was not specific enough to Fortune Creek (although specific to the scope of Appellant's mining compared to the size of the Creek); no rule of law permits the Department to impose unreasonable permit conditions merely because the Gold and Fish Pamphlet rules may also be categorically unreasonable.

The PCHB cited RCW 77.55.021, but nothing in the statute imposes a peculiar rule of evidence limiting evidence to "conditions specific to the operation" or "specific to the stream". The only reference to evidence is that "[p]rotection of fish life is the only ground upon which approval of the permit may be denied or conditioned". RCW 77.55.021(3)(a). It defies credulity that the Legislature intended to bar permit applicants from proving that the nature of their activity, even as a general matter, was entirely benign.

The PCHB also rejected as a matter of law the evidence, discussed above, that appellant could mitigate damage to redds. "His argument on stopping the dredge when redds are encountered, however, is another improper attack on WDFW's regulations rather than a justification for relaxed restrictions based upon the specific conditions in Fortune Creek." (Conclusion of Law ¶ 12.) The statutes cannot be construed to make such evidence irrelevant to the lawfulness of permit conditions.

III. THE PCHB AND SUPERIOR COURT ERRED IN PERMITTING THE DEPARTMENT TO CONDITION THE PERMIT BASED ON IMPACTS FROM FUTURE PERMITS, NOT YET APPLIED FOR (Issue No. 3).

The permit writer, Mr. Meyer, took the position that he was lawfully entitled to deny appellant's request for an extension of mining time, because even if the resulting impact were too small to measure, if the condition were allowed, then "every other miner should be allowed to do the same thing" —which might have an impact. (CP255:17-22.) This is fundamentally irrational, in the sense that the Department retains the discretion to condition future permits, if any are even applied for, to address such effects as may arise in the future. For the Department to restrict an applicant based on speculation concerning future applications is manifestly imposing restrictions "out of proportion to the impact of the proposed project" in violation of RCW 77.55.231(1).

Neither the PCHB nor the trial court made any specific ruling on this issue, though Appellant argued to them. The Department and Mr. Meyer in particular, manifestly need guidance on this point to avoid still further legal error in denying permits.

IV. THE PCHB AND TRIAL COURT ERRED BY ALLOWING THE DEPARTMENT TO DISPENSE WITH ANY ESTIMATE OF IMPACTS (Issue No. 4).

The law requires that the Department develop permit conditions in "proportion to the impact of the proposed project." RCW 77.55.231. Obviously, o*ne cannot know if permit conditions are proportional to the impact if one makes no attempt to assess that impact.* Irrespective of the statutory language, the starting point for *any* regulation concerning the impacts of private conduct is a rational assessment of the impacts of such conduct that trigger public concern.

Perhaps recognizing this, the Department has developed a formal Mitigation Policy, which provides:

> "WDFW shall determine impacts and mitigation. WDFW shall determine the project impact, significance of impact, amount of mitigation required and amount of mitigation achieved based on the best available information, including the applicant's plans and specifications. For large projects with potentially significant impacts, this will be based on review of studies approved by WDFW."

(A36, at 4.) The Policy even specifies that "[h]abitat loss and mitigation success shall be measured with the Habitat Evaluation Procedure (HEP) or other method acceptable to WDFW". (A36, at 2.)

The permit writer, Mr. Meyer, made repeated reference to the Policy in explaining why he made the decisions he did, but only to the Policy's suggestion that "[a]voiding the impact altogether by not taking a certain action or parts of an action" was the required option. (Compare A36, at 1 and CP252:20-21 ("My job is to avoid the impact as its [*sic*—should be "the" or "my"] highest priority . . .").) Mr. Meyer's interpretation of the Policy was, in substance, condition the permit to avoid any possibility of any impact regardless of its magnitude. (CP251:7-19; 252:13-255:3.)

Mr. Meyer ignored the Policy's requirement that impact be estimated; asked why he did not prepare such an estimate, Mr. Meyer responded that "[i]t's not my job". (CP251:17; *see also* CP252:19.) Mr. Meyer testified, in substance, that his implementation of the statute was entirely inconsistent with RCW 77.55.231: by insisting that all impacts be entirely mitigated, which might be accomplished by simply forbidding the activity through conditions, one need never address the question of project impact at all. (CP255:22 to 256:3.) From Mr. Meyer's viewpoint, it was an "unreasonable request" to

assess impacts at all "for a single mining dredging permit". (CP258:2-3.) *This Kafkaesque approach to permitting amounts to determining that the smaller the impact, the more it will be forbidden.* Federal endangered species regulators, by contrast, have estimated infinitesimal suction dredging impacts to aid decisionmaking.[15]

The Board upheld the Department's refusal even to estimate impacts on the basis that "the applicant is responsible for providing the information necessary to fully evaluate the impact of extending a duly adopted work window". (Conclusion of Law ¶ 13.) This provision is flatly contrary to the Policy's command to make estimates "based on the best available information" (A36, at 4.) Appellant supplied sufficient information to make a rational calculation: the minimal extent of streambed he proposed to disturb, and when he proposed to disturb it.

It is axiomatic that an agency that fails to consider factors made relevant (and even controlling) by the statutory scheme has acted arbitrarily and capriciously, and its decision must be set aside. The Department has failed "to follow a prescribed procedure" within the meaning of RCW 34.05.570(3)(c), failed to decide "all issues requiring resolution by the agency" within the meaning of RCW 34.05.570(3)(f) and acted in a manner "arbitrary and capricious" within the meaning of RCW 34.05.570(3)(i). Insofar as compliance with the Policy is a legal issue, review on this point is *de novo*. *See City of Ar-*

[15] The record reflects that the federal government has, in connection with federal ESA issues, made estimates of the impact for 18 dredgers on a single Creek, so one can prepare such estimates. (A37.) Appellant does not agree with the accuracy of NMFS' calculation, but offers it to rebut the notion that the Department lacked sufficient evidence to make estimates; the resulting NMFS permit conditions are in any event far less restrictive.

lington, 164 Wn.2d at 779 (challenges under RCW 34.05.570(3)(c) & (d) receive *de novo* review).

V. THE DEPARTMENT'S MITIGATION POLICY IS A RULE THAT MAY NOT LAWFULLY BE APPLIED FOR WANT OF LAWFUL ADOPTION (Issue No. 5).

The Department's Mitigation Policy is a "rule" within the meaning of the Administrative Procedure Act. The Act declares that "rule". . . means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law . . .". RCW 34.05.010(16).

The Policy constitutes a directive of general applicability, for it applies to all applicants seeking permits from the Department (and under other specified circumstances). (A36, at 1.) *Cf. Hillis v. State of Washington*, 131 Wn.2d 373, 399-400, 932 P.2d 139 (1997) ("having to wait for a basin assessment or to fit into one of the [water permit] prior groups" constituted Department "rules" adopted in violation of APA procedural requirements).

At no time did the Department follow the prescribed rulemaking procedures before adopting the Policy. Accordingly, the Administrative Procedure Act requires this Court to set aside the Policy, and because the Department has applied it to the detriment of Appellant, to enjoin its application, enforcement and implementation.

Washington courts have repeatedly provided such relief. For example, in *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640 (1992) (en banc), Ecology had properly adopted a "narrative water quality standard" but then added a numeric overlay without following rulemaking procedures. The Supreme Court had little problem identifying the Department's standard as a "rule": "Because Ecology applies its numeric standard uniformly . . . this standard is 'of general applicability' within the meaning of RCW 34.05.010(15) [now (16)]. Ecology's numeric standard thus constitutes a 'rule' under the APA." *Simpson*, 119 Wn.2d at 648; *see also Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 97 (2000) (en banc).

Under the Administrative Procedure Act, the Court may grant relief upon a determination "that a person seeking judicial relief has been substantially prejudiced by the action complained of". RCW 34.05.570(1)(d). Such substantial prejudice is found where a "rule, or its threatened application, interferes with or threatens to interfere with or impair the legal rights or privileges of the Appellant". *See* RCW 34.05.570(2)(b). Here the Department's conduct, upheld by the Board, has seriously interfered with Appellant's right to mine.

VI. THE DEPARTMENT AND BOARD FAILED TO OBEY THE LEGISLATURE'S COMMAND TO UTILIZE THE LEAST BURDENSOME FORM OF REGULATION (Issue No. 6).

In 1997, the Legislature declared that

> "small scale prospecting and mining: (1) Is an important part of the heritage of the state; (2) provides economic benefits to the state; and (3) can be conducted in a manner that is beneficial to fish habitat and fish propagation. Now, therefore, the legislature declares that small scale prospecting and mining *shall be regulated in the least burdensome manner* that is consistent with the state's fish management

> objectives and the federal endangered species act." (1991 Wash. Laws Chap. 415, § 1; emphasis added.)

As set forth above, those "fish management objectives" require treating fish as a resource, and the Department must additionally use the least restrictive means available to meet its resource conservation objectives.

The record reflects that in numerous other cases, the Department relaxed work windows and offered other miners less restrictive forms of regulation. (*See generally* A26, at 1-2 summarizing dozens of such examples).) Numerous permits issued to other miners simply directed the miners to avoid "pocket gravel deposits" with gravel ½ to 1 ½" in diameter. (*See, e.g.,* A26, at 11, 165.) These miners, like Appellant, proposed no mitigation plans, and their applications were not significantly different than Appellants. (A76; A77; *See* CP276:23 to 277:17; *see also* CP487:15 to 489:25 (Mr. Meyer unable to explain why other permit could have date extended to April 1st); A78 (other permit in close vicinity).) There are such "pockets of fine gravel all throughout the system" (CP282:10-11), and it is obviously more sensible to tell miners to avoid them than it is to to try and map them all out in a context where they are constantly changing.

Mr. Meyer could have inserted such a "pocket gravel" provision in Appellant's permit, but did not. (*See* CP233:5-8.) Other biologists regarded this as an adequate permitting condition. (CP480:19-23.) The only explanation Mr. Meyer could offer for refusing to use such a condition, and extending the work windows thereby, was speculation concerning the possibility of gigantic fish of a size never observed in Fortune Creek, or other events that might cause fish to spawn in larger materials. (CP235:3 to 236:5; *see also* CP244:1-20.) While he did not say so in so many words, his attitude with respect to

Appellant was that because fish can spawn anywhere (not true), mining must be prohibited everywhere (not reasonable).

Other miners were also offered a simple "no net loss" permit condition, but not Appellant. (*E.g.*, A26, at 20; *see also* CP263:7-12.) Mr. Meyer could offer no explanation of why Appellant could not have received such a condition, other that Appellant's objection to the site visit approach. (CP264:7 to 265:3.) Additional possible less restrictive alternatives included regulation of dredge nozzle size (CP390:11-16 (Mr. Harvester testifies "that could have been done"); regulation to avoid pockets of very fine sediment (CP413:22 to 414:8); and regulation to avoid some areas entirely, such as the South Fork (CP480:24 to 481:20). The PCHB did not address whether the Department's conditions might be the "least burdensome" in light of all the alternative permit conditions. The only finding related to the issue was the Board's conclusion that "other miners have been able to obtain extensions based on information specific to the proposed sites" (Conclusion of Law ¶ 16), but this finding is contrary to the evidence just discussed (*see also* A76-78). The Board and the Department have failed entirely to explain why conditions to avoid the sensitive areas are not sufficient, in a context where they are routinely employed, and why Mr. Meyer was required to proceed on a hole-by-hole, site-specific analysis for this applicant.

VII. THE DEPARTMENT'S REGULATORY EFFORTS ARE PREEMPTED BY FEDERAL LAW WHERE, AS HERE, THEY INTERFERE WITH MINING ON FEDERAL MINING CLAIMS (Issue No. 7).

The Department unequivocally took the position that the fact that Appellant proposed to exercise federal rights on federal land was utterly irrelevant to its decisionmak-

ing. (CP415:16 ("we don't look at anything like that").[16] The Board took the position that the question of federal supremacy was "outside the scope of its jurisdiction (Conclusion of Law ¶ 4), but did proceed to render an advisory opinion on the matter (Conclusion of Law ¶ 5.) The Superior Court held that short of an absolute prohibition, federal law imposed no constraints upon the Department. (Opinion at 4.) However, restricting operators on federal mining claims on federal land to two weeks of operation a year materially interferes with such mining in a fashion federal law does not permit.

A. The Nature of Rights in Mining Claims under Federal Law.

Congress has declared "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a(1). The United States Court of Appeals for the Ninth Circuit has confirmed the "all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country," *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

The cornerstone of these policies is the 1872 Mining Act, which, as amended, now declares:

> ". . . all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . ." 30 U.S.C. § 22 (emphasis added)."

[16] The Department is sensitive to issues of federal supremacy when actions by federal agencies on federal lands are involved, and does not require any hydraulic permit *at all* in such circumstances. (*See* A51; CP172:3-14.)

Because the lands where Appellant sought to mine are lands belonging to the United States, there is a general federal mandate for this portion of the Creek to be "free and open" for both "occupation and purchase[17]".

Appellant was primarily seeking to exercise his rights by assignment to mine inside two federally-registered mining claims on lands belonging to the United States: the "Good Fortune Association" and "Crazy Eight Association" claims. (*See generally* A42-45 (location notices and federal registry information; *see also* CP131:17 to (testimony of Appellant).) Exhibit 47 consists of a map overlaying the two claims onto Fortune Creek, from which one can see that a large portion of the Creek is covered. (*See* A47; CP132:24 to 133:2.) While the application sought permission to operate as high as the headwaters of the Creek, above these claims (CP152:8-15), in fact Appellant had never gotten anywhere near that far up the Creek (*see* CP149:9-22),

Until 1955, Congress even granted miners the *exclusive* right of possession of their mining claims:

> "The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain . . . so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26; *see also* 30 U.S.C. § 35 (same rules for placer claims)."

This exclusive right is also reflected in Washington State law. RCW 78.08.030.

Based upon these and other statutes, federal courts have recognized that miners such as the defendant hold federally-established rights in their mining claims, which con-

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[17] Congress later suspended the right to purchase.

stitute private "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 395 (1909); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (1910) (miners hold a "distinct but qualified property right" with "possessory title"). Congress eventually made the U.S. Forest Service a co-tenant of mining claims with respect to "surface resources" for claims located after 1955, but only for the limited time prior to patenting, and not to the extent it would interfere with mineral development. The Multiple Use Act confirms a federal policy of facilitating mining of mineral deposits, and subordinating all other uses, including the protection of other resources:

> "Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That *any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . .*" 30 U.S.C. § 612(b) (emphasis added)."

While the U.S. Forest Service is no longer restricted from entering claims, and may "manage other surface resources thereof," such regulation is flatly prohibited if it "materially interferes" with mining and activities "reasonably incident thereto". *See also United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999) ("the Forest Service may regulate use of National Forest Lands by holders of unpatented mining claims, like the Shumways, but only to the extent that the regulations are "reasonable" and do not

impermissibly encroach on legitimate uses incident to mining and mill site claims").[18]

It was for some time questionable whether states could regulate mining on federal mining claims on federal land at all, but there is no doubt that the scope of state regulatory authority on mining cannot exceed the very limited authority given to even federal agencies.

B. Law Concerning the Scope of Federal Preemption.

The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. The Courts have long recognized that the important federal interests in mineral development created by federal law sharply limit the scope of state regulation of mineral development. As the U.S. Supreme Court long ago declared in discussing mining interests, any "right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws." *Butte City Water Co. v. Baker*, 196 U.S. 119, 125 (1905).

The Supreme Court has outlined several species of federal preemption, species that are growing very rapidly as demonstrated in the very recent case of *Arizona v. United States*, No. 11-182 (June 25, 2012). This case concerns the preemption principle that

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[18] These restrictions are akin to a large body of common law establishing that those enjoying the dominant mineral estate (here Appellant) may proceed to develop the rights and need only avoid unnecessary disturbance of the subservient surface estate (the Service). *See generally United States v. Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570, *12-*16, No. 80-129 (W.D. Pa. Dec. 16, 1980) (applying doctrine in Allegany National Forest).

"where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," it is preempted. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592 (1980); *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-74 (2000) (preemption where federal law "provisions be refused their natural effect"; citation omitted); *Perez v. Campbell*, 402 U.S. 637 (1971) ("any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause" regardless of the underlying purpose of its enactors).

Consistent with the Supremacy Clause, the Washington Supreme Court has indicated that it follows this same principle in determining federal preemption. *Alverado v. Washington Public Power Supply System*, 111 Wn.2d 434, 431 (1988) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) for the proposition that Washington law is preempted "when it would hinder accomplishment of the full purposes and objectives of the federal regulations").

The federal courts have repeatedly employed federal preemption doctrines to strike down state regulation that interferes with mining on federal lands. Thus in *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), the U.S. Court of Appeals for the Eighth Circuit struck down a "county ordinance prohibiting the issuance of any new or amended permits for surface metal mining within the Spearfish Canyon Area". *Id.* at 1006. And in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), the United States Court of Appeals for the Ninth Circuit declared that: "The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judg-

ment for that of Congress." Federal agencies have rendered similar decisions; when the federal government has determined that federal land is best suited for mineral development purposes, mining may not be interfered with by fish structures intended to conserve fish. *See generally In re Shoemaker*, 110 I.B.L.A. 39 (July 13, 1989).

The Supreme Court of Colorado and the Oregon Court of Appeals have reached similar conclusions. *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (Colo. 1982) (county's refusal to issue drilling permit overturned); *Elliott v. Oregon Int'l Mining Co.*, 654 P.2d 663 (1982) (county ordinances prohibiting surface mining in some areas preempted).

The Department and Board placed great emphasis upon the *Granite Rock* case, in which the U.S. Supreme Court refused to strike down on its face a demand by the State of California that miners obtain a coastal zone development permit. The Board offered its advisory opinion that *Granite Rock* interpreted preemption in this context to forbid only a complete state prohibition on mining. (Conclusion of Law ¶ 5.)

That is not the holding of *Granite Rock*. The Supreme Court repeatedly emphasized that "Granite Rock does not argue that the Coastal Commission has placed any particular conditions on the issuance of a permit that conflict with federal statutes or regulations". *Id.* at 579. Rather, Granite Rock refused even to apply for a permit, arguing that *any* set of permit conditions would conflict with federal law. *Id.* at 580. The Coastal Commission, for its part, urged the Supreme Court that there was "no reason to find that the [Coastal Commission] will apply [its] regulations so as to deprive [Granite Rock] of its rights under the Mining Act". *Id.* at 586.

The Court noted that "one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable" (*id.* at 587), but declared that "[i]n the present posture of this litigation, the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement" (*id.* at 589). Through this language, it is obvious that the Court was referring to regulations beyond a blanket prohibition on mining.

The *Granite Rock* Court concluded by emphasizing the narrow nature of its holding:

> ". . . we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme."

(*Id.* at 594.) This case presents the issue not addressed in *Granite Rock*: whether a specific permit condition, namely restricting mining to two weeks a year, does in fact interfere with the purposes of federal law.

C. How the Department Materially Interfered with Prospecting, Mining and Processing Operations.

As set forth above, federal law declares that the mineral lands should remain "open" and forbids "material interference" with mining operation on account of the desire to manage other "surface resources," which include fish. *Shoemaker*, 110 I.B.L.A. at 48-50 ("fish and fish habitats are within the intended scope of 'other surface resources' that BLM has authority to manage under 30 U.S.C. § 612(b)"). "Material interference" should have the commonsense, dictionary meaning of the terms. *Shoemaker*, 110

I.B.L.A. at 54 (reviewing dictionary meanings and concluding that the question is whether an agency regulation to protect surface resources will "substantially hinder, impede, or clash with appellant's mining operations").

The question of "material interference" with mining should also be evaluated from several important perspectives.

First, Congressional intent is clear that notwithstanding agency authority to regulate for fish, the mining use was to be the dominant use to which other considerations had to yield. *Shoemaker*, 110 I.B.L.A. at 50-53 (agency regulation cannot impair the miner's "first and full right to use the surface and surface resources").

Second, Appellant has not challenged numerous provisions of the State's elaborate regulatory system that includes such things as regulations limiting the scope of streambed alteration; and the regulations limiting mining of sensitive areas; regulations requiring them to relocate operations if they "observe or encounter redds, or actively spawning fish" (WAC 220-110-202(22)).

Third, the question of material interference should also be evaluated in the context of the availability of a wide range of less restrictive regulations, discussed above, that the Department could have, but did not employ. These less restrictive alternatives would adequately vindicate the fish protection goals of the Department, with substantially less material conflict with federal law.

While Appellant regards it as obvious that shutting down mining for all but two weeks a year is a "material interference" in mining, Appellant also presented the testimony of Thomas Kitchar, who is an expert in gold mining and the regulation of small

scale gold mining. (CP103:7 to 105:5.) Mr. Kitchar explained the process of suction dredge mining in detail, emphasizing that most of the recoverable gold presently available is in the waterway itself. (CP112:14.) While it is possible to mine out of the water in "bench deposits," much larger deposits are required to enable the method to be economically viable to mine. (CP112:22-133:6.) Appellant explained that this out-of-the-water activity, called "high banking" was "secondary" in his case, with his "primary activity . . . sampling with a suction dredge, locating the best locations of the gold". (CP117:8-10.[19])

Mining is "a business, like any other business". (CP119:23-24.) Miners have "a substantial investment in equipment, time and energy, and to only be able to practice that trade two weeks out of the year is prohibitive". (CP120:1-4.) Mr. Kitchar concluded that a two-week window "almost makes all mining almost just impossible or worthless". (CP120:10-11.)

The Department offered two responses to material interference. The first was that Appellant was still allowed to operate outside the water, but the Department did not dispute that the commercially significant quantities of gold were only in the water, and a prohibition of in-water mining is a closure of the valuable portions of the mining claim.

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[19] As a practical matter, Appellant would only switch over to high banking if "suddenly I'm finding rough gold that has some host rock on each little piece, [so] I know I'm very close to the lode source". (CP117:17-21; *see also* CP168:8-17.) The Department has emphasized that it approved an expanded high-banking season for Appellant, but seems unable to recognize that the two methods have to be used flexibly in common. (*See* CP155:25 to 156:3.) At one point during the process, Appellant sent an e-mail that described his intentions as "necessitating use of a highbanker more so rather than dredging" (R4), but his interlocutory intentions do not resolve the question of material interference.

The Department also argued that the interference was Appellant's fault for not cooperating with its proposal to scope out each hole in advance. Such a process is unnecessary in light of the benign nature of the mining, unreasonable given the constantly changing nature of the stream, and not commercially practicable. Miners must move from spot to spot, sampling, and might recover only $120-150 worth of gold in this process. (CP114:8-13.) The sampling process is an "iterative, intuitive process", where future mining locations are a function of information gathered from the sampling. (CP168:25 to 169:2; CP116-117.) One simply cannot predict where the information will lead. (*See generally* CP162-164 (Appellant outlines some considerations in selecting locations).) And even if Appellant could specify a handful of hole locations, they could not actually be inspected until the snow melted in June; the Department would then have forty-five days to respond (CP243:11), and the summer dredging season would be essentially gone.

The bottom of the stream is constantly changing, such that it makes no sense to try and identify particular areas where mining is permissible. (CP114-116; *see also* CP131:11-13 (testimony of Appellant).) As Appellant explained, you can plan "a general location, but a specific location, no". (CP131:15-16.[20])

Ironically, the permit writer, Mr. Meyer, took a similar position with respect to identifying fish habitat: he could identify areas where fish are "likely" to spawn, but fish would often surprise him by spawning in unlikely areas. (CP213:2-9.) He took the posi-

[20] In addition to the general impracticability or identifying specific locations in advance, during the process of the permit application, Petitioner was also incapacitated and could not have participated in any site visit. (CP148:1-11.)

tion that the Department could not survey the mining claims and simply identify areas on a map where it would be appropriate to mine. (CP214:25-215:5.) While it is possible that there are very specific areas in the Fortune Creek watershed where Mr. Meyer might have specifically authorized Appellant to dig a hole (CP471:1-2 (Mr. Meyer says "some sections" within the first 2.5 miles might have been approved")), such a regulatory approach is entirely inconsistent with the federal design for mineral development.

The Department offered testimony that many miners specified precisely where they wanted to mine in their applications (CP364:3-4 (applications are "*often* very specific"), but confronted on cross-examination with copies of the applications, he said he didn't really know whether Appellant's application was less specific than the others (CP402:5). In fact, the Department commonly approves applications to work in very large areas, including entire mining claims. (*See* A26, at 11, 23; CP403:13 to 404:19.) Indeed, Mr. Meyer approved mining in an entire 1.5 mile stretch of the Cle Elum river *immediately downstream from Appellant*. (A78.)

The notion of identifying areas on a hole-by-hole basis where mining might be appropriate through a site visit is fundamentally illusory. In addition to representing a staggering waste of resources, implementing the hydraulic permitting statute on a hole-by-hole such a basis would *itself* materially interfere with mining. Significantly, Congress specifically considered and rejected such a scheme for Forest Service regulations, requiring a simpler scheme that merely provided notice to the Service because a more

cumbersome system would seriously interfere with federal minerals policy.[21] It is difficult to conceive of how the mineral resources of the United States could be developed at all if each exploratory sampling hole required advance approval, in a context where one could only move from hole to hole after summer-by-summer approvals over years or decades.

VIII. THE HYDRAULIC PERMITTING STATUTE IS UNCONSTITIONALLY VAGUE ON ITS FACE AND AS APPLIED TO APPELLANT, AND THE DEPARTMENT HAS UNCONSTITUTIONALLY DISCRIMINATED AGAINST APPELLANT (Issue No. 8).

Under the applicable law and regulations, the Department and its employees lack any discernable guidance from the statute or regulations as to the proper scope of permit application review. A core due process and equal protection problem arises because standardless official action gives rise to a serious risk of arbitrary and discriminatory

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[21] The Forest Service initially promulgated its 36 C.F.R. Part 228 (then Part 252) as a proposed rule in 1973. 38 Fed. Reg. 34,817 (Dec. 19, 1973). This provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Forest Service mining regulations which would entangle small-scale miners in NEPA-style planning exercises. *See generally Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs,* 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, under an approach that required advance approval of small scale operations, it would often be impossible to comply with planning processes consistent with the "length of the field season" (*id.* at 37); the industry noted, however, "no objection to a notification procedure which would alert the Forest Service to the expected activities" (*id.* at 41).

During the hearings, the Forest Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of Forest Service Chief); *see also* proposed 36 C.F.R. § 252.7, 38 Fed. Reg. at 34,818 (with certain exceptions, "[n]o operations shall be conducted unless they are in accordance with an approved plan of operations . . ."). Thereafter, the Forest Service conformed to Congressional intent and amended the proposed regulations to add a "notice of intent provision" which would suffice for small-scale operations. 39 Fed. Reg. 26,038, 26,039 (July 16, 1974) (proposed 36 C.F.R. § 252.4). The final rule was adopted August 28, 1974. 39 Fed. Reg. 31,317 (Aug. 28, 1974).

conduct. Unfortunately, in this case, there is substantial evidence, discussed below, that Appellant was the victim of just such behavior on the part of the Department.

A. The Statutory Phrase "Protection of Fish Life" Provides No Guidance to the Department's Permit Reviewers.

As set forth above, the Department's permit writers (and rule developers) have no specific guidance on the question whether individual fish eggs or larger fish resources are to be protected, what constitutes a "reasonable" permit condition, when permit conditions are "out of proportion to the impact of the proposed project," and what constitutes "adequate" mitigation. Extensive testimony before the Board confirmed the utterly standardless approach of the permit writer. (CP257:1 to 260:24; *see also* CP405:3-10.) To make matters worse, the Department has provided no specific findings concerning its refusal to extend the in-water work times in violation of RCW 77.55.021(8). The ultimate criterion seemed, under cross-examination, to consist of little more than the "comfort level" of biologists. (CP405:4-5.)

Courts in other states have found such a standardless approach to be constitutionally infirm. As the Vermont Supreme Court explained in *In re Appeal of JAM Golf, LLC*, 969 A.3d 47, 52 (Vt. 2008),

> "'Protect' . . . cannot be the equivalent of total preservation, because the same regulations allow for development, which, by necessity, must reduce wildlife habitat and affect scenic views. How much less than total preservation qualifies as sufficient protection, however, we cannot know, because the regulations do not say. Even had the trial court endeavored to apply a 'reasonableness' measure to this term, § 26.151 would be unworkable. The language of the regulations offers no guidance as to what degree of preservation short of destruction is acceptable under the statute. From a regulatory standpoint, therefore, § 26.151(g) provides no guidance as to what may be fairly expected from landowners who own a parcel containing wildlife habitat or scenic views—both common situations in Ver-

> mont—and who wish to develop their property into a PRD. Such standardless discretion violates property owners' due process rights."

As set forth in below, Washington law is evolving on this point, but there are serious constitutional issues posed by the application of the statute on its face and in the circumstances of this case.

The problem is not just that the hydraulic permit statute alone contemplates some level of non-protection of fish, while commanding "protection of fish life". The entire body of statutes, including the Department's broad general authority to enact rules "specifying the times when the taking of . . . fish . . . is lawful or unlawful" (RCW 77.12.047(1)(a)) must be considered as a whole, but the permit writers have no guidance on how to balance resource impacts arising from killing fish directly for sport, consumption or profit; killing them incidental to other economic activities; and protecting them in some way.

While there may have been a time when the Department's representatives took a practical, common-sense approach to assessing "protection of fish life," the position now articulated by Mr. Meyer is both radical and not uniformly imposed by the Department. As noted above, other permit writers could and did offer less restrictive alternatives, such as simply avoiding the gravel where fish spawn.

B. The Washington Constitution Requires Greater Guidance for Permit Reviewers.

It has long been the rule in Washington that "legislative power may not be delegated to an administrative agency without the prescription of reasonable standards". *Rody v. Hollis*, 81 Wn. 88, 91 (1972). Appellant acknowledges that an older Supreme

Court case has upheld the hydraulic permitting provisions against one species of constitutional attack. In *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894 (1979), the State pursued a criminal prosecution against Crown Zellerbach for failure to comply with conditions in a hydraulic permit. Crown Zellerbach challenged the statute as not "meet[ing] the criteria for lawful delegation" of legislative power. *Id.* at 900.

The Supreme Court found that the general statutory standard for "protection of fish life" was adequate to avoid a delegation challenge, "particularly in light of our stated view that environmental factors are not readily subject to standardization or quantification". *Id.* The Supreme Court cited the then-recent case of *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59 (1978), for this proposition. *See Polygon*, 90 Wn.2d at 69 ("environmental factors, *especially those involving visual considerations*, are not readily subject to standardization or quantification"; emphasis added). *Polygon* had rejected a claim that building permits could not be rejected on the basis of SEPA review, but recognized that very general standards involved the "potential for abuse" and therefore "require[d] a higher degree of judicial scrutiny than is normally appropriate for administrative action". *Polygon*, 90 Wn.2d at 69 (applying "clearly erroneous" standard).

More recent cases have recognized that the premise of *Crown Zellerbach* and *Polygon—that no standards can be supplied in the environmental context*—was simply erroneous. For example, in *Anderson v. City of Issaquah*, 70 Wn. App. 64 (1993), the Court of Appeals overturned the denial of building permit on the basis that the design was not "harmonious" or "compatible". *Id.* at 75-76. The court noted that even "aesthetic considerations are not impossible to define in a code or ordinance," citing exam-

ples. *Id.* at 78. Decades of evolving environmental regulation have made it eminently possible for the Legislature or Department to provide more precise standards for fish protection, especially in a context where staggering sums are routinely expended to assess the status and health of fish populations.

The Department has now demonstrated through its radical expansion of the hydraulic permitting act that the act is indeed standardless, and this Court should distinguish *Crown Zellerbach* and would hold the statute unconstitutional as applied to Appellant. While the *Crown Zellerbach* court had found that adequate procedural safeguards were available through judicial review under the administrative procedures act, *Crown Zellerbach*, 92 Wn.2d at 901, the *Anderson* court explained that "the appellate process is to no avail where the statute at issue contains no ascertainable standards . . . ," *Anderson*, 70 Wn. App. at 81.

The *Crown Zellerbach* court had also relied, in part, upon the notion that "appropriate standardized technical provisions, with minor variation, generally remain the same for hydraulic projects" and "standard provisions were adopted by policy of the directors". *Id.* at 898. Here, of course, there are generalized in-water work time rules, but this case does not involve standard provisions or generalized rules; it involves the degree to which citizens, here exercising federal property rights, will be permitted to exercise their right under the rules to *deviate* from the standard provisions.

This case thus arises in an entirely different factual context than *Crown Zellerbach*, in which the Department lacks any standards or guidance as to how to determine who is permitted a variance from the in-water work times, and who is not. There are no

standards at all other than "protection of fish life". This means that any particular permit writer can grant or deny the permit for essentially any reason or no reason, since any entry into the water when fish are present can be seen as posing risk to fish life.

The *Crown Zellerbach* case should not be read as holding that the "protection of fish life" standard is adequate for all constitutional purposes. In particular, as applied in these circumstances, the standard denied Appellant due process of law and equal protection of the laws. Other miners, not saddled with the arbitrary circumstance of having Messrs. Harvester and Meyer review their permit applications, were routinely granted extensions of the in-water work times to work on their mining claims. Putting Mr. Harvester in authority over Appellant's permit application, after the personal animosity and reprimand discussed above, provided free reign for abuse of the standardless process. Particularly given the spectacularly feeble justification for the permit restrictions, the inference is plain that Appellant was singled out and denied a variance from the in-water work rules, and in substance punished for his (and his wife's) involvement in the regulatory process.

C. Appellant Was Not Treated As Similarly Situated Miners Were.

As set forth in Statement ¶ F, there was considerable evidence that Appellant was not treated the same as similarly situated miners. The PCHB found no substance to the issue because Mr. Harvester, who was involved in the incident with Appellant's wife (and was the supervisor of Mr. Meyer) denied it. (Finding ¶ 16.). The PCHB credited Mr. Harvester's testimony that he did not "process or issue" the permit personally. (*Id.*) Whatever "process" may mean, the record reflects Mr. Harvester's personal involvement,

and there is ultimately no credible reason why a very large number of other miners who received variances and less restrictive regulations (A26), even immediately downstream.

The PCHB's finding that other miners had received more favorable treatment because they had provided more information about their plans than Appellant (Finding ¶ 17), but as noted above, cross-examination revealed this claim to lack merit (CP402:5). Above all else, no one could explain why Mr. Meyer granted the miners immediately downstream a window from July 16th through August 31st for a nonspecific area "beginning ~200 meters below the confluence of the Cle Elum River with Camp Creek and continuing upstream for approximately 1.5 miles to Fortune Creek" (A78). As far as the record shows, only Appellant has suffered Mr. Meyer's hole-by-hole demand.

IX. EVEN IF THE STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED, AT THE LEAST THE BURDEN OF PROOF SHOULD SHIFT TO THE DEPARTMENT TO JUSTIFY THE PERMIT RESTRICTIONS (Issue No. 9).

In analogous circumstances, Washington courts have held that, at the least, a standardless statute shifts the burden of proof to the permit writer to justify the restrictions. *See, e.g., Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219 (1981) ("when a city council exercises adjudicatory administrative discretion in denying a permit under a section of a building code that contains general as compared to specific standards, a presumption of reasonableness does not attach to its decision, and the council's decision in denying the building permit in the absence of written findings and conclusions must be deemed to be arbitrary and capricious").

The PCHB held that Appellant had the burden of proof pursuant to WAC 371-08-485(3) (Conclusion of Law ¶ 1), but neither the PCHB nor the Superior Court addressed

the foregoing authority or even the issues implicated by the standardless nature of the law; this Court can and should follow *Pentagram Corp.*

X. APPELLANT'S INABILITY TO MEET WITH THE DEPARTMENT TO PROVIDE MORE SPECIFIC LOCATIONS FOR MINING SHOULD NOT FORECLOSE HIS RIGHT TO LAWFUL DECISIONMAKING (Issue No. 10).

The Superior Court declared that "the most critical fact in these proceedings" was "Appellant's refusal[22] to meet and discuss his specific site information," and even that "it is very likely the department would have granted the Appellant permission to mine exactly where he wanted to mine". (CP777.) The Superior Court cited no evidence to support this conclusion, but it presumably relates to the fact that *after* making the permit decision, Mr. Meyer wrote a letter in which he stated that if additional information were provided, he "may" be able to extend the work window. (R6.) Given that he let the neighboring miners excavate anywhere in a 1.5 mile stretch immediately downstream, any conclusion that his decision here was explained by a lack of information is not supported by substantial evidence.

More importantly, there is no requirement in law or rule for such a site visit. Nor does one make practical sense in the context of this activity since there was no dispute that conditions on the stream changed constantly, making it impossible to identify any particular area as permanently suitable for mining. (*See also* PCHB Finding of Fact ¶ 10.) As set forth above, requiring site visits and advance approval before each excavation would cripple mineral development, and makes no sense in light of the non-existent impacts.

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[22] In fact, a "severely degenerated left hip joint" prevented the visit. (CP148:1-11.)

In addition, as set forth above, Mr. Meyer's view of the law was so far from correct that Mr. Meyer could not possibly make a lawful permit decision even if he had more factual information. As the Supreme Court long ago explained, "an order may not stand if the agency has misconceived the law". *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Appellants are entitled to a permit decision correctly made, on the basis of the information available to the Department. *See also* A36, at 4 (Department is to use "best available information").

Conclusion

The trial court should be reversed, and the Department instructed to allow Appellant to work from June through September, because his activities realistically provide no need for "protection of fish life" beyond the extensive protections that are not challenged herein.

DATED: May 3, 2013.

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No. 314090

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

BRUCE M. BEATTY,

Appellant,

and

WASHINGTON FISH and WILDLIFE COMMISSION, WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, AND POLLUTION CONTROL HEARINGS BOARD,

Respondents.

CERTIFICATE OF SERVICE

Pursuant to RAP 10.5(b), I certify that on the 3rd day of May 2013, I caused to be served a copy of BRUCE M. BEATTY'S AMENDED OPENING BRIEF on the parties below in the following manner:

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