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

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Appellant,

v.

PUGET SOUND HARVESTERS ASSOCIATION,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case is a rule challenge filed by the Puget Sound Harvesters Association (PSHA) pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. PSHA challenged as arbitrary and capricious the 2008 Puget Sound commercial salmon fishing regulations adopted by the Washington Department of Fish and Wildlife (WDFW), because they did not allocate to gillnet fishers 50 percent of the projected available catch of chum salmon. The trial court ruled that the regulations were arbitrary and capricious because, without justification in the agency record, they appeared designed to allocate 30 percent of the catch to gillnet fishers and 70 percent to purse seine fishers. However, the agency record demonstrates the regulations were not intended to achieve any particular catch allocation, were consistent with WDFW's broad discretion to manage the fishery, and were the result of an extensive public process and careful consideration of PSHA's objections to the proposed rules.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Thurston County Superior Court erred by substituting its judgment for WDFW's and declaring the 2008 versions of WAC 220-47-311 and 220-47-411 invalid as arbitrary and capricious.

2. The superior court erred in awarding PSHA \$14,267.20 in attorney fees and costs pursuant to RCW 4.84.350, the Equal Access to Justice Act.

The superior court made several findings of fact and conclusions of law that contributed to its erroneous order. These are set forth below.

3. Finding of Fact 7 states as follows:

Although historically the two gear types have generally divided the fish more or less equally, in the early 1990's the percentage of catch for gillnetters declined precipitously. In an effort to support the gillnet fleet, WDFW increased their opportunity to catch fish. As a result, the percentage of the overall non-treaty catch for the gillnetters climbed up to about 30%. It still remained short of the historical 50% average that was in place prior to the 1990's.

The superior court erred in finding that, historically, gillnet and purse seine gear groups generally divided the fish more or less equally. The court also erred in finding that the precipitous decline in the gillnet percentage of catch occurred in the early 1990s.

4. Finding of Fact 10 states as follows:

WDFW has the ability to forecast with reasonable accuracy the percentage allocation for each gear group based on time on the water or "opportunity." That is because it has detailed records of the amount of catch by each gear group for many years. Although WDFW is considering various factors required by law, such as conservation of target species, minimization of by-catch, monitoring and sampling of all fisheries, and fully utilizing the non-Indian allowable catch, WDFW generally aims for a percentage of allocation of roughly 70/30 in favor of the purse seiners.

The superior court erred in finding that WDFW has the ability to accurately forecast the percentage of allocation for each gear group based on time on the water or "opportunity." The court also erred in finding that

WDFW generally aims for a percentage of allocation of roughly 70/30 in favor of the purse seiners.

5. Finding of Fact 11 states as follows:

WDFW defends these numbers by comparing them to the roughly 5% gillnetter catch allocation of the early 1990's. PSHA, however, looks back at the period from 1973-1990 during which the gear groups were [more] or less equal in their shares of the total catch. They argue that that a 70/30 allocation is not "equitable" and therefore should not be permitted by law.

The superior court erred in finding that the gillnetters' allocation constituted five percent of the catch in the early 1990s.

6. Conclusion of Law 4 states as follows:

WDFW has amply demonstrated a rational basis for allocating based on opportunity, not catch. However, it is evident that WDFW has ample catch history to enable it to predict an approximate share of the catch based on opportunity. The allocations in this fishery appear calculated to reach an approximate percentage for the two competing fisheries of 30% for the gillnetters and 70% for the purse seiners.

The superior court erred in holding that WDFW has an ample catch history to enable it to predict an approximate share of the catch based on opportunity. The court also erred in finding that the allocations in the fishery were calculated to reach an approximate percentage of 30 percent for the gillnetters and 70 percent for the purse seiners.

7. Conclusion of Law 5 states as follows:

Nowhere in the record is there an explanation of the rational basis for this result.

The superior court erred in holding that the record does not explain the basis for the allocation embodied in the challenged fishing regulations.

8. Conclusion of Law 6 states as follows:

The allocation for the 2008 non-tribal commercial salmon fishing for gillnets and purse seines in Areas 10 and 11 were willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action and therefore arbitrary and capricious.

The superior court erred in ruling that the allocation for gillnets and purse seines embodied in the 2008 non-tribal commercial salmon fishing seasons were arbitrary and capricious.

9. Conclusion of Law 7 states: “WDFW’s actions were not substantially justified and an award of attorney fees and costs to PSHA is not unjust.” The superior court erred in finding WDFW’s actions were not substantially justified and in awarding PSHA attorney fees and costs.

B. Issues Relating to Assignments of Error

1. Did the Thurston County Superior Court erroneously conclude that the South Puget Sound (Areas 10 & 11) commercial fishing schedule contained in WAC 220-47-311 and 220-47-411 was invalid as arbitrary and capricious because it was designed to achieve a 70 percent purse seine to 30 percent gillnet catch allocation, when the record is clear that WDFW structured the season to allocate *opportunity* rather than catch, did not intend any particular catch outcome, and otherwise

explained the basis for WDFW's allocation? [Assignments of Error 1, 3, 4, 5, 6, 7 and 8]

2. Did the superior court erroneously award attorney fees when it erred in declaring WAC 220-47-311 and 220-47-411 invalid as arbitrary and capricious? Did the superior court err in determining that WDFW's actions were not substantially justified under the Equal Access to Justice Act? [Assignments of Error 2 and 9]

III. STATEMENT OF THE CASE

A. Procedural History

WDFW adopted regulations setting the 2008 fishing season for commercial salmon on July 8, 2008. Administrative Record (AR) 24-36. Included within this filing were amendments to WAC 220-47-311 and WAC 220-47-411 which, respectively, set open periods for commercial purse seine and gillnet salmon fishing in Puget Sound. AR 31-32, 34-36.

PSHA, representing commercial gillnet fishers, and the Purse Seine Vessel Owners Association (PSVOA), representing commercial purse seine fishers, filed competing lawsuits in Thurston County Superior Court seeking judicial review of the regulations pursuant to the APA. PSHA's petition claimed that the schedule for Areas 10 & 11 was arbitrary and capricious because it would reduce the gillnet fleet's share of catch "from historic and recent levels." CP 7-25. PSVOA's petition claimed that the regulations for Areas 10 & 11, and regulations for Areas 8 (Skagit

Bay), 8A (Everett Bay), and 12 & 12B (Hood Canal), were arbitrary and capricious and violated principles of due process because they provided gillnet fishers with greater fishing opportunity than purse seiners, without justification. CP 253-59. On September 4, 2008, pursuant to the parties' stipulation, the superior court consolidated both actions under a single cause number, 08-2-01744-1, before Judge Chris Wickham. CP 34-40.

PSHA and PSVOA both moved for preliminary injunctions. CP 43, 58. Following briefing and oral argument on October 3, 2008, Judge Wickham denied both motions via Order dated October 30, 2008. CP 156. In addressing the likelihood that Petitioners would succeed on the merits, Judge Wickham observed,

[T]his court cannot say there is no rational basis for [the schedule adopted by WDFW], particularly when viewed in light of all of the Department's objectives.

....
... [B]ecause of the rationale presented in the Concise Explanatory Statement (AR 11-23) and the testimony of Mr. Pattillo, this court finds that the Department has shown a rational basis for the 2008 rules sufficient to prevent PSHA from showing a likelihood of success on the merits.

CP 161-62.¹ The court similarly concluded that PSVOA could not show a likelihood of success on the merits. CP 162.

PSVOA stipulated to dismissal of its claims. CP 123. Judge Wickham conducted the trial concerning PSHA's petition on January 27, 2009. On June 2, 2009, Judge Wickham entered a Final Order and

¹ The Concise Explanatory Statement (AR 11-23) is attached as Appendix 1.

Judgment. CP 232.² Although Judge Wickham found an adequate basis in the record to support WDFW's decision to allocate fishing opportunity rather than catch, he also concluded that "[t]he allocations in this fishery appear calculated to reach an approximate percentage of catch for the two competing fisheries of 30% for the gillnetters and 70% for the purse seiners. . . . Nowhere in the record is there an explanation of the rational basis for this result." CP 237. On that basis, Judge Wickham declared the 2008 versions of WAC 220-47-311 and 220-47-411 invalid as arbitrary and capricious.³ CP 238-39. WDFW filed its notice of appeal with this Court on June 16, 2009. CP 240.

B. Factual Background

WDFW regulates commercial salmon fishing in Puget Sound by gear type and by geographic area. The various geographic areas are described in WDFW's 2008 Puget Sound Commercial Salmon Regulations Pamphlet, AR 315-61, 337-39 (Management Areas). This case concerns primarily the schedule for commercial gillnet and purse seine fishing for chum salmon in Areas 10 & 11 (South Puget Sound).

² A copy of the Final Order and Judgment is attached as Appendix 2.

³ By the time the superior court issued its Final Order and Judgment, the 2008 commercial salmon fishing season was over. While the matter was technically moot, the superior court decided the case anyway, because the court concluded that (1) it poses issues of a public nature; (2) an authoritative determination is desirable to provide future guidance to WDFW; and (3) the issue is likely to recur. CP 236. *See Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). Given that PSHA challenged the 2007 Puget Sound commercial fishing regulations on similar grounds, and may do so again absent clarification from this Court, no party urged dismissal of this case as moot.

There are significant differences between gillnet and purse seine fishing. For example, gillnetters use relatively small boats with one or two crew members and typically catch a few hundred fish per night. Purse seiners, in contrast, rely on larger boats with five or six crew, and can catch several thousand fish per day. Fish and Wildlife Comm'n Tr. 12/8/07, at 30⁴; AR 232 (photos). While purse seiners have greater fishing power, there are significantly fewer licensed purse seiners than gillnetters. FWC Tr. 12/8/07, at 30. AR 229.

WDFW develops its regulations for non-tribal salmon fishing seasons in Puget Sound through a multi-step process that includes discussion with Indian treaty tribes (Tribes) and commercial gear groups. CP 74.⁵ Pursuant to federal court orders, WDFW and the Tribes must reach agreement on allocation of harvestable salmon between tribal and non-tribal fisheries. *See generally United States v. Washington*, 384

⁴ Transcripts of the Fish and Wildlife Commission's December 8, 2007, and March 8, 2008, meetings were submitted to the superior court as part of the agency record. Hereafter, such transcripts are referred to as FWC Tr. [date]. CP 73-82 is the Declaration of Patrick L. Pattillo.

⁵ RCW 34.05.562(1) authorizes courts to receive evidence in addition to that contained in the agency record, if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding material facts in rulemaking. Thus, the court may consider information from agency staff that explains the material in the record or provides background about the agency's decision. *See Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 475, 832 P.2d 1310 (1992) ("additional evidence of an agency's reasoning and the background materials relied upon may be presented on review"); *Purse Seine Vessel Owners Ass'n v. State*, 92 Wn. App. 381, 388, 966 P.2d 928 (1998) (court relied on affidavit of WDFW biologist). In support of its brief on the merits in superior court, WDFW submitted the Declaration of Patrick L. Pattillo as well as the transcript of Mr. Pattillo's testimony during the preliminary injunction hearing. Although there is ample support in the agency record for the regulations adopted by WDFW, this Court may consider Mr. Pattillo's declaration and testimony as part of the superior court record. *Waste Management, Inc. v. Washington Util. and Transp. Comm'n*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994).

F. Supp. 312, 420 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). These agreements are developed each spring as part of the “North of Falcon” planning process. CP 74, ¶ 3. This process includes negotiations among representatives of WDFW, tribal and federal management agencies, the commercial and recreational fishing industries, and concerned citizens. CP 74-75, ¶ 4. WDFW and the Tribes negotiate which days of the week will be open to fishing to ensure a fair harvest opportunity for tribal and non-tribal fleets. Once these opened days are determined, changes can only be made by agreement between WDFW and the Tribes. CP 75, ¶ 5. In allocating the non-tribal share, WDFW tries to secure consensus among interested parties, but ultimately makes a policy judgment on how best to meet its management objectives in a manner consistent with the tribal/state agreement.

Certain general principles guide the negotiation of fishing seasons in Puget Sound. To avoid conflicts and aid in conservation, WDFW and the Tribes generally open different days of the week to their fishing fleets. AR 202; FWC Tr. 12/8/07, at 50, ll. 8-22. Similarly, WDFW generally opens different days of the week to the different non-tribal gear groups. When fishing is closed to a particular gear group in one area of Puget Sound, it is likely open in another area. Moreover, WDFW commonly opens more than one area to a commercial gear group at any given time. This helps prevent overharvest and enables the fishers to choose where to focus their efforts. Thus, changes to the fishing schedule for one area will

likely impact the schedule in one or more other Puget Sound areas. CP 75, ¶¶ 5-6.

In setting commercial fishing seasons for Puget Sound, including Areas 10 & 11, WDFW has never allocated a fixed or guaranteed share of catch to commercial gillnet or purse seine fleets. AR 17. Rather, WDFW has always allocated between commercial gear groups on the basis of “harvest opportunity” (i.e., fishing time). AR 13. Until 2003, WDFW scheduled seasons with an equal number of days for purse seine and gillnet fishers. *Id.* Averaging all years between 1973 and 2007, the gillnet fleet has caught 39 percent of the non-tribal share and the purse seine fleet has caught 61 percent. *See* AR 175, 249.⁶ Over this period, however, the proportional catches of purse seine and gillnet fleets have varied widely, including significant variations from year-to-year. AR 13, 175.

In the years leading up to 2003, the market price of chum salmon declined significantly. This price drop contributed to a decline in the level of participation by commercial fishers in general, and by the gillnet fleet to an even greater degree. The gillnet percentage of the catch in Areas 10 & 11 fell dramatically from a high of 79 percent in 1979 to a low of just 5 percent in 2002. AR 13, 175. In 2003, in response to this situation, and at the gillnetters’ request, WDFW departed from its long-standing approach of providing equal numbers of fishing days for gear groups, and began scheduling more fishing days for the gillnet fleet than for the purse seine

⁶ AR 266 calculates the average gillnet share during this period as 40 percent, when certain years are excluded due to low catches or no gillnet markets.

fleet. AR 13-14, 458-60; FWC Tr. 12/8/07, at 41-43. That year, WDFW's pre-season regulations for Areas 10 & 11 scheduled three gillnet fishing days for each purse seine fishing day. AR 23, 463. WDFW did not intend this change to be permanent. Rather, it intended to monitor the situation and employ adaptive management as the situation unfolded over time. FWC Tr. 12/8/07, at 42, ll. 10-22.

In the years following 2003, as the poor market conditions improved and the gillnet industry has recovered, WDFW has slowly reduced the gillnet fleet's opportunity ratio advantage. *See* AR 14, 463. During 2004 to 2007, despite a general trend back toward a more equal allocation of fishing days between groups, the gillnet catch in Areas 10 & 11 steadily increased. AR 460. In 2007, WDFW scheduled just under twice the number of fishing days for gillnets than for purse seines in Areas 10 & 11. That year, the gillnetters actually fished Areas 10 & 11 on five days, compared to four days for the purse seine fleet, yet the gillnet market share rose to about 31 percent of the harvestable chum for those areas. AR 14, 459-60, 463.⁷

In a separate, earlier suit, PSHA challenged the 2007 regulations for Areas 10 & 11. Thurston County Superior Court Judge Chris Wickham presided over that case as well. In an oral ruling on May 2, 2008, and a written order dated June 2, 2008, Judge Wickham declared the

⁷ The ratio of days actually fished by gillnets relative to purse seines during 2004 to 2007 was considerably lower than the ratio of days scheduled in the pre-season regulations, due to in-season adjustments (i.e., in-season closures intended to ensure that total non-tribal share is not exceeded). AR 463-64.

2007 versions of WAC 220-47-311 and 220-47-411 invalid as arbitrary and capricious. AR 56-62, 77, 87. Specifically, the court found that WDFW relied solely on a 17 percent benchmark harvest outcome as WDFW's justification for reducing from 2006 to 2007 the ratio of gillnet to purse seine fishing time.⁸ Because Judge Wickham found no basis in the record for using this benchmark, he invalidated the 2007 regulations as arbitrary and capricious. AR 60-62.

In contrast, WDFW did not rely on any benchmark in developing the 2008 Puget Sound commercial fishing regulations at issue in the instant litigation. In consultation with the nine-member citizens' Fish and Wildlife Commission, WDFW identified several objectives to guide its development of the 2008 regulations. Those objectives, in order of priority from most to least important, were as follows:

1. Ensure the conservation of target species—meet spawning goals;
2. Minimize catch or impacts on incidental species (by-catch);
3. Monitor and sample all fisheries;
4. Maintain the economic well-being and stability of the fishing industry;
5. Fully utilize the non-Indian allowable catch; and,
6. Fairly allocate harvest opportunity between gear at groups.

AR 13.

WDFW filed a Pre-proposal Statement of Inquiry with the Code Reviser on January 21, 2008, providing notice to the public that WDFW may engage in rulemaking with respect to the 2008 fishing season.

⁸ That year, WDFW used the benchmark based on the gillnetters' proportion of the commercial non-tribal share of chum during 1996-2000. AR 458.

AR 55. WDFW filed its proposed rules (CR-102) on May 21, 2008. AR 40-52. It conducted a rulemaking hearing on June 23-24 (AR 63-65), and adopted its final rules on July 8, 2008 (AR 24-36).

The schedule adopted by WDFW was codified in WAC 220-47-311 and -411, and published in the 2008 Puget Sound Commercial Salmon Regulations pamphlet. AR 315-61. A summary of the schedule is set forth below:

Week	Day	Date	Gear Group	Hours Open
Week 43	Sun	10/19	Gillnet	15
	Mon	10/20	Purse Seine	11
	Wed	10/22	Gillnet	8
Week 44	Mon	10/27	Purse Seine	11
	Tue	10/28	Gillnet	15
	Wed	10/29	Purse Seine	11
	Thu	10/30	Gillnet	16
Week 45	Sun	11/2	Gillnet	15
	Mon	11/3	Purse Seine	11
	Wed	11/5	Gillnet	8

Week	Day	Date	Gear Group	Hours Open
Week 46	Sun	11/9	Gillnet	16
	Mon	11/10	Purse Seine	11
	Wed	11/12	Purse Seine	11
	Thu	11/13	Gillnet	8
Week 47	Sun	11/16	Gillnet	16
	Mon	11/17	Purse Seine	11
	Wed	11/19	Gillnet	8
Week 48	Sun	11/23	Gillnet	17
	Mon	11/24	Purse Seine	11
	Wed	11/26	Gillnet	8

See AR 324.

The regulations provided for 12 days of gillnet fishing and 8 days of purse seine fishing in Areas 10 & 11. AR 324. The regulations included Wednesday or Thursday “late week” gillnet openings to provide for catch at a time during the week that is convenient for sale to weekend local “niche” markets, as requested by the gillnetters. AR 19. Gillnets were provided with Thursday rather than Wednesday openings for weeks

44 and 46, to allow for purse seine openings on Wednesdays in those two weeks. (WDFW needed to schedule purse seine fisheries on those Wednesdays for data recovery purposes.) The regulations provided gillnets with “first starts” (i.e., the opportunity to have their fishery open on the first day of a fishing week) for every week except week 44. In that week, it provided the purse seine fleet with a Monday first start. However, the schedule allowed the gillnetters to fish for twice the time (16 rather than 8 hours) on the Thursday in week 44. As part of the process intended to reach consensus among industry representatives, WDFW assured the parties that it would not assume this schedule beyond 2008, and committed to meet with industry representatives after the season to evaluate how it went. CP 76-77, ¶¶ 11-15; AR 23, 257-61, 277-83, 284-87, 288-94, 295-300, 302-04.⁹ As noted, there was no benchmark, quota, or trigger assumed in this schedule as there was in 2007. Thus, each gear group was free to catch as many fish as it could, subject only to the conservation limit associated with the total non-tribal share.

⁹ The evolution of the schedule ultimately adopted by WDFW involved a great deal of give and take intended to reach consensus. The cited portions of the record include meeting notes and correspondence that generally reflect the evolution of the schedule that WDFW adopted. Patrick L. Pattillo, WDFW’s Salmon Policy Coordinator, described this evolution during his testimony to the court at the October 3, 2008, hearing on Petitioners’ preliminary injunction motions. RP (Aug. 3, 2008) at 59-74.

IV. ARGUMENT

A. Standard of Review

Judicial review of agency action is governed by the APA. On review of agency action, the court of appeals “sits in the same position as the superior court,” applying the standards of review set forth in the APA to record before the agency. *Tapper v. Empl. Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Purse Seine Vessel Owners Ass’n v. State*, 92 Wn. App. 381, 388, 966 P.2d 928 (1998), *review denied*, 137 Wn.2d 1030, 1284 [Table] (1999). In a rulemaking challenge, “the agency’s rulemaking file serves as the record.” However, the file “need not be the exclusive basis for agency action on that rule.” RCW 34.05.370(4); *Washington Indep. Tel. Ass’n v. Washington Util. and Transp. Comm’n*, 148 Wn.2d 887, 906, 64 P.3d 606, 616 (2003). The reviewing court must consider the rulemaking file “and the agency’s explanations for adopting the rule.” *Id.* If the superior court takes evidence to supplement the record, the court of appeals reviews the additional evidence before the superior court. *Waste Management, Inc. v. Washington Util. and Transp. Comm’n*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994); *Purse Seine Vessel Owners Ass’n*, 92 Wn. App. at 388.

A party challenging an agency rule pursuant to the APA has the burden to prove that it is invalid. RCW 34.05.570(1)(a); *Ass’n of Wash. Bus. v. Dep’t of Rev.*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). A court may declare a rule invalid only if it determines that the rule: (1) violates constitutional provisions; (2) exceeds the statutory authority of the agency;

(3) was adopted without compliance to statutory rule-making procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c); *Ass'n of Wash. Bus.*, 155 Wn.2d at 437. The sole issue presented by this case is whether WAC 220-47-311 and 220-47-411 are invalid as arbitrary and capricious.

The arbitrary and capricious test is a very narrow standard that imposes a heavy burden on the party asserting it. *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). An action is “arbitrary and capricious” if it is “willful and unreasoning and taken without regard to the attending facts and circumstances.” *Washington Indep. Tel. Ass'n*, 148 Wn.2d at 905. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002). Under the arbitrary and capricious test, a court will not set aside a discretionary decision of an agency absent a clear showing of abuse. *ARCO Prods. Co. v. Wasington. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 888 P.2d 728 (1995). Moreover, “[i]n reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1); *Rios*, 145 Wn.2d at 501-02 n.12. Indeed, the court’s job is to review the record to determine if the result was reached through a process of reason, “not whether the result was itself reasonable in the judgment of the court.” *Rios*, 145 Wn.2d at 501.

Finally, the court must accord particular deference when an agency's decision is based heavily on factual matters, especially those which are complex or involve agency technical expertise. *Id.* at 501-02 n.12.

B. WDFW's Adoption of WAC 220-47-311 and WAC 220-47-411 Was Not Arbitrary and Capricious

There are four primary reasons why WDFW's adoption of WAC 220-47-311 and 220-47-411 was not arbitrary and capricious. First, the legislature gave WDFW broad discretion to manage the fisheries, including the discretion to specify the time, place and manner of fishing. Second, no law entitles the gillnetters to a specific or fixed share of the available fish. Third WDFW's regulations were not calculated or intended to result in any particular gillnet/purse seine catch ratio. Finally, the agency record fully supports WDFW's decision on how to structure the fishery.

1. The legislature granted WDFW broad discretion to manage the fisheries

Let us at the outset be reminded that in the regulation of and restrictions upon the taking of the fish from the waters of the state, the state is but dealing with its own property over which its control is as absolute as any other owner has over his property.

McMillan v. Sims, 132 Wash. 265, 268, 231 P. 943 (1925).

In Washington, fish are property of the State which the legislature has placed under WDFW's care and control. *Washington Kelpers Ass'n v.*

State, 81 Wn.2d 410, 415-16, 502 P.2d 1170 (1972), *cert. denied*, 411 U.S. 982 (1973); *Creveling v. Dep't of Fish and Wildlife*, 142 Wn. App. 827, 831, 177 P.3d 136 (2008). Specifically, RCW 77.04.012 provides, in pertinent part:

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.

The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreation and commercial fishing in this state.

The commission may authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of the resources.

RCW 77.04.012. With respect to commercial salmon fishing in particular, RCW 77.50.120 provides, in part:

It is the intent of the legislature to ensure that a sustainable level of salmon is made available for harvest for commercial fishers in the state. Maintaining consistent harvest levels has become increasingly difficult with the listing of salmon species under the federal endangered species act. Without a stable level of harvest, fishers cannot develop niche markets that maximize the economic value of the harvest.

RCW 77.12.047 authorizes WDFW to adopt rules specifying the time, place and manner in which it is lawful to take fish, and the equipment and methods that may be used:

- (1) The commission may adopt, amend, or repeal rules as follows:
 - (a) Specifying the times when the taking of wildlife, fish, or shellfish is lawful or unlawful.
 - (b) Specifying the areas and waters in which the taking and possession of wildlife, fish or shellfish is lawful or unlawful.
 - (c) Specifying and defining the gear, appliances or other equipment and methods that may be used to take wildlife, fish, or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed.

RCW 77.12.047.¹⁰ It is unlawful to commercially fish at a time or location not authorized by the Commission by rule, or in a manner that otherwise does not conform to any other restrictions adopted by the Commission by rule. RCW 77.15.550.

Courts have consistently held that these statutes give WDFW broad discretion to manage the fisheries. *See, e.g., Purse Seine Vessel Owners Ass'n*, 92 Wn. App. at 391-92 (WDFW has “broad regulatory powers” and “considerable discretion” to manage fish in the state, including “exercising ‘ultimate control as to whether any fish whatsoever may be taken’”), *citing Northwest Gillnetters Ass'n v. Sandison*, 95 Wn.2d 638, 643, 628 P.2d 800 (1981). WDFW has the authority to regulate the type of gear and times at which it can be employed in fishing specific

¹⁰ RCW 77.12.047 authorizes the Fish and Wildlife Commission to adopt rules. Pursuant to RCW 77.04.020, the Commission delegated rulemaking authority to the Director in its North of Falcon Policy. AR 223-25.

varieties and runs of fish and to discriminate among classes of users by gear and purpose. *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 946, 603 P.2d 819 (1979).¹¹

Pursuant to this broad delegation of authority, WDFW exercised its discretion and adopted regulations setting the time, place and manner in which Puget Sound salmon may be commercially fished. The superior court made no finding that WDFW failed to exercise its discretion, or that it exercised it in a manner that did not comply with the above statutes. Rather, the superior court invalidated the regulations based on the judge's own belief that the season structure would result in an unfair proportion of catch for the gillnetters. The superior court failed to give any deference to WDFW, despite the technical nature of the decision, and it inappropriately substituted its judgment for the agency's. *See Rios*, 145 Wn.2d at 501.

2. No law entitles gillnetters to a specific or fixed share of the catch

Commercial gillnet fishers, unlike Indian Treaty Tribes¹², have no right to a fixed share of available fish. *Purse Seine Vessel Owners Ass'n*

¹¹ In *Northwest Gillnetters Ass'n*, the court construed a prior version of RCW 77.04.012 that limited WDFW's regulation to measures needed for conservation purposes only. While PSHA here challenges DFW's refusal to guarantee it a specific portion of the catch, the plaintiffs in *Northwest Gillnetters Ass'n* challenged WDFW's very authority to allocate between fishing groups. The court upheld the challenged regulation, broadly construing WDFW's authority to regulate for conservation purposes as including the ability to discriminate among classes of users by gear and purpose. *Id.* at 641-42. In 1983, the legislature amended the statute to separate the goal of conservation from other goals in the statute. Laws of 1983, 1st Ex. Sess., ch. 46, § 5. That statute is now codified as RCW 77.04.012.

¹² In *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 687-90 (9th Cir. 1975) (*Boldt Decision*), the court held that the right of taking fish in common with other people secured to certain Indian Tribes in treaties

v. State, 92 Wn. App. at 393.¹³ Nothing in the statutory framework governing WDFW's management of the fisheries requires it to allocate any particular share of the catch to the gillnetters. Because the State owns the fish, "the individual non-treaty fisherman has no property rights that guarantee him a share of the runs." *Puget Sound Gillnetters Ass'n*, 92 Wn.2d at 948 n.5. *Accord, Marincovich v. Tarabochia*, 114 Wn.2d 271, 276, 787 P.2d 562 (1990) (fish in state waters belong to all the people in their collective, sovereign capacity); *Purse Seine Vessel Owners Ass'n*, 92 Wn. App. at 393.

Because gillnet fishers have no right to a set share of the catch, and because the statutes give WDFW broad authority to manage the fishery, there was no basis for the trial court's conclusion that the 2008 regulations were arbitrary and capricious.

negotiated by the United States, entitled the Tribes to a fair and equitable share of harvestable fish. As part of its equitable remedy, the court set the tribal share at 50 percent, in part based on the Tribes' historic dependence on fishing for food and commerce. *Id.* at 343-44.

¹³ In *Purse Seine Vessel Owners Association v. State*, PSVOA challenged WDFW's decision to close a non-treaty herring fishery for conservation reasons, while allowing a treaty fishery to proceed. PSVOA's argument that non-treaty fishers were entitled to allocation of 50 percent of the non-treaty fish was similar to PSHA's argument in this case. This Court rejected the argument, holding that "harvesting fish is a privilege bestowed by the state, that is, the 'citizen's right to take fish is purely derivative of the state's power to regulate rights in fish.'" *Id.* at 393. While the Court suggested in dictum that "non-treaty fishers may be entitled to their fair share of harvestable fish," the Court also cautioned that "a court should be leery of trying to substitute its judgment for that of the agency empowered to control one of the state's precious marine resources."

3. WDFW's regulations were not calculated or intended to result in any particular catch ratio

The superior court agreed that WDFW “has amply demonstrated a rational basis for allocating based on opportunity, not catch.” CP 237, ¶ 4. Nonetheless, the court concluded that “WDFW has ample catch history to enable it to predict an approximate share of the catch based on opportunity” and that “the allocations in this fishery appear calculated to reach an approximate percentage of catch for the two competing fisheries of 30% for the gillnetters and 70% for the purse seiners.” *Id.* The court ultimately declared the regulations invalid because the court concluded, “[n]owhere in the record is there an explanation for the rational basis for this result.” *Id.* ¶ 5.

The superior court's reasoning contains two inherent errors. First, there is nothing in the record supporting the court's conclusion that WDFW intended a 30/70 split, nor any other particular catch “result.” Second, given all the variables that affect catch rates, WDFW did not have the data necessary to confidently predict what catch would result from any given allocation of fishing time. Each of these are discussed below.

The agency record is clear that WDFW's 2008 regulations were designed to allocate fishing opportunity rather than catch. The Concise Explanatory Statement (CES) prepared by WDFW pursuant to RCW 34.05.325(6)(a), discusses this issue throughout the document. WDFW's reasoning is summarized in the introduction:

For the 2008 season, WDFW has proposed and is adopting rules that allocate *fishing opportunity* between the two

groups, rather than capping the total catch of either group. WDFW believes this is the most equitable means of regulating this fishery given the historic variations in catch, differences in fishing efficiency between the two groups, economics of the fishery and market forces, and fluctuations in the fishing effort and fleet sizes between the two groups.

AR 11 (*italics added*), *see* AR 13. The key difference between allocating catch and allocating opportunity is that allocating catch assures each gear group a specific outcome, whereas allocating opportunity does not. Given the many variables outside of WDFW's control that affect how many fish any gear group catches in a season, WDFW did not believe it had the staff and financial resources to collect and monitor the data needed to impose a specific catch share. AR 17. WDFW was willing to allocate catch only if the industry groups reached agreement on catch share outcome. Gillnet and purse seine representatives were unable to reach agreement. Consequently, WDFW decided to allocate opportunity rather than catch. AR 23.

Moreover, WDFW has never allocated on the basis of catch for the Areas 10 & 11 chum fishery or for any other Puget Sound commercial salmon fishery. AR 17. As indicated above, for the entire history of this fishery from the 1970s up until 2003, WDFW allocated on the basis of equal time for purse seine and gillnet fisheries. Only then, in the face of extraordinary market conditions that threatened the very existence of the

gillnet fishing industry, did WDFW deviate from equal time and allocate more fishing days to the gillnetters.¹⁴

The second error in the superior court's reasoning is that WDFW itself concluded that it could not reliably predict the outcome of the 2008 fishery, given the many factors beyond WDFW's control that determine how many fish either gear group would catch. It was precisely for this reason that WDFW decided that allocating fishing opportunity was the fairest way to allocate the resource.

WDFW believes that a fair balance of opportunity for commercial salmon fishers can be achieved without specifying catch allocation by defining seasons (by gears, species and location) that provide equitable opportunity to catch salmon in the various fisheries throughout Puget Sound. . . .

. . . Achieving a fair allocation of the harvest itself in this fishery by WDFW mandate is not realistic, given the number of and variability within factors that are relevant to such an allocation. These include the number of active fishing licenses in both fleets, the economic investment of individual vessel owners in both fleets, the fishing effort made by individual fishers in both fleets, and the numbers of individuals employed by each fleet. WDFW does not have access to accurate information regarding all of these factors, and it does not have the resources to manage this fishery or others around Puget Sound on such an intensive basis. Therefore, unless the gear groups can agree on an allocation of fish between themselves, WDFW will continue to regulate to achieve an equitable allocation of fishing opportunity rather than proportion of the harvestable catch.

¹⁴ The gillnetters' proportion of the catch steadily increased after 2003. WDFW explained that increased gillnet participation in the fishery due to higher fish prices was likely a determining factor increasing gillnet catch after 2003. AR 14. For the reasons described below, there is no direct correlation between the number of fishing days and catch outcomes.

AR 17. The record specifically says that WDFW cannot accurately predict the catch outcomes resulting from the 2008 season because “[the fishery] is characterized by a high degree of uncertainty and variability with respect to gillnet and purse seine catch rates.” AR 16. Indeed, WDFW cannot even accurately predict the run size of fish; it is “always different from the preseason forecast.” FWC Tr. 12/8/07, at 32 ll. 6-11. Thus, the superior court’s findings that WDFW’s regulations were intended to achieve a particular catch outcome is simply wrong.

4. The agency’s record fully supports WDFW’s decision on how to structure the fishing season

WDFW made an exhaustive effort to understand and evaluate industry concerns in the development of its regulations. As part of this process, it carefully considered PSHA’s concerns and arguments in favor of an allocation of a guaranteed share of the catch and/or more fishing time. In its CES, WDFW detailed the reasons for its decision. Additional information in the rulemaking files supports the statements and conclusions in the CES, as explained below. The superior court impermissibly substituted its judgment for the agency’s.

a. WDFW engaged in an extensive public process

WDFW developed its 2008 Puget Sound commercial fishing regulations through an exhaustive process that far surpassed the ordinary rulemaking requirements of the Administrative Procedure Act. WDFW

provided two briefings to the Fish and Wildlife Commission at which it discussed the allocation issues at length and sought Commission input.¹⁵ WDFW also held at least eight meetings with industry representatives,¹⁶ conducted a rulemaking hearing,¹⁷ and provided the opportunity to submit written comments.¹⁸

One of WDFW's objectives throughout its 2008 process was to achieve an equitable balance of harvest opportunity via a process in which all opinions could be aired. AR 10. Although fair allocation was only one (and in fact, the lowest priority) of the six management criteria relied upon by WDFW, it was a central consideration during the season setting process, given the litigation over the 2007 regulations. AR 13. Therefore, WDFW sought and obtained approval from the Fish and Wildlife Commission to utilize a special public negotiation process designed to reach inter-gear agreement for commercial fishing regulations prior to convening the regular, annual North of Falcon public process. AR 11. As part of this special process, WDFW convened and provided a neutral facilitator at three meetings with industry representatives at which both long-term and short-term proposals were discussed and considered.

AR 12, 242-48, 257-61, 278-83. In addition to WDFW staff, two members of the Fish and Wildlife Commission participated in the

¹⁵ AR 190-203, 207-40; and December 8, 2007, and March 7, 2008, Transcripts.

¹⁶ CP 75 ¶ 7; AR 242-304.

¹⁷ AR 63-65.

¹⁸ AR 66-76.

meetings with industry representatives during the North of Falcon process.

AR 12.

During the negotiations, representatives of the gillnet fleet advocated regulations that allocated specific numbers of fish between gear groups, while representatives of the purse seine industry, in contrast, advocated a return to an equal number of fishing days for both groups, as was in place prior to 2003. WDFW indicated that it preferred to allocate on the basis of fishing opportunity rather than catch, but that it would consider a catch-based allocation if the industry groups could agree on one. Because industry representatives were not able to reach such agreement, negotiations shifted to trying to develop an agreed allocation based on fishing time. CP 75 ¶¶ 8-10; AR 11, 23, 291-93.

Between April 1 and April 10, gillnet, purse seine, and WDFW representatives exchanged proposals and counter proposals in attempts to reach consensus on a schedule for the 2008 season. While these meetings enhanced WDFW's understanding of the issues, they did not result in agreement. AR 12. The schedule ultimately adopted reflected WDFW's best efforts to facilitate a consensus between industry representatives that met WDFW's management objectives.

WDFW went to great effort to listen to all concerns and arguments regarding allocation of the fisheries in Areas 10 and 11 and to carefully consider all perspectives before exercising its discretion. The extensive collaborative process that WDFW used to develop its regulations, with substantial input from all segments of the affected fishing industry and

other interested parties, belies any claim that WDFW's action was "willful and unreasoning" and that it did not consider the facts and circumstances. *See Washington Indep. Tel. Ass'n v. Washington Util. and Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606, 616 (2003).

b. WDFW considered numerous factors in reaching its decision, and thoroughly explained its reasoning

WDFW provided a detailed explanation of the basis for its rules in the CES. AR 9-23. This document describes the history of rule development, the fishery management objectives guiding WDFW's decision and the supporting statutory authority, the history of the fishery, and WDFW's response to public comments, including the specific comments PSHA submitted and later relied upon to support its rule challenge. Additional information in the agency rulemaking record supports the statements and conclusions in the CES, as explained below.

PSHA argued during the rulemaking and to the superior court that given historic catch levels, an equitable allocation would guarantee the gillnetters 50 percent of the catch. PSHA relied on the period of 1973 to 1993, during which the "average" allocation was near 50/50. AR 75-76; CP 138, 167, 236 ¶ 11. A careful review of the numbers reveals a different story, however. PSHA omits catch results for 1994 through 2002, during which WDFW also allocated on the basis of equal fishing days. When those additional nine years are included, the average gillnet catch for 1973 to 2002 is 42 percent. And when the calculation includes

all years from 1973 through 2007, the average gillnet catch is 39 percent. AR 266.

In any event, WDFW concluded that for a variety of reasons, long-term historical statistical averages of gillnet season results are not particularly informative with respect to how much fishing time to allocate in any given year. The CES indicates that catch shares for gillnet and purse seine fleets have “varied greatly” over the period of 1973 to 2007. AR 13. Between 1973 and 2002, during which WDFW scheduled equal days for each gear group, the gillnet share of the total catch per season ranged from 79 percent (1979) to just 5 percent (2002). There were also significant variations from year to year during this period. AR 175.¹⁹ Given the variable nature of catch over time, it would be difficult for WDFW to select an appropriate or “fair” percentage of catch for the gillnet fleet, and even more difficult to accurately predict in advance the number of fishing days needed to achieve that outcome.

The CES explains that even if allocation of the catch was the best way to regulate the Areas 10 and 11 chum fishery, “a 50-50 split is not justified by reference to the 1973-1993 time period, because underlying conditions have changed significantly since that time.” AR 21. For example, fleet size affects the number of fish that a gear group catches, and the number of Puget Sound non-treaty commercial gillnet and purse

¹⁹ For example, the gillnetters caught approximately 64 percent in 1973 and 13 percent in 1974, 79 percent in 1979 and 53 percent in 1980, 57 percent in 1983 and 49 percent in 1984, 42 percent in 1993 and 31 percent in 1994, 16 percent in 1996 and 26 percent in 1997. AR 175.

seine licenses has varied significantly over the last 30 years. AR 13, 229. The size of both fleets has declined for a variety of reasons, including reductions in non-tribal allocations due to Indian treaty rights, economic conditions, and licensed “buy-back” programs designed to protect treaty fishing rights and to maintain the economic vitality of the industry by reducing fleet size. AR 18. However, the number of gillnet vessels has declined much more than the number of purse seine vessels. AR 18, 22, *see* AR 229.²⁰ Based on its analysis of the data, WDFW concluded that “long-term historical information offers limited utility for guiding management decisions for contemporary Puget Sound salmon fisheries. Fisheries data as recent as the period immediately before the 2001 season do not appear to be comparable with current data given changes in fleet size and gear composition.” AR 18.

In addition to the licensed number of vessels, another factor that WDFW considered in developing its regulations was variability in the fishing effort of individual fishers in each fleet. AR 11, 17. At the time WDFW adopts its preseason regulations, it can only speculate how many gillnetters or purse seiners will actually fish in any given area. A license to fish is not a mandate, and some licensed fishers may choose not to fish

²⁰ For the ten year period between 1973 and 1982, during which gillnets typically caught more fish than purse seines, there were 1540 gillnet licenses available to participate in the Puget Sound commercial salmon fishery, nearly eight times the 204 gillnet licenses participating today. AR 18, 229, 266. The number of purse seine licenses during that period averaged 360, which is more than four times the current level of about 81. For the period of 1973-2001, an average of 3.8 gillnet vessels were licensed for every purse seine vessel, whereas today, there are only 2.5 licensed gillnet vessels for every purse seine vessel.

on any given day, or to fish in a different area. WDFW's 2008 Puget Sound commercial fishing regulations opened multiple areas at the same time in order to avoid conflicts and over-harvest. *See* AR 323-24 (opening Areas 7 & 7A, 7B, 8A & 8D, 10 & 11, 12 & 12B during weeks 43 through 46 of the season). Thus, WDFW concluded that in order to develop catch shares for Areas 10 & 11, it would need to consider fisheries in the other areas as well. As noted, however, WDFW concluded that it did not have resources to do so. AR 17.

WDFW considered variations in market circumstances in developing its 2008 regulations. The gillnet share of the catch steadily increased from its low in 2002 to 31 percent in 2007. AR 227. WDFW noted that this increase corresponded with a dramatic increase in the price per pound for chum salmon. AR 14. "Prices paid to gillnet and purse seine fishers for Area 10 & 11 chum salmon catches have increased from lows of 10-15 cents per pound (when markets for catches could be found) in the 2001-2003 seasons to high levels approaching \$1.00 per pound in most recent seasons." AR 19. WDFW predicted a continued improvement in market conditions for chum in 2008. AR 14, 15, 22. Thus, the reasons justifying the original deviation from an allocation based on equal time have dissipated, and WDFW has gradually backed off the 3:1 ratio of fishing days favoring the gillnet fleet.

WDFW considered the relative economic investments of purse seine versus gillnet fishing boats. AR 17. Gillnet operators use relatively small boats with small crews, sometimes as few as one or two people.

Purse seine operators, in contrast, utilize larger boats and typically rely on a crew of five or six. FWC Tr. 12/8/07, at 30. Thus, while purse seines have significantly greater catching power, they also require significantly more start-up and operational investment, and need to catch more fish simply to cover their costs.

WDFW also considered the difference in gillnet and purse seine catch efficiency (i.e., the number of fish that purse seine or gillnet fleets can catch in any given period). PSHA argued that gillnetters should be allocated 50 percent of the catch because purse seines are more efficient. AR 75-76. As described in the CES, however, WDFW concluded that simply because purse seines are more catch efficient, is not a basis to allocate gillnets 50 percent of the fish. AR 14-16. Catch efficiencies, like season outcomes, are variable. For example, gillnet catch efficiency doubled between 2006 and 2007 from more than about 500 chum fish per hour to over 1200 chum per hour. AR 15. WDFW carefully considered PSHA's catch efficiency arguments and concluded that they did not justify allocating 50 percent of the catch in Areas 10 & 11 to gillnetters. AR 14-16. WDFW decided to deal with catch rates through a conservative approach to in-season adjustments. AR 15-16. In other words, WDFW would shut down the fishery if necessary to ensure commercial fleets would not exceed the non-tribal conservation limit.

The CES reflects that WDFW considered numerous other factors in setting the 2008 fishing regulations, but which WDFW concluded did not provide a basis for allocating any particular amount of catch, let alone

50 percent, to the gillnetters. These factors include net depth (AR 15), by-catch (AR 19-20), licensing and marketing fees (AR 18-19), perceptions regarding the advantage of “first starts” (being the first gear group to fish in any given week) (AR 16), and local niche marketing (AR 19, 324).²¹ Given the complexities of the fisheries and breath of topics discussed in the CES and reflected in the record, it is hard to imagine an agency undertaking a more careful analysis of the facts and circumstances in making a decision.

c. The superior court impermissibly substituted its judgment for that of the agency

In evaluating agency conduct under the arbitrary and capricious standard, the court’s role is to review the record and the agency’s explanation and to determine whether the agency exercised its discretion in accordance with the law; it is not the court’s job to second guess the agency’s judgment. *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501-02 n.12, 39 P.3d 961 (2002); RCW 34.05.574(1). The CES and supporting materials in the record demonstrate that WDFW carefully considered all relevant factors in deciding how to allocate fishing opportunity between gillnet and purse seine fishers. The superior court discussed none of these factors in its decision. In fact, the court largely ignored the record and appears to have acted on its own notions of fairness. In declaring WAC 220-47-311 and 220-47-411 arbitrary and

²¹ WDFW considered local niche marketing in the development of the 2008 rules, and included Wednesday and Thursday gillnet openings to provide for catch at a time during the week that is convenient for sale to weekend local markets. AR 19, 324.

capricious, the superior court inappropriately substituted its judgment for the agency's despite this Court's clear caution against doing so in *Purse Seine Vessel Owners Ass'n v. State*, 92 Wn. App. 381, 394, 966 P.2d 928 (1998), *review denied*, 137 Wn.2d 1030 (1999); *Accord, Rios*, 145 Wn.2d at 501-02.

C. The Superior Court Abused its Discretion in Awarding Attorney Fees and Costs

1. Should WDFW prevail on appeal, PSHA is not entitled to fees and costs under the Equal Access to Justice Act.

The superior court awarded PSHA \$14,267.20 in attorney fees and costs pursuant to RCW 4.84.350, the Equal Access to Justice Act (EAJA). CP 238. The EAJA authorizes a court to award "a qualified party that prevails in a judicial review of agency action" up to \$25,000 in reasonable attorney fees and other expenses, "unless the court finds that the agency action was substantially justified or that circumstances make the award unjust." RCW 4.84.350(1). This Court reviews an award of fees and costs under the EAJA for abuse of discretion. *Silverstreak, Inc. v. Washington Dep't of Labor and Indus.*, 159 Wn.2d 868, 902, 154 P.3d 891 (2007). Because the superior court erred in declaring WAC 220-47-311 and 220-47-411 invalid as arbitrary and capricious, it likewise abused its discretion in finding that PSHA is a prevailing party entitled to attorney fees. In any event, for the reasons described below, WDFW's adoption of the 2008 commercial salmon fishing regulations for Areas 10 & 11 was

substantially justified under the EAJA, and the superior court abused its discretion in finding otherwise and awarding PSHA its fees and costs.

2. WDFW's Actions Were Substantially Justified

The Washington Legislature adopted the EAJA to provide attorney fees to smaller parties who must defend against “unreasonable agency action.” *Silverstreak*, 159 Wn.2d at 902. The EAJA, like any other statute allowing attorney fees against the State, should be strictly construed since it constitutes a waiver of sovereign immunity and is counter to the American rule requiring all parties to pay their own costs. *See Rettkowski v. Dep't of Ecology*, 76 Wn. App 384, 389, 885 P.2d 852 (1994) (construing RCW 90.14.190), *aff'd in part, rev'd in part on other grounds*, 128 Wn.2d 508, 910 P.2d 462 (1996). The award of attorney fees to a prevailing party is therefore not automatic. Instead, a prevailing party is awarded attorney fees only when a government agency's actions were not substantially justified. *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1087, 256 U.S. App. D.C. 395 (D.C. Cir. 1986).²² “Substantially justified” means “justified to a degree that would satisfy a reasonable person,” and requires that the state show its position “had a reasonable basis in law and fact.” *Silverstreak*, 159 Wn.2d at 892.

²² Washington's EAJA is very similar to a federal Act codified at 28 U.S.C. § 2412(d)(1)(A). Because the State EAJA largely mirrors the federal Act, Washington courts have looked to federal decisions to determine how to apply the State Act. *Plum Creek Timber Co. v. Washington Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595, 993 P.2d 287 (2000).

Whether an agency's position had a reasonable basis in law and in fact depends on the facts of the case. When an agency can demonstrate that it relied on statutory authority, legislative intent, and case precedent, state courts have been inclined to find the agency's actions substantially justified. In *Silverstreak*, for example, a contractor sued the Department of Labor and Industries (L&I) after the agency reinterpreted its rules to require the contractor to pay prevailing wage back pay to workers thought to be exempt. Though the court ultimately estopped L&I from enforcing the directive (given prior representations that the contractor would not have to pay prevailing wages), the court held that the agency's actions were substantially justified because it acted within its statutory authority, construed the prevailing wage act in favor of the workers as intended by the Legislature, and relied on favorable Washington case precedent. *Id.*

This Court similarly denied attorney fees despite ruling in favor of the plaintiff in *Kettle Range Conserv. Group v. Washington Dep't of Natural Res.*, 120 Wn. App. 434, 85 P.3d 894 (2003). In that case, Kettle Range argued that the Department of Natural Resources (DNR) failed to comply with the State Environmental Policy Act (SEPA) in approving certain timber harvests. Although the court remanded the case because DNR's approval of the watershed analysis was based on a flawed road inventory, the court found that DNR's actions were substantially justified, and therefore denied fees under the EAJA, because a reasonable person would have believed the road inventory was correct. *Kettle Range*, 120 Wn. App. at 469.

Division I of the Court of Appeals similarly upheld the superior court's denial of attorney fees despite ruling that DNR violated SEPA. *Plum Creek Timber Co. v. Washington Forest Practices Appeals Bd.*, 99 Wn. App. 579, 596, 993 P.2d 287 (2000). The court of appeals upheld the trial court's conclusion that "DNR's position in the case was reasonable and therefore substantially justified because the case involves balancing of sensitive, sometimes competing or conflicting interests in a controversial area and requires analysis of close questions on which there is no clear precedent on point." The court of appeals also noted that the agency had to consider "a complicated regulatory scheme as well as subjective issues of aesthetics" on which there was no state appellate precedent. *Id.* at 595-96.

Federal courts have held that an agency decision might be substantially justified for purposes of the EAJA even if the decision was found to be arbitrary and capricious. *Omni Packaging, Inc. v. United States I.N.S.*, 940 F. Supp. 42, 46 (D.C. Puerto Rico 1996). In *Omni Packaging*, plaintiffs challenged the INS's denial of an applicant's petition for status allowing permanent residence. The court held that the INS abused its discretion in failing to explain the basis for its decision, and remanded the decision back to the agency. Nonetheless, the court held that the agency's decision to deny the petition, in contrast to its failure to adequately explain its reasoning, was substantially justified, and therefore denied fees under the federal EAJA. *Omni Packaging*, 940 F. Supp. at 46. *See also Andrew v. Bowen*, 837 F.2d 875 (9th Cir. 1988) ("[A]rbitrary and

capricious conduct is not per se unreasonable” under federal EAJA); *United States v. Hallmark Const. Co.*, 200 F.3d 1076, 1079 (7th Cir. 2000) (“[t]he mere finding that the government’s position was arbitrary and capricious does not mandate an award of attorney’s fees under the EAJA.”)

In this case, WDFW was substantially justified in its actions. As described in section II.B.1 of this brief, RCW 77.04.012 gives WDFW wide discretion in choosing how to structure the fisheries. The case law construing the statutory scheme confirms that non-treaty fishers are not entitled to a guaranteed share of the catch. *E.g.*, *Puget Sound Gillnetters Ass’n v. Moos*, 92 Wn.2d 939, 948 n.5, 603 P.2d 819 (1979). Thus, WDFW’s position was substantially justified by the governing statutes and cases.

WDFW’s decision concerning how to fairly allocate the fishery was documented at length in its CES. That document indicated the criteria that the Fish and Wildlife Commission approved and that WDFW used to develop the allocations embodied in the 2008 regulations. WDFW’s decision was a policy decision reflecting its best judgment about how to balance the interests of competing gear groups. WDFW’s decision regarding fishing regulations was therefore like the complex regulatory scheme and the subjective aesthetics considerations discussed in the *Plum Creek* case.

Moreover, WDFW made significant changes in its approach to the 2008 regulations following Judge Wickham’s invalidation of its 2007

regulations. First, unlike in 2007, WDFW did not rely on use of a benchmark to trigger decisions about when to close the season to one gear group or the other. Second, WDFW significantly documented its decision-making in the CES. Third, WDFW increased its efforts to build consensus among competing gear groups in advance of adopting its regulations. It was reasonable for WDFW to believe that its 2008 regulations complied with the law.

Judge Wickham presumably considered WDFW's action substantially justified when he denied PSHA's preliminary injunction request. The court explained its reasoning as follows:

PSHA's challenge is a closer call. But because of the rationale presented in the Concise Explanatory Statement (AR 11-23) and the testimony of Mr. Pattillo, this Court finds that the Department has shown a rational basis for the 2008 rules sufficient to prevent PSHA from showing a likelihood of success on the merits.

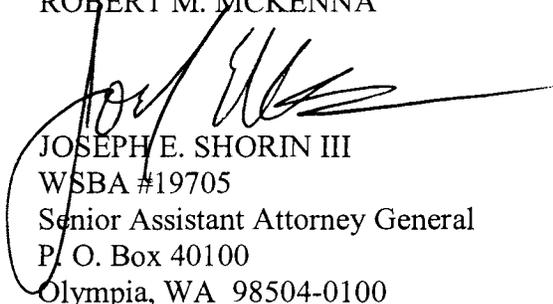
While the court ultimately ruled against WDFW on the merits, the fact that the court initially sided with WDFW and considered the question to be a close call further supports WDFW's position that it was substantially justified in its 2008 allocation decision. *Plum Creek*, 99 Wn. App. at 595-96 (denying fees where decision required analysis of close questions); *Cummings v. Sullivan*, 950 F.2d 492, 498 (7th Cir. 1991) (“[t]he closeness of the question is, in itself, evidence of substantial justification.”). This Court should therefore rule that the superior court abused its discretion in finding that WDFW's actions were not substantially justified and in awarding attorney fees and costs pursuant to the EAJA.

V. CONCLUSION

For the foregoing reasons, WDFW's adoption of WAC 220-47-311 and 220-47-411 was not arbitrary and capricious. The CES and the supporting agency record reflect a careful, deliberative process in which WDFW considered all the facts and circumstances. The superior court substituted its judgment for that of WDFW. On review of the agency record, this Court should uphold the challenged regulations. This court should also rule that the superior court abused its discretion in awarding attorney fees pursuant to the Equal Access to Justice Act.

RESPECTFULLY SUBMITTED this 7th day of August, 2009.

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

DATED this 7th day of August, 2009, at Olympia, WA.



GLENDAYEPES
Legal Assistant

APPENDIX 1



STATE OF WASHINGTON

Department of Fish and Wildlife

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Main Office Location: Natural Resources Building • 1111 Washington Street SE • Olympia WA

July 8, 2008

Dear Puget Sound Commercial Salmon Fishery License Holders and Interested Parties:

The Washington Department of Fish and Wildlife (Department) has considered all public comments received during the Proposed Rule Making process comment period, including testimony submitted at the public hearing held in Olympia on June 24, regarding the proposed 2008 Puget Sound commercial salmon fishing rules. The Department will adopt the rules as proposed in CR102 –WSR 08-11-123 for the 2008 season.

The rationale for adopting the 2008 season rules as proposed, including how these rules will ensure that management objectives for the fisheries and the natural resources affected by the fisheries will be achieved, is provided in the enclosed, Concise Explanatory Statement (CES).

The 2008 season rules are constructed to ensure that:

- Conservation objectives or spawning goals for the target species will be met.
- Catch or impacts on incidental species (bycatch) will be minimized.
- All fisheries will be monitored and sampled.
- The economic well-being and stability of the fishing industry will be maintained.
- The non-Indian allowable catch will be fully utilized.
- Schedules represent agreement for fair harvest opportunity with the treaty Indian tribes.
- Harvest opportunity between the non-Indian gear groups will be fairly allocated.

An objection to the proposed rules was received on June 18, 2008, from the Puget Sound Harvesters Association, specifically with respect to rules applying to the fall chum salmon fishery in Area 10 and 11 in 2008. The Puget Sound Harvesters Association has not proposed an alternative fishing season schedule, but has requested that the Department revisit arguments supporting catch allocation. The proposed rules define season structures that were agreed upon between the Department and industry representatives during the 2008 North of Falcon / Pacific Fishery Management Council public meetings held during February, March and April.

The proposed rules provide for a fair allocation of harvest opportunity among the gear groups in this fishery, considering all relevant factors, including; (1) historical and recent changes in the economic condition of the Puget Sound commercial salmon fisheries; (2) historical and recent fleet sizes; (3) differences in power of the gillnet and purse seine fleets; and, (4) the capability

Puget Sound Commercial Salmon Fishery License Holders and Interested Parties

July 8, 2008

Page 2

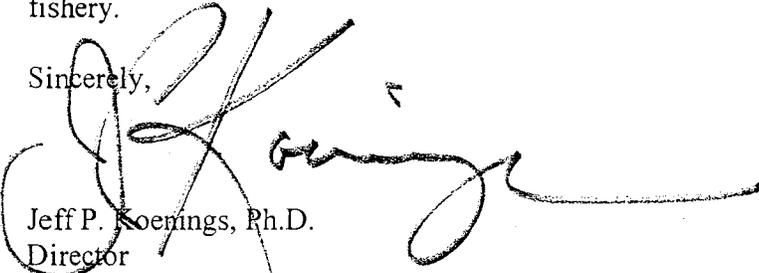
for controlling commercial-fleet harvests sufficient to meet the management objectives listed above.

Achieving an equitable balance of harvest opportunity for a dynamic fishery is a challenging responsibility for the Department as well as for representatives of the fishing industry. We believe that our engagement on the many management issues of 2008 with representatives from the gillnet and purse seine communities throughout the North of Falcon process was thorough in addressing the full range of issues, and fair in providing an opportunity for all opinions to be heard. Seldom does the annual season-setting process result in everyone's objectives being completely achieved.

The Department will closely monitor progress of the 2008 fishery, in-season, to identify any outcomes that are significantly different than expected for the gillnet and purse seine fisheries. In-season changes to schedules and harvest opportunities may occur to ensure achievement of our management objectives, but the Department will consult with industry representatives prior to making modifications.

The Department will conduct a meeting at the end of the 2008 season for staff and representatives from the commercial sectors to evaluate the performance of the 2008 agreement and recommend modifications for improvement and possible application to future seasons. The Department is committed to continue working in good faith with you and other representatives from the commercial fishing industry to improve the planning and management of this important fishery.

Sincerely,


Jeff P. Koenings, Ph.D.
Director

Enclosure

cc: Phil Anderson, Deputy Director
Sheila Lynch, AAG
Pat Pattillo
John Long
Jeromy Jording
Lori Preuss

Concise Explanatory Statement Puget Sound Commercial Salmon Fishery Regulations for 2008

This Concise Explanatory Statement (CES) addresses public comments received regarding the proposed 2008 Puget Sound commercial salmon fishing rules and describes the Washington Department of Fish and Wildlife (WDFW) rationale in adopting the rules as proposed. The majority of comments received are focused on the portion of the regulations setting the fall chum fishing schedule for Areas 10 and 11, South Puget Sound. For that reason, this CES similarly focuses on those areas. Comments opposing the proposed fishing schedule for Areas 10 and 11 were received from the Puget Sound Harvesters Association (PSHA), an organization representing commercial gillnet fishers.

Introduction

Management of the South Puget Sound Areas 10 & 11 fall chum salmon commercial fishery has been controversial for several years. Conservation objectives for the fishery as expressed in escapement goals have been consistently achieved, resulting in healthy wild chum salmon stocks and large numbers of harvestable fish on a sustained basis.

However, WDFW rules for this fishery, including pre-season adopted regulations and modifications made in-season by emergency rulemaking authority, have been criticized by representatives of both purse seine and gillnet gears. Criticism from industry about management of the Areas 10 & 11 fall chum salmon commercial fishery has been directed almost exclusively at allocation issues between the gillnet and purse seine fishing industry sectors, including sharing of catch and fishing opportunity.

Representatives of the gillnet fishing community have advocated for regulations allocating the numbers of harvestable fish between the purse seiners and gillnetters.

Representatives of the purse seine community have advocated for a return to the equal number of fishing days for both gear groups, which WDFW implemented before the 2003 season.

For the 2008 season, WDFW has proposed and is adopting rules that allocate fishing opportunity between the two groups, rather than capping the total catch of either group. WDFW believes that this is the most equitable means of regulating this fishery given the historical variations in catch, differences in fishing efficiency between the two groups, economics of the fishery and market forces, and fluctuations in the fishing effort and fleet sizes between the two groups. WDFW will continue to work with the industry to develop regulations for the future that further the agency's statutory mandate and ideally are the product of agreement between the agency and the gear groups.

History of Rule Development

At a meeting of the Washington Fish and Wildlife Commission on December 8, 2007, WDFW staff presented the management history of the Areas 10 & 11 fall chum salmon fishery and proposed a special public negotiation process designed to reach inter-gear agreement for commercial fishing regulations prior to convening the regular, annual public process for setting seasons. The Commission endorsed the Agency's special public process proposal and WDFW subsequently convened several public meetings with

gillnet and purse seine industry representatives to hear perspectives on management objectives and to exchange proposals for managing future fisheries. Three meetings facilitated by a WDFW employee were conducted in 2008 (February 5, March 4, and March 17) in which both long-term solutions and short-term (2008 fisheries) proposals were discussed and considered. While these meetings enhanced WDFW's understanding of the issues raised by the gear groups, they did not result in an agreement regarding the 2008 chum fishing season in Areas 10 and 11.

The regular, annual public process for defining salmon fishery rules, known as the North of Falcon process, began for the 2008 season with an initial meeting on March 4 to discuss the structure of the Areas 10 & 11 fall chum salmon fishery. North of Falcon public meetings were held on March 18, April 1, and during the week of April 7-11, for this same purpose and involved commercial industry representatives. Washington Fish and Wildlife Commissioners attended most of these meetings to gain an understanding of the process so that they could address these controversial issues and support the Department in conducting the public process endorsed by the Commission. Puget Sound commercial salmon fishing seasons proposed for adoption by WDFW, including seasons and rules applying to the Area 10 & 11 fall chum salmon fishery for 2008, are a product of this public North of Falcon process.

At a meeting on April 10, 2008, representatives of both gillnet and purse seine industry gear types expressed verbal agreement with WDFW's proposal for the 2008 chum fishing season in Areas 10 and 11. Subsequent to that meeting, an organization representing interests of the Puget Sound gillnet industry, Puget Sound Harvesters Association (PSHA) submitted comments opposing the WDFW proposed rules for the Area 10 & 11 fall chum salmon fishery.

Fishery Management Objectives

WDFW manages the salmon fisheries in Puget Sound, including the Areas 10 & 11 chum salmon fishery consistent with existing permanent laws now in force. Excerpts of relevant sections of these existing permanent laws include:

RCW 77.04.012

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.

The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.

The commission may authorize the taking of wildlife, food fish, game fish, and

shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.

and,

RCW 77.50.120

It is the intent of the legislature to ensure that a sustainable level of salmon is made available for harvest for commercial fishers in the state. Maintaining consistent harvest levels has become increasingly difficult with the listing of salmonid species under the federal endangered species act. Without a stable level of harvest, fishers cannot develop niche markets that maximize the economic value of the harvest. New tools and approaches are needed by fish managers to bring increased stability to the fishing industry.

From these laws, and with policy guidance from the Commission, WDFW has defined management objectives for Puget Sound commercial salmon fisheries. These objectives, in order from most to least important, mandate that WDFW:

- 1) Ensure the conservation of target species – meet spawning goals;
- 2) Minimize catch or impacts on incidental species (bycatch);
- 3) Monitor and sample all fisheries;
- 4) Maintain the economic well-being and stability of the fishing industry;
- 5) Fully utilize the non-Indian allowable catch; and,
- 6) Fairly allocate harvest opportunity between gear groups.

Fishery History

The number of chum salmon harvested in the Areas 10 & 11 fall fishery by the combined Puget Sound commercial salmon fleet has varied greatly. Over the period 1973 to 2007, the total season catch ranged from a low of 700 chum salmon in 1979 to a high of nearly 500,000 chum salmon in 2002. Catch shares of chum salmon for gillnet and purse seine gears also have varied greatly. For example, the gillnet share of the total catch per season by both gears ranged from 79% in 1979 to just 5% in 2002. Catch shares by gear type are affected by many factors including the inherent difference in catch efficiency or power of the two gears, fleet size, fishery economics and market conditions, management restrictions intended to minimize bycatch, and biological factors such as the total abundance of chum salmon in the fishery.

Prior to the 2003 season, WDFW provided access or opportunity to harvest the available number of chum salmon in the Area 10 & 11 fishery by scheduling seasons with an equal number of days opened for purse seine and gillnet gears. Recognizing that low prices paid for chum salmon was a significant factor in observed low catches for the gillnet industry in seasons prior to 2003 and responding to a request from a small number of gillnetters to provide assistance and support for improving their ability to directly market their catches to consumers in local or “niche” markets, WDFW departed from the long-standing approach to structuring seasons based on an equal number of days in order to better address the management objective to: “*maintain the economic well-being and stability of the fishing industry*” and to: “*fairly allocate harvest opportunity between gear*”

groups". For the 2003 and all subsequent Area 10 & 11 fall chum salmon seasons, more fishing opportunity has been provided to the gillnet fleet than to the purse seine fleet. The basis for this season structure has been the assumption that economic conditions presented a disadvantage to the gillnet fleet with respect to harvest opportunity, economic well-being, and stability.

Since 2003, WDFW has observed a continuous increase in fishing effort and catching power by the gillnet fleet. In 2007, the gillnet fleet caught approximately 31% of the harvestable chum, with five total fishing days in comparison to the four total purse seine fishing days. For reasons discussed below, the most important being the dramatic increase in price per pound for chum, WDFW expects this trend to continue.

Response to Public Comments

Comment #1. The proposed 2008 rules reduce the amount of fishing time allocated to the gillnet fleet in relation to the purse seine fleet and will therefore reduce the proportion of the gillnet catch so that it is not "equitable."

Response #1: WDFW does not agree that it must allocate a specific proportion of fish to each gear group, or that it should do so without agreement between the relevant gear groups. See the response to comment #3 below for more explanation.

In any event, WDFW does not believe that the proposed season structure will result in a reduced proportion of gillnet catch. Since the 2001 season, the gillnet share of the total chum catch has increased each year from a low share of 5% in 2002 to a high share of 31% in 2007. This increase occurred despite the fact that the pre-season adopted 2007 season structure provided for fewer gillnet fishing days to every purse seine fishing day than was provided by the pre-season adopted season in 2003-2006. While the total number of gillnet fishing days relative to purse seine fishing days has declined from 2003 to 2007, the gillnet proportion of the catch has increased.

Observing prices paid in the region for early salmon seasons, market conditions for chum salmon in the 2008 Area 10 & 11 fall fishery appear to be improved from the 2007 season. WDFW expects that the gillnet share will be similar to the 2007 record share of 31% and a higher share is likely if these positive market conditions result in another increase in catch rate per hour for the gillnet fishery similar to the increase observed between 2006 and 2007. The proposed season allows for variation in catch sharing that is clearly evident in the historical record, and a fair opportunity to harvest an increased share under advantageous circumstances for either gear type.

Comment #2. The purse seine fleet has a much higher level of catch efficiency and WDFW cannot control its catch. Therefore, allowing the purse seine fleet a "first start" in one week of the fishing season will result in a much higher catch for the purse seine fleet.

Response #2: Purse seine and gillnet gears have large differences in catch efficiency or catching power per vessel. For example, during the 2006 and 2007 seasons, gillnetters caught an average of 725 chum salmon per hour of fishing time, while purse seiners caught an average of 4,893 chum salmon per hour of fishing time.

Gillnet and purse seine gear efficiency may be related to the abundance and distribution of chum salmon and the differences in operation or fishing effectiveness of these two gears. Abundance appears to have an inverse relationship to the proportion of fish caught by the gillnet fleet. For seasons during the period of 1973 to 2002, when the combined catch of the two gears was low (75,000 chum or less), the gillnet fleet caught an average of 40% of the total catch. When the combined catch of the two gears was high (greater than 125,000), the gillnet fleet share of the catch was much lower, averaging just 25% of the total catch. Purse seine gear effectiveness relies on schooling behavior and higher concentrations, so gillnet gear has a relative catch efficiency advantage when chum salmon are in lower abundance and are more dispersed. The total annual catch for the years 1973-2000 averaged just 108,000 chum salmon, while the average chum salmon catch for the seasons since 2001 is more than 366,000. A similarly high number of chum salmon are forecast for the 2008 season and lower gillnet catch effectiveness relative to purse seine gear may be expected as well.

Catch efficiency has increased in recent years and may be masking catch patterns apparent in historical data. Improved catch efficiency can be attributed in part to technological advancements over time for both gears. The reduction in fleet sizes may also improve catching power per vessel, as competition for limited numbers of salmon is reduced. Improved economic and market conditions (e.g., ex-vessel values of chum salmon) in recent seasons may provide an increased incentive for effective fishing. The gillnet rate of catch for the 2006 season was approximately 500 chum salmon caught per hour. This catch rate more than doubled for the 2007 season to over 1,200 chum salmon caught per hour. Purse seine participation also has increased with improved market conditions. For example, the record high purse seine catch of the final opening of the 2007 fishery was due in part to an increase in purse seine vessels choosing to participate in the Area 10 & 11 fishery rather than the Hood Canal fishery that was opened simultaneously.

Proposals were presented from the industry to place new restrictions on gear for the purpose of reducing catch rates and thereby increasing season length and improving marketing opportunities for local/niche marketing. For example, gillnet representatives proposed to limit purse seine net depth. WDFW considered the possibility that such restrictions could improve the economic well-being of the industry, but rejected this proposal for two reasons: (1) such a restriction would decrease the economic efficiency of the purse seine fleet by causing fewer chum to be caught with the same operating costs; and (2) the restriction would not be fairly balanced between the two gears - longer seasons will primarily benefit a small portion of the gillnet fleet.

WDFW has considered catch efficiency in structuring the 2008 Areas 10 & 11 chum salmon fishery. Catching power has increased for both fleets and presents an increasing

potential problem for managers as they control outcomes of the fishery to meet conservation objectives and limit the catch to meet treaty Indian allocation objectives. Although catching power is not the basis for defining the pre-season planned structure of the 2008 Area 10 & 11 chum salmon fishery, WDFW has concluded that the increased power demonstrated over recent seasons for both gears will require a more conservative approach to in-season management of the 2008 fishery. Season schedules described in the proposed 2008 Puget Sound Commercial Salmon Regulations for the Area 10 & 11 chum salmon fishery (Table 3, pages 4-5) will be changed as the chum salmon runs are updated and catch rate information is collected from the fishery. The fishery is unlikely to be opened for the entire number of days scheduled.

Both gillnet and purse seine fishers believe that a gear group fishing first during a given week ("first start") has an advantage over the other gear group. This belief reflects assumptions that fishing success improves with abundance and that fish abundance is increased (i.e., a "build-up" occurs) during the days when no fishing was scheduled as a result of fish schooling behavior. In other words, the purse seine and gillnet fishers believe that the gear group that fishes after an opening for the other gear will have lower catch success. This belief is not supported by the data.

For example, in 2007 during the first week of the Area 10 & 11 fishery, the gillnet gear group fished on Sunday, October 21, and caught 13,004 chum salmon. On Monday, October 22, the purse seine gear group fished and caught 46,634 chum salmon. On Tuesday, October 23, the gill net gear group then fished again and caught 17,639 chum salmon. The catch per vessel for gill nets on the 21 was 228 fish per vessel. The catch per vessel for gill nets on the 23 following removal of fish by both the purse seine gear and by the gillnet gear in the first opening, increased to 271 chum salmon. A similar pattern occurred the following week. The gillnet gear catch rate increased from 275 chum per vessel on Tuesday, October 30. Once again, this followed a purse seine opening on Monday, October 29. The data suggest that fish abundance is more likely related to tidal and environmental patterns that do not match up with weekly calendar patterns, and that a "build up" effect of schooling fish does not occur.

Comment #3. WDFW must allocate percentages of the total harvestable chum on a daily basis in order to equitably distribute fish between the gillnet fleet and the purse seine fleet. The allocation should be 50-50 between the two groups. WDFW should allocate fish based on the following factors: a) number of gillnet licenses compared to purse seine licenses; b) fees paid by gillnetters as compared to purse seiners; c) direct marketing to local buyers by gillnetters; d) bycatch of non-target species; and, e) catch proportions between 1973 and 1993.

Response #3: The regulations and season structure of the Area 10 & 11 fall chum salmon fishery are reasonably constructed to ensure fair allocation of harvest *opportunity* between gear groups. While regulations and the management intent for this fishery are expected to result in fair allocation of harvest opportunity, catch outcomes are less certain. The fishery is characterized by a high degree of uncertainty and variability with respect to gillnet and purse seine catch rates. WDFW does expect conditions of the

fishery, including high chum salmon abundance, excellent salmon marketing conditions, and high levels of participation by licensed vessels, will result in a similar or higher catch rates for gillnet gear. Although difficult to predict, another year of increased catch share for gillnet gear appears likely.

WDFW has the legal authority to allocate catch between gear types, but the agency has never defined gillnet and purse seine catch allocations for the Areas 10 & 11 chum salmon fishery or for any other Puget Sound commercial salmon fisheries. WDFW conveyed early in the February and March facilitated discussion process that Agency support for specifying catch allocations would require agreement between gear representatives. WDFW believes that a fair balance of opportunity for commercial salmon fishers can be achieved without specifying catch allocations by defining seasons (by gears, species and location) that provide equitable opportunity to catch salmon in the various fisheries throughout Puget Sound. Particularly given the high degree of variation in outcomes between seasons, WDFW prefers to look at the balance of all Puget Sound commercial fishing opportunities over several years, and to promote a philosophy of working together in a spirit of give and take.

WDFW remains open to the possibility that an agreeable solution to the controversy about fairly balancing opportunity will eventually result in the definition of catch shares. However, given the complexity of issues involved, the need to consider fisheries other than the Areas 10 & 11 chum fishery, and the failure to reach agreement on catch allocation for the 2008 season, WDFW supports the continued use of fishing schedules as a reasonable means of addressing the needs of the two gear types and meeting the management objective to "*fairly allocate harvest opportunity between gear groups.*" Achieving a fair allocation of the harvest itself in this fishery by WDFW mandate is not realistic, given the number of and variability within factors that are relevant to such an allocation. These include the number of active fishing licenses in both fleets, the economic investment of individual vessel owners in both fleets, the fishing effort made by individual fishers in both fleets, and the numbers of individuals employed by each fleet. WDFW does not have access to accurate information regarding all of these factors, and it does not have the resources to manage this fishery or others around the Puget Sound on such an intensive basis. Therefore, unless the gear groups can agree on an allocation of fish between themselves, WDFW will continue to regulate to achieve an equitable allocation of fishing opportunity rather than proportion of the harvestable catch.

Economic conditions associated with the Area 10 & 11 chum salmon fishery have significantly changed since the 2001 - 2003 seasons, when WDFW first modified the practice of providing equal time to gillnet and purse seine fleets. WDFW concludes that additional time provided to the gillnet fleet for the 2008 season by a season structure with additional gillnet days opened mid-week (Wednesday) contributes to the economic well-being of the gillnet fleet and is expected to contribute to the enhancement and improvement of the commercial salmon fishing industry overall.

Specific factors:

a) Number of gillnetters versus number of purse seiners

The number of licensed Puget Sound purse seine vessels has always been far fewer than the number of licensed Puget Sound gillnet vessels, reflecting historical fishery developments, economics of the industry, and fishery management. The Puget Sound non-Indian commercial fleet size has changed dramatically over the period from 1973 to the present, in terms of the total number of participating vessels and fleet composition. For the ten-year period from 1973 to 1982, the number of gillnet licenses available to participate in the Puget Sound commercial salmon fishery averaged 1,540 annually, nearly eight times the average number of licenses participating in today's fishery (an average of 204 since 2002). The number of purse seine licenses during that early period averaged 360, that is more than four times the current level (an average of 81 since 2002).

Reductions in the fleet size were a natural or expected outcome of major salmon management policy changes in the Northwest that include, for example, policy changes regarding Indian treaty rights and reductions to non-Indian allocations). The size of the non-Indian fleet also was reduced as a result of government-funded programs designed to retire licenses and vessels from active use and retain the economic viability of the fleet with fewer fish allocated for harvest. The most recent reduction in fleet size resulted from a "buy-back" program associated with the renegotiation of Annex IV of the Pacific Salmon Treaty in 1999.

Historically (1973-2001) an average of 3.8 gillnet vessels were licensed for every purse seine vessel participating in Puget Sound salmon fisheries. Today the number of participating gillnet vessels continues to be much greater than the number of purse seine vessels but the fleet size advantage has been reduced to just 2.5 gillnet vessels licensed for every purse seine vessel licensed.

Fleet size and gear composition has changed dramatically over the period from 1973 to the present. Even in recent years, significant changes have occurred. Puget Sound gillnet licenses were reduced from nearly 700 for the 2000 season to a current level of only 204 and the purse seine fleet was reduced from more than 260 in the 2000 season to a current level of only 81 licensed vessels. Observing these changes, WDFW concludes that long-term historical information offers limited utility for guiding management decisions for contemporary Puget Sound salmon fisheries. Fishery data as recent as the period immediately prior to the 2001 season do not appear to be comparable with current data given changes in fleet size and gear composition.

WDFW has considered current (2001 to present) fleet size and gear composition in structuring the 2008 Area 10 & 11 chum fishery season in a manner that will "*fairly allocate harvest opportunity between gear groups.*" Different numbers of licenses for the two gears are not a reasonable basis for allocating harvest opportunity given the overwhelming difference in catching power between gillnet and purse seine gears and the demonstrated ability of both fleets to compete for the limited total allowable catch of chum salmon.

b) Fees and taxes paid by gear groups.

WDFW does not believe that this factor is relevant to its statutory mandate for regulating commercial fishing. License fees are not tied to the amount of fishing opportunity or fish allocated to any particular gear group, nor are they relevant to the goals of conserving fish and wildlife resources. To some extent, fees may be relevant to the goal of maintaining the economic well-being and stability of the fishing industry – if fees are too high, they may discourage participation in the fishery. However, that issue is relevant to the setting of the fees, not the allocation of fishing opportunity. And in any event, WDFW has been provided no information showing that the current fee structure is a factor influencing participation in the fishery.

Puget Sound Harvesters Association also comments that the gillnet fleet should be apportioned 50% of the total chum catch in areas 10 and 11 because the gillnet community has formed the Puget Sound Salmon Commission, a marketing commission authorized under the Department of Agriculture, and taxes itself to support this commission. While WDFW recognizes the efforts of the gillnetters to improve the marketing of their product locally, it does not believe that this factor justifies a strict allocation of the total catch.

The economic and market conditions observed during the period of 2001-2003 have changed dramatically in recent seasons. Prices paid for all salmon species in fisheries coast-wide have greatly increased, and prices paid to gillnet and purse seine fishers for Area 10 & 11 chum salmon catches have increased from lows of 10-15 cents per pound (when markets for catches could be found) in the 2001-2003 seasons to high levels approaching \$1.00 per pound in the most recent seasons. The recent high salmon prices are most likely due to changes in supply and demand for salmon on a broad, regional scale. There is little evidence that local marketing efforts by the industry are a significant factor affecting prices paid to the fleet overall.

c) Direct marketing to local buyers by gillnetters.

Local/niche marketed chum salmon represent a small proportion (average 10% for 2003-2007) of the total volume of chum salmon marketed. WDFW does not believe that setting a 50-50 allocation of fish between gillnetters and purse seiners will further the economic well-being and stability of the commercial fishing industry, including the local/niche market for chum salmon. However, WDFW continues to support local “value-added” marketing approaches such as those promoted by the State of Washington sponsored gillnet industry commodities board, the Puget Sound Salmon Commission. To address this issue, the 2008 fall chum fishing regulations in Areas 10 and 11 include Wednesday gillnet openings to provide for catch at a time during the week that is convenient for sale to weekend local markets.

d) Bycatch Minimization

Chinook salmon and coho salmon are taken incidental to the target species of the Area 10 & 11 chum fishery. Populations of both of these species have conservation concerns and the impact of bycatch in this fishery was considered in development of season structure and gear restrictions to minimize the number of coho and Chinook salmon encountered by purse seine and gillnet gears. However, WDFW does not believe that moving to a

strict allocation of catch for Areas 10 and 11 will add to these measures to reduce bycatch. In this fishery, existing gear restrictions, geographical closures, and season timing effectively minimize bycatch.

Puget Sound Chinook salmon are listed as threatened under the Endangered Species Act and limits on the acceptable impact are defined within the Comprehensive Management Plan for Puget Sound Chinook (CMPPSC) (Source: Puget Sound Indian Tribes and WDFW, 2004). Annual fisheries developed by the tribes and WDFW adhere to these limits by estimating the expected cumulative impacts across all tribal and non-Indian fisheries.

Chinook salmon encountered in the Area 10 & 11 fall chum salmon fishery are small, immature fish. Chinook encounter rates or impacts from other fisheries, such as the Area 7/7A (San Juan Island) sockeye and pink salmon fishery represent impacts on larger, mature salmon, and estimates for that fishery are not comparable to encounter rates or impact estimates of the Area 10 & 11 chum salmon fishery. No limits on the Chinook bycatch for the Area 10 and 11 chum fishery are defined under the CMPPSC but WDFW has addressed the objective to minimize the impact on this species by implementing gear restrictions that are expected to result in low numbers of Chinook salmon encountered by the gears. For example, purse seine gear is restricted to the use of 3 ½-inch minimum mesh in the main body and the bunt part of the net. Purse seine nets are also required to have a 5-inch mesh strip to allow small Chinook salmon to escape unharmed. Gillnet gear is required to be constructed of 6 ¼-inch minimum mesh that is a size targeting the body size of chum salmon while reducing the number of encountered juvenile or immature Chinook salmon.

Coho salmon are not listed under the Endangered Species Act, but strong conservation concern has been consistently expressed by WDFW for wild coho salmon populations of the South Puget Sound region. WDFW has managed to meet the objective of minimizing the impact of this fishery on coho salmon by implementing gear restrictions, as mentioned above, and by structuring the season to reduce the rate of coho salmon encountered by the gears. For example, the start of the 2008 fall chum season is delayed until a time when earlier migrating coho salmon will have passed through the area to spawn.

Because species taken incidental to the Area 10 & 11 chum salmon fishery levels are encountered at very low rates compared to the target species, direct sampling of the fisheries by scientists onboard vessels while the gear is actively operated is known to provide the most accurate assessment of bycatch. WDFW conducts sampling and monitoring programs to gather data for estimating the expected impacts on Chinook salmon and coho salmon by gillnet and purse seine gears. For logistical and monetary reasons, sampling of the gillnet fleet has not provided sufficient sample sizes to provide statistically reliable estimates of bycatch for that gear, so managers have relied on landed catch from historical and current fisheries to estimate impacts for gillnet gear. WDFW believes this insufficient level of direct, scientific sampling is likely to produce estimates of impact that are biased low. To compensate for this bias to gillnet bycatch impact

estimates, WDFW has relied on sampling of purse seine gear to provide an estimate of the relative abundance of encountered Chinook and coho salmon in the Area 10 & 11 chum salmon fishery. If data obtained in-season from these sampling programs indicate the abundance of these incidentally encountered species is significantly higher than pre-season estimates, fishing schedules or regulations may be modified to ensure that bycatch is minimized.

WDFW expects to increase direct monitoring of gillnet gear to match the data collection program currently in place for purse seine gear. This program will meet the management objective to "*monitor and sample all fisheries*". The inability to implement sufficient monitoring and sampling programs could lead to more conservative management strategies that ensure bycatch levels are consistent with pre-season expectations. Increased sampling of the gillnet fishery is important because mortality rates on salmon incidentally caught by gillnets are much greater than for purse seine gear. Tribal, state and federal scientists agree that 100% of the coho and Chinook salmon encountered by gillnet gear will die from handling, while a significant portion of the salmon encountered by purse seine gear can be released alive.

Seabirds are also encountered and killed by commercial net fisheries in Area 10 & 11 during the time that the chum salmon fishery is opened. Studies during the mid-1990's of the interaction of seabirds with commercial gear in this fishery showed that the most significant seabird bycatch problem was with gillnet gear. Based on recommendations from those studies restrictions to both purse seine and gillnet gears have been in place for several years to minimize seabird bycatch. Those same restrictions will be in place for the 2008 season. It is important to note that a significant number of dead seabirds were encountered in the Port Madison area during the time that commercial fishing was opened during the 2007 chum salmon fishery. Considering the possibility for a recurrence of high seabird mortality, WDFW has concluded that closure of the Port Madison area in 2008 is an appropriate and prudent measure to minimize bycatch of these species.

e) Catch proportions between 1973 and 1993

WDFW received comments suggesting that the rules should split the catch evenly between the gillnetters and purse seiners because the historical catch ratio was approximately 50-50. WDFW recognizes that catch shares did average approximately 50-50 for the 20-year period between 1973 and 1993. However, as discussed throughout this document, catch varies according to numerous factors, including market conditions, the number of active licenses, and catch efficiency. WDFW believes that even if allocation of the catch was the best way to regulate the Area 10 and 11 chum fishery, a 50-50 split is not justified by reference to the 1973-1993 time period because underlying conditions have changed significantly since that time.

As discussed above, while WDFW consistently provided for equal fishing time until 2003, the gillnet proportion of the catch declined dramatically between the early 1990's and 2003. This apparently resulted from a drastic reduction in participation and fishing effort responding to poor market conditions. The fact that the proportion of gillnet catch

has remained below historical highs despite the fact that the fleet has been afforded a higher proportion of fishing opportunity than in the past suggests that external factors continue to differ from those observed in the 1973-1993 time period. In addition, as discussed above, the relative sizes of the two fleets have changed. Historically (1973-2001) there were 3.8 gillnet licenses to every one purse seine license. Currently, the ratio is 2.5 to 1. In summary, there are differences in the fleets and in external conditions that make the imposition of the approximate catch ratio for 1973-1993 inappropriate, even if WDFW were to choose to allocate catch rather than fishing opportunity.

Summary Conclusions

WDFW concludes that the regulations and seasons proposed for the Area 10 & 11 fall chum salmon commercial fishery are reasonably constructed to ensure that the management objectives for this fishery are achieved.

Conservation of target species is assured, given the proven capability of WDFW to meet spawning goals for South Puget Sound chum salmon. Meeting the conservation objective in 2008 will likely require a more conservative approach to in-season assessment of biological and fishery information and a consideration of the increasing catch power of purse seine and gillnet gears demonstrated in recent fishing seasons.

The seasons, regulations, and sampling programs for this fishery are expected to minimize incidentally encountered non-target species, including fish and seabirds. In-season adjustments to regulations may be necessary to ensure this objective is met if information collected indicates higher than expected bycatch.

The fishery is designed to ensure that the economic well-being and stability of the fishing industry is maintained. The gillnet industry's interest in a season that promoted local/niche marketing initiatives is addressed by including weekly, mid-week openings for gillnet gear.

The fishery is designed to fully utilize the non-Indian allowable catch. However, observing recent increases in the rate of harvest for the Area 10 & 11 chum fishery, WDFW may need to make very conservative in-season decisions to ensure that conservation objectives are met, potentially reducing harvest to less than the full non-Indian allowable catch.

The regulations and season structure of the Area 10 & 11 fall chum salmon fishery are reasonably constructed to ensure fair allocation of harvest *opportunity* between gear groups. While regulations and the management intent for this fishery are expected to result in fair allocation of harvest opportunity, catch outcomes are less certain. The fishery is characterized by a high degree of uncertainty and variability with respect to gillnet and purse seine catch rates. WDFW expects that the conditions of the fishery, including high chum salmon abundance, excellent salmon marketing conditions, and high levels of participation by licensed vessels, will result in a similar or higher catch rates for gillnet gear. Although difficult to predict, another year of increased catch share for gillnet gear appears likely. Fishing opportunity provided by the 2008 fishery is similar to

Concise Explanatory Statement

Puget Sound Commercial salmon fishery regulations for 2008

July 8, 2008

the actual outcome of the 2007 season and represents a fair allocation of harvest opportunity for the two gear groups given the dramatic changes in economics of the fishery that have occurred since 2003 when the department initiated the system of providing three days of gillnet fishing for each day of purse seine opportunity.

WDFW has the legal authority to allocate catch between gear types, but the agency has never defined gillnet and purse seine catch allocations for the Areas 10 & 11 chum salmon fishery or for any other Puget Sound commercial salmon fisheries. WDFW conveyed early in the February and March facilitated discussion process that agency support for specifying catch allocations would require agreement between gear representatives. WDFW believes that a fair balance of opportunity for commercial salmon fishers can be achieved without specifying catch allocations but rather by defining seasons (by gears, species and location) that provide equitable opportunity to catch salmon in the various fisheries throughout Puget Sound. Particularly given the high degree of variation in outcomes between seasons, WDFW prefers to look at the balance of all Puget Sound commercial fishing opportunities over several years, and to promote a philosophy of working together in a spirit of give and take. WDFW remains open to the possibility that an agreeable solution to the controversy about fairly balancing opportunity will eventually result in the definition of catch shares. However, given the complexity of issues involved, the need to consider fisheries other than the Areas 10 & 11 chum fishery, and the failure to reach agreement on catch allocation for the 2008 season, WDFW supports continued use of fishing schedules as a reasonable means of addressing the needs of the two gear types and meeting the management objective to: "*fairly allocate harvest opportunity between gear groups*".

At the close of the 2008 salmon-season public meetings, attended by both gillnet and purse seine industry representatives, a season structure alternative to catch allocation was proposed by the Puget Sound Harvesters Association. That proposal was modified, by agreement of all industry representatives present, to include a "first-start" for purse seine gear during one week (week 42) of the season in exchange for additional time opened during that same week for gillnet gear. All industry participants present at these meetings agreed that this schedule represented the best possible outcome for the 2008 negotiation process and that discussions about future seasons should continue following conclusion of the 2008 season. To that end, WDFW will conduct a meeting at the end of the 2008 season for department staff and representatives from the commercial sectors to evaluate the performance of the 2008 agreement and recommend modifications for improvement and possible application to future seasons.

APPENDIX 2

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THURSTON COUNTY WA

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DETT J. GOULD, CLERK

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	Date: <u>Tuesday, June 2, 2009</u>
	Time: <u>1:30 p.m.</u>
	Judge/Calendar: <u>Wickham</u>

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

PUGET SOUND HARVESTERS
ASSOCIATION,

Petitioner,

v.

WASHINGTON STATE
DEPARTMENT OF FISH AND
WILDLIFE,

Respondent.

Case No. 08-2-01744-1
(Consolidated)

FINAL ORDER AND JUDGMENT

This administrative rule challenge brought by Puget Sound Harvesters Association ("PSHA") was heard by this Court on January 27, 2009. Based upon the Court's review of the agency record prepared by Respondent Washington Department of Fish and Wildlife ("WDFW"), briefing submitted by the parties, and oral argument, the Court issued a Letter Opinion on April 24, 2009. Pursuant to CR 54(a), the Court hereby enters its final determination in this action as follows:

FINAL ORDER AND JUDGMENT- 1

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1424 Fourth Avenue, Suite 1015
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Phone: (206) 621-8868
Fax: (206) 621-0512

tlc

ORIGINAL

INTRODUCTION

1
2 1. On July 8, 2008, WDFW issued its 2008 rules for commercial salmon
3 fishing in Puget Sound ("2008 rules"). PSHA filed a rule challenge pursuant to the
4 Washington State Administrative Procedures Act ("APA"), Ch. 34.05 RCW, challenging
5 the 2008 rules, specifically WAC 220-47-311 and 200-47-411.

6
7 2. A companion case was filed by the Purse Seine Vessel Owners Association
8 ("PSVOA") also challenging WDFW's rules. The PSVOA challenge was dismissed with
9 prejudice by stipulation on January 27, 2009.

10 3. WDFW prepared and filed the rulemaking record for the 2008 versions of
11 WAC 220-47-311 and 220-47-411 in compliance with RCW 34.05.566.

12
13 4. On October 3, 2008 this court heard PSHA's request of a preliminary
14 injunction. The Court denied the requested preliminary injunction.

15 5. This matter came on for trial on January 27, 2009. The issue raised by
16 PSHA is whether the 2008 rules are arbitrary and capricious and therefore invalid under the
17 APA, RCW 34.05.570? The Court answers in the affirmative.

18
19 **FINDINGS OF FACT**

20 1. WDFW regulates commercial salmon fishing in Puget Sound by gear type
21 and geographic area. For the purposes of regulating salmon fishing, WDFW divides Puget
22 Sound into several areas. The areas at issue in this case are Areas 10 and 11 in the South
23 Puget Sound. The target fishery in Areas 10 and 11 is the fall chum salmon. There are two
24 major types of commercial equipment used for chum salmon in Areas 10 and 11 – gillnets
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1 and purse seines. PSHA is challenging the regulations for the 2008 commercial salmon
2 fishing season in Areas 10 and 11 for gillnets and purse seines.

3 2. WDFW develops rules for commercial salmon fishing through a process
4 called the "North of Falcon" process.

5 3. Generally speaking, the North of Falcon process begins with a forecast of
6 salmon expected to return to the Sound during the season. The Indian Treaty Tribes and
7 WDFW must agree on a total forecast and then on an allocation between treaty and non-
8 treaty fishermen. This agreement includes which days the fishery will be open to non-
9 treaty fishermen.
10

11 4. WDFW then begins a series of meeting and public hearing to provide the
12 competing gear types (here gillnetters and purse seiners) an opportunity to catch an
13 appropriate amount of the non-treaty allocation during these non-treaty fishing days.
14

15 5. WDFW attempts to allocate the fishing opportunities between gillnetters
16 and purse seiners by agreement, but in recent years that has not been possible. Ultimately
17 WDFW must decide the allocation based on the information before it and the law.
18

19 6. Purse seiners and gillnetters have very different methods of catching these
20 fish. The purse seiners have equipment capable of catching more fish per boat than the
21 gillnetters and they have demonstrated an extremely efficient method of fishing. The
22 gillnetters have more licensed boats, smaller boats, and have a smaller catch per boat than
23 the purse seiners. In recent years the gillnetters have marketed more fish locally in farmers
24 markets and similar venues that have the purse seiners. So although the two gear type are
25 catching the same fish, they have different catch rates and marketing systems.
26
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1 7. WDFW finds itself between these competing gear types. Although
2 historically the two gear types have generally divided the fish more or less equally, in the
3 early 1990's the percentage of the catch for gillnetters declined precipitously. In an effort
4 to support the gillnet fleet, WDFW increased their opportunity to catch fish. As a result,
5 the percentage of the overall non-treaty catch for the gillnetters climbed up to about 30%.
6 It still remained short of the historical 50% average that was in place prior to the 1990s.

7
8 8. Recently the PSHA, representing the gillnetters, has challenged the
9 methodology of WDFW in this Court. In 2007 PSHA challenged the allocation for the
10 2007 season. After the season was completed, this Court agreed with PSHA that there was
11 not a rational basis for WDFW's 2007 allocation. The Court declared the 2007 rules
12 arbitrary and capricious and invalid and awarded PSHA its attorneys' fees pursuant to
13 RCW 4.84.350.
14

15 9. PSHA claims now that the method used in 2008 varies little from the
16 method used in 2007 and is similarly arbitrary and capricious. WDFW argues that it has
17 many factors to consider and has weighed them all. It further argues that as long as the
18 decision is not arbitrary and capricious, this court must support the decision.
19

20 10. WDFW has the ability to forecast with reasonable accuracy the percentage
21 allocation for each gear group based on time on the water or "opportunity." That is
22 because it has detailed records of the amount of catch by each gear group for many years.
23 Although WDFW is considering various factors required by law, such as conservation of
24 target species, minimization of by-catch, monitoring and sampling of all fisheries, and fully
25

1 utilizing the non-Indian allowable catch, WDFW generally aims for a percentage of
2 allocation of roughly 70/30 in favor of the purse seiners.

3 11. WDFW defends these numbers by comparing them to the roughly
4 5% gillnetter catch allocation of the early 1990's. PSHA, however, looks back at the
5 period from 1973-1990 during which the gear groups were or less equal in their shares of
6 the total catch. They argue that a 70/30 allocation is not "equitable" and therefore should
7 not be permitted by law.

9 12. PSHA argues that 2008 rules are facially invalid because by allocating
10 based on equitable "opportunity" or time on the water, WDFW is knowingly allocating the
11 number of fish to be caught with a 70/30 allocation in favor of the purse seiners and that
12 this allocation is not equitable. PSHA argues further, that even if not facially invalid,
13 WDFW's record does not provide a rational basis to support WDFW's allocation of
14 harvestable fish in favor of the purse seiners.

16 13. While technically moot, this matter is of substantial public interest because
17 (1) it poses and issues of a public nature; (2) an authoritative determination is desirable to
18 provide future guidance to public officers; and (3) the issue is likely to recur.

20 14. PSHA is a "qualified party" under RCW 4.84.340(5) as an association with
21 a net worth of less than \$5,000,000.00.

22 **CONCLUSIONS OF LAW**

23 1. While this matter is moot because the 2008 fishing season is over, this
24 matter falls within the "substantial public interest" exception and should be heard and
25 decided.
26

1 2. Under the APA, the Court must uphold an agency rule unless it finds that
2 the rule "violates constitutional provisions; the rule exceed the statutory authority of the
3 agency; the rule was adopted without compliance with statutory rule-making procedures; or
4 the rule is arbitrary and capricious." RCW 34.05.570(2)(c).

5 3. PSHA is seeking relief based on its belief that the rules setting the 2008
6 commercial salmon fishing season for gillnets and purse seines in Areas 10 and 11 are
7 arbitrary and capricious. An agency action is arbitrary and capricious if its action is
8 "willful and unreasoning action, taken without regard to or consideration of the facts and
9 circumstances surrounding the action. Where there is room for two opinions, an action
10 taken after due consideration is not arbitrary and capricious even though a reviewing court
11 may believe it to be erroneous." *Redmond v. Growth Hearings Board*, 136 Wn.2d 38, 46
12 (1998).

13 4. WDFW has amply demonstrated a rational basis for allocating based on
14 opportunity, not catch. However, it is evident that WDFW has ample catch history to
15 enable it to predict an approximate share of the catch based on opportunity. The
16 allocations in this fishery appear calculated to reach an approximate percentage of catch for
17 the two competing fisheries of 30% for the gillnetters and 70% for the purse seiners.
18

19 5. Nowhere in the record is there an explanation of the rational basis for this
20 result.
21

22 6. The allocation for the 2008 non-tribal commercial salmon fishing for
23 gillnets and purse seines in Areas 10 and 11 were willful and unreasoning action, taken
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1 without regard to or consideration of the fact and circumstances surrounding the action and
2 therefore arbitrary and capricious.

3 7. WDFW's actions were not substantially justified and an award of attorneys'
4 fees and costs to PSHA is not unjust.

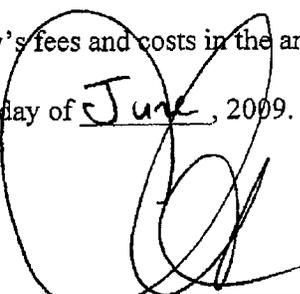
5 **ORDER**

6 It is hereby ORDERED:

7
8 1. The Court declares that the 2008 versions of WAC 220-47-311 and 2009-
9 47-411 are invalid because they are arbitrary and capricious.

10 2. Pursuant to RCW 4.84.350 Respondent WDFW shall pay Petitioner
11 PSHA's reasonable attorney's fees and costs in the amount of \$ 14,767.00

12 DATED this 2 day of June, 2009.



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16 HONORABLE CHRIS WICKHAM
17 THURSTON COUNTY SUPERIOR COURT JUDGE

18
19 Presented by:

20 GENDLER & MANN, LLP



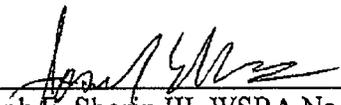
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Approved as to form:

Robert M. McKenna
Attorney General



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Senior Assistant Attorney General