

I. INTRODUCTION

For over 30 years, the Washington State Department of Fish and Wildlife (WDFW) has allocated between Puget Sound commercial gillnet and purse seine fishers based on fishing opportunity. Until 2003, WDFW allocated equal opportunity—i.e., an equal number of fishing days—to each gear group, regardless of catch outcome. AR 13. WDFW’s long-time approach to season structure reflected its policy determination that equal *access* to the fishery is a reasonable basis to respond to the competing demands to make use of the state’s harvestable resource presented by two competing commercial fishing groups with highly divergent gear, practices and economics.

In 2003, in an effort to shore up a gillnet industry hit hard by a decline in market prices, WDFW, on a temporary basis, departed from its longstanding practice of providing equal fishing time to commercial gillnet and purse seine fleets, and allocated significantly more time to gillnetters. *See* FWC Tr. 12/8/07, at 42, ll. 10-22. However, WDFW’s season structure was not intended to result in a 50/50 split of catch, nor did it reflect an abandonment of WDFW’s basic approach of allocating fishing time rather than fish. *See* AR 13-14.

Since then, as market prices have climbed to record highs and the gillnet fleet’s proportion of the available catch has grown to about 30 percent, WDFW slowly began reducing the extra opportunity it provided to gillnetters, and has trended back toward its historic practice of allocating equal time to both fleets. Still, WDFW’s 2008 regulations,

which are at issue in this case, allocated to gillnetters 60 percent of the fishing days and 63 percent of the total season fishing time.¹ After careful analysis, WDFW concluded that this season structure met all of its management objectives for the fishery, including its objective to “fairly allocate harvest *opportunity* to gear groups.” (Emphasis added.) AR 11, 22.

PSHA argues that 63 percent of the time on the water is not enough. Instead, it argues that in absence of a justification supporting a different catch outcome, WDFW must structure the season to assure each gear group catches 50 percent of the fish. PSHA’s Response at 18.

PSHA’s position is fundamentally flawed for several reasons. First, WDFW has the authority and discretion to allocate harvest opportunity rather than fish, and has done so throughout the 30-year history of this fishery. Second, while PSHA agrees that fair allocation of harvest *opportunity* is an appropriate management objective, it conflates this objective with assuring equal harvest *outcome*. The superior court made a similar error, concluding that because, in the court’s view, WDFW could predict the approximate catch outcome that would result from its 2008 pre-season schedule, the season appeared “calculated” to achieve that result. *See* CP 237, ¶ 4. However, the record is clear that WDFW did not structure the fishery to achieve any particular catch outcome. PSHA’s

¹ *See* AR 324. The regulations allocated 12 fishing days to gillnetters and 8 to purse seiners. In terms of hours, the regulations allocated 150 hours to gillnetters and 88 hours to purse seiners. *Id.*

and the court's analyses fail because they require WDFW to explain the basis for a potential outcome (allocation of actual harvest rates) that the agency's stated management objectives never intended to pursue in the first instance.

Finally, the record and WDFW's explanation of its decision show why WDFW, for policy and technical reasons, chose to allocate opportunity rather than catch, why it continued to provide some extra opportunity to gillnetters, and why it rejected PSHA's demand for significantly more opportunity. For these reasons, as explained in detail below, this Court should reverse the superior court's erroneous holding that the 2008 Puget Sound commercial salmon regulations were arbitrary and capricious. The Court should reverse the superior court's award of attorneys' fees as well.

II. ARGUMENT

A. **WDFW Has the Authority and Discretion to Allocate Harvest Opportunity Rather than Fish**

WDFW has broad statutory authority and discretion to determine how to manage state fisheries. This discretion includes the decision about how to allocate harvest among competing industry segments. The statutes governing WDFW's management of state-run fisheries, and the cases construing them, are discussed in detail in WDFW's opening brief. *See* Brief of Appellant at 18-22.

PSHA makes two statutory arguments in support of its position that WDFW must allocate on the basis of catch rather than opportunity.

First, PSHA argues that WDFW is required to allocate catch because RCW 77.04.012 directs WDFW to “conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair *the resource*.” (Italics added.) See PSHA Response at 14. However, the fact that this statute directs WDFW to avoid impairing fish resources in no way requires that it guarantee one gear group or another any particular share of catch. The statute leaves such matters to WDFW’s discretion by allowing WDFW to authorize the taking of fish at “times, places, or in manners or quantities, as in the judgment of the [fish and wildlife] commission does not impair the supply of these resources.” RCW 77.04.012.

For its second argument, PSHA claims that WDFW’s broad reading of its discretion under the statute would require that this Court “write out of existence the mandate in RCW 77.04.412² that WDFW allocate fish based only on (1) conservation purposes; (2) maintaining the economic well-being of the industry; or (3) enhancement or improvement of the industry.” PSHA Response at 17-18. The full list of reasons WDFW is statutorily *authorized* to allocate between commercial gillnet and purse seine fishers was not litigated by the parties below nor addressed by the superior court, and therefore need not be taken up by this Court.³ What is clear, however, is that the statute does not *require* that WDFW allocate catch rather than fishing opportunity.

² WDFW assumes that PSHA intended to refer to RCW 77.04.012.

³ PSHA does not enumerate all of the legitimate policy objectives WDFW may consider in structuring the fishery. For example, the statute also references the promotion of orderly fisheries and the enhancement and improvement of recreational as well as commercial fisheries. RCW 77.04.012.

It is actually PSHA, not WDFW, that seeks to rewrite the broad grant of authority in the statute by cabining WDFW's consideration of competing policy objectives with what PSHA argues is some freestanding obligation to provide a default 50/50 allocation of harvest between two competing commercial gear groups. The principle advanced by PSHA is found nowhere in WDFW's statutes nor its general fishery rules.

PSHA mischaracterizes the superior court's rulings in the instant litigation and in the litigation challenging the 2007 regulations, implying that the superior court held that WDFW is required to allocate fish ("the *resource*") rather than fishing time. PSHA's Response at 1-2. In fact, in both cases, the superior court expressly upheld WDFW's authority to allocate on the basis of fishing time.

In the litigation challenging WDFW's 2007 regulations, the superior court held,

On the issue of WDFW's authority to allocate between purse seines and gillnets, based upon the Court's review of case law, [citations omitted] WDFW has statutory authority to allocate fish *and/or fishing opportunity* among commercial gear groups, including purse seines and gillnets.

AR 60 (*italics added*). Similarly, in the case from which WDFW took this appeal, the superior court found that "WDFW has amply demonstrated a rational basis for allocating based on opportunity, not catch." CP 237. Where the court went wrong, however, was that it invalidated WDFW's opportunity-based rules because WDFW did not justify what the court predicted would be the likely catch outcome. In effect, the court confused

allocating *opportunity* with allocating *catch* by opportunity. As explained below, WDFW never sought to allocate specific catch shares.

B. Fair Allocation of Harvest Opportunity Does Not Require Equal Catch

The concept of equitable allocation derives not from statute, but from the six management objectives that WDFW itself adopted to guide its decision-making in setting seasons for Puget Sound commercial salmon fisheries. WDFW's sixth management objective, its lowest priority objective, was to "[f]airly allocate *harvest opportunity* between gear groups." AR 13 (emphasis added). It was not to fairly allocate *fish*.

PSHA agrees that "[t]here is nothing arbitrary and capricious about the management objectives; they are a reasonable interpretation of the Legislature's mandate to conserve fish and the fishing industry." PSHA Response at 22. Nonetheless, for two consecutive years, PSHA has hijacked the objective concerning harvest opportunity, elevated it beyond its intended importance, made it out to be something that it was never intended to be (an assurance of equal catch), and then argued that the record was insufficient to show why WDFW deviated from what the objective required.

PSHA argues throughout its Response Brief that WDFW must justify any deviation from a 50-50 allocation of fish between commercial gillnetters and purse seiners. This argument is ultimately premised on the faulty assumption that the fairness of harvest opportunity must be assessed solely or primarily through the lens of catch outcome. Moreover, even if

catch outcome were the primary measure of fairness, PSHA's argument in favor of equal shares is unsupported by the record.

1. WDFW never intended nor implemented its objective of fair allocation of harvest opportunity to ensure equal catch

It is undisputed that prior to 2003, WDFW scheduled an equal number of fishing days for commercial gillnet and purse seine fishing in Areas 10 and 11. AR 13. In some years, gillnetters caught more fish; in others, purse seiners caught more; in others still, they caught roughly the same amount. *See* AR 175. However, WDFW has never allocated on the basis of catch in Areas 10 and 11, nor in any other Puget Sound commercial fishery. AR 17.

WDFW's approach of providing equal fishing time reflected its policy determination that these competing groups of fishermen should simply be provided with roughly equal access to the state's share of harvestable chum in Puget Sound. The record explains that WDFW chose to allocate fishing opportunity, rather than capping the catch of either group, because it considered this approach to be the most equitable, given the many variables that affect catch outcome, and which WDFW does not control. AR 11, 16-17. This decision reflects a reasoned approach to fishery management. While it is not the policy choice PSHA would prefer, nor apparently the superior court, neither PSHA nor the courts are vested with making these kinds of policy choices.

WDFW departed from its historic practice of providing equal fishing time to commercial gillnet and purse seine fishers in Areas 10 and 11 beginning in 2003, when prices were depressed, the gillnet share fell to a low of five percent, and the industry was at risk of complete collapse. AR 13-14. Between 2003 and 2008, WDFW scheduled considerably less fishing time for commercial purse seine fishers than for commercial gillnet fishers. WDFW explained that its original departure from its longstanding practice of scheduling equal days was intended to address its management objectives to “*maintain the economic well-being and stability of the fishing industry*” and to “*fairly allocate harvest opportunity between groups.*” AR 13-14. Although WDFW considered fair allocation of harvest opportunity in responding to the historically low gillnet catch, its temporary deviation from equal fishing time was not designed to deliver a 50 percent catch outcome and it never had that effect.

In its 2008 regulations, WDFW allocated 12 fishing days (150 hours and 63 percent of the total fishing time) to gillnetters and 8 fishing days (88 hours and 37 percent of the total fishing time) to purse seiners. *See* AR 22, 324. This schedule provided the gillnetters with the midweek openings they requested for local, *niche* marketing. The regulations also allocated to gillnetters the “first starts” (first scheduled fishing in the week) they requested in all but one week of the season. AR 19, 324; CP 76-77, ¶¶ 11-15. WDFW concluded that its 2008 season structure again fairly allocated harvest opportunity between gear groups. However, this conclusion was not premised on a mathematical calculation

of catch outcome, beyond a rough determination that the dire conditions that resulted in gillnet catch shares plummeting to five percent have significantly improved.

Under the season structure adopted by WDFW for 2008, gillnetters and purse seiners alike were free to catch as many chum salmon in Areas 10 and 11 as they were able, subject only to the total non-treaty share conservation limit agreed to between WDFW and the Tribes. PSHA's suggestion that WDFW somehow limited gillnet harvest is flat wrong.⁴ WDFW imposed no limits on gillnet catch in 2008, and its allocation was not designed to achieve any particular catch outcome. AR 11.⁵

Moreover, only by significantly limiting purse seine fishing could WDFW assure that gillnetters would catch 50 percent of the non-treaty fish. As explained below, while WDFW did provide some extra opportunity to gillnetters to address the economic wellbeing and stability of the industry, it declined to take the extraordinary action urged by

⁴ PSHA alternates between arguing that WDFW has attempted to limit its catch to 30 percent and to 18 percent. *E.g.*, PSHA Response at 15, 35, 36. As indicated, WDFW did not intend any particular catch outcome. Nonetheless, PSHA makes several mistakes in calculating its 18 percent figure. First, gillnet catch rates vary significantly from year to year, and even week to week, and are affected by a variety of factors other than the number of fishing days. AR 15. Second, the gillnet catch rate more than doubled between 2006 and 2007, making reliance on an average of the two years for calculating 2008 catches inappropriate. AR 15; RP (Oct. 3, 2008) at 87-89. The fact that gillnetters caught approximately 25 percent of the non-treaty chum salmon in Areas 10 and 11 in 2006 and 31 percent in 2007 is further indication that PSHA's dire predictions for 2008 do not add up.

⁵ PSHA repeatedly references WDFW's decision to close the 2007 Areas 10 and 11 gillnet fishery based on a 17 percent benchmark derived from gillnetter catch between 1996 and 2000. Judge Wickham, in litigation concerning the 2007 season, ruled that WDFW's reliance on the benchmark was arbitrary and capricious. Whatever criticism PSHA may have of WDFW's use of a benchmark in 2007, it is irrelevant to the 2008 regulations, which relied on no benchmark.

PSHA, of limiting purse seine fishing to the degree that would guarantee gillnetters 50 percent of the fish.

2. Historic catch levels do not support PSHA's argument for equal catch shares

The purported statistical basis for PSHA's assertion that equity demands a season structure designed to allocate 50 percent of the catch to gillnetters is PSHA's calculation that "[f]rom 1973 to 1993, the gillnetters caught approximately 50 percent of the chum salmon available for non-treaty commercial harvest in Areas 10 and 11." PSHA's Response at 6. As indicated in WDFW's opening brief, but ignored in PSHA's response brief, PSHA excluded data from 1994 through 2002, when gillnetters caught considerably less than 50 percent of the catch despite being allocated equal fishing time as purse seiners. Brief of Appellant, at 29-32; AR 21-22, 175. When those years are included, the average gillnet catch is 42 percent—not the 50 percent PSHA claims gillnetters historically caught.

Moreover, PSHA failed to respond to WDFW's point regarding the effect of changes in fleet size on the fairness of a catch allocation. Brief of Appellant at 20-31 and n.20. The proportion of licensed gillnet vessels compared to licensed purse seine vessels is significantly smaller today than it was during the years that PSHA argues gillnetters and purse seiners caught an equal number of fish. *See* AR 18, 22, 229, 266. The record shows that WDFW concluded that even if it were to allocate on the basis of catch, it would be inappropriate to rely on data from only 1973 to 1993,

given the differences in fleet size, gear composition, and other conditions that now exist. AR 18, 22.

Indeed, the record reflects that gillnet catch relative to purse seine catch varied widely from year to year and trended downward between 1973 and 2002, when the gillnetters' proportion of the non-treaty catch fell to just five percent. *See* AR 175. Thus, WDFW concluded, "long-term historical information offers limited utility for guiding management decisions for contemporary Puget Sound salmon fisheries." AR 18. Such long-term averages do not, in any event, justify assuring gillnetters 50 percent of the catch in any given year.

C. There is Ample Support in the Record for WDFW's Decision

PSHA reviews a litany of considerations which it argues support allocation of more time to gillnetters. The question before this Court is not whether there is any evidence in the record to support the allocation requested by PSHA. The question is whether WDFW's decision was "willful and unreasoning and taken without regard to the attending facts and circumstances." *Washington Indep. Tel. Ass'n v. Washington Util. and Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606, 616 (2003). If there is room for two opinions, the agency action is not arbitrary and capricious. *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

WDFW summarized the various considerations that went into its regulation on pages 29-35 of its opening brief. The brief cites to the

locations in the Concise Explanatory Statement and other portions of the record that show WDFW fully considered PSHA's arguments but found they did not justify further increasing the gillnet allocation. WDFW will not repeat those arguments here. However, WDFW will respond here to PSHA's arguments concerning the economics of the gillnet industry, bycatch, catch efficiency, and WDFW's management objectives.

1. The economic condition of the gillnet industry does not require allocating 50 percent of the catch to gillnetters

PSHA argues that it was arbitrary and capricious for WDFW not to have allocated more opportunity to gillnetters than the 63 percent of the total fishing time allocated to them in the 2008 regulations. However, PSHA does not dispute that the primary reason for WDFW's departure from the historic practice of providing equal time to both gear groups—the near-collapse of the gillnet industry—has significantly subsided. The record is replete with references to the rebound and strength of the gillnet industry.

Since 2003, there has been a continuous increase in gillnet fishing effort; gillnet catch shares have steadily increased from a low of 5 percent to about 30 percent; prices for chum salmon have increased from a low of 10 cents per pound to prices approaching \$1.00 per pound; and gillnetters have had success fostering local “niche” markets. AR 14, 19, 172, 175, 227, 268. PSHA even admits that 2006 and 2007 “were good seasons for the gillnet fleet” and argues, “gillnetters are now capable of catching and selling their historic 50 percent of the harvest again.”

PSHA's Response at 10, 14, 22 (citing AR 267). There is nothing in the record to suggest that WDFW's management objective of "maintain[ing] the economic wellbeing and stability of the fishing industry" required providing even more fishing time to gillnetters than the extra time already afforded to them by WDFW. To the contrary, WDFW concluded that setting a 50-50 allocation of fish between gillnetters and purse seiners would *not* further the economic well-being and stability of the commercial fishing industry. AR 19.

2. Bycatch concerns do not mandate guaranteeing gillnetters 50 percent of the catch

PSHA argues that the rate of bycatch is higher for purse seines than for gillnets and that this required WDFW to allocate a greater proportion of fishing time to gillnetters. PSHA Response, at 19. PSHA is wrong. The record shows that gillnets—not purse seines—have a higher rate of bycatch. Nonetheless, because WDFW did not reduce or limit the gillnet fleet's fishing opportunity due to gillnet bycatch concerns, PSHA's bycatch arguments are irrelevant.

Minimizing bycatch was one of the management objectives WDFW relied on in developing the 2008 regulations. To meet this objective, WDFW imposed gear restrictions to minimize the number of coho and Chinook salmon encountered by purse seines and gillnets. Gear restrictions imposed on purse seines include 3-1/2 inch minimum mesh size in the main body and bunt part of the net, and the requirement for a 5-inch mesh strip to allow small Chinook salmon to escape unharmed.

Gillnet gear is likewise required to be constructed of 6-1/4 inch minimum mesh. Additionally, in order to minimize bycatch, WDFW scheduled the start of the fall 2008 chum season to occur *after* migrating coho would have already passed through the area to spawn. AR 20.

WDFW considered but rejected the notion that allocating more catch to the gillnet fleet would add to these measures. AR 19-20. In fact, WDFW explained its belief that the “mortality rate on salmon incidentally caught by gillnets is much greater than for purse seine gear.” AR 21. WDFW also referenced studies showing that the bycatch of seabirds is more significant from gillnets than purse seines. *Id.*

PSHA relies on its own self-serving correspondence to support its claim that results from a 2006 fishery show that bycatch is higher for purse seines than gillnets. *See* PSHA Response at 19. WDFW considered the 2006 bycatch information that PSHA cites, but found it not comparable because it concerned a different fishery, in a different location, and at a different time of year:

Chinook salmon encountered in the Area 10 & 11 fall chum salmon fishery is 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.

AR 20. Moreover, PSHA provides only estimated numbers of non-target fish killed, but no information about the number of fish encountered,

which would be necessary for an apples-to-apples comparison of gillnet and purse seine bycatch rates.

PSHA quotes from the 1997 Pacific Salmon Commission Chinook Technical Committee (CTC) Report on Incidental Fishing Mortality⁶ as support for its argument that purse seine bycatch exceeds gillnet bycatch. The quotation is, “These results indicate that gillnet release mortality can be highly variable and may be substantially lower than 90 percent for salmon in their final year of life and close to maturity.” PSHA Response at 26-27, quoting from AR 157. PSHA’s reliance on this study is misplaced for several reasons.

First, as indicated, Chinook salmon likely to be encountered in the Areas 10 and 11 fall fishery are small, immature fish—not “salmon in their final year of life and close to maturity.” AR 20. WDFW believes that the minimum mesh size requirements it imposed will help ensure these fish pass through nets unimpeded. AR 19. Nonetheless, the CTC report states that for small, immature fish encountered by gillnets, “the CTC will continue to use the 90 percent mortality rate previously assumed.” AR 157.

Second, the CTC study concluded that purse seine bycatch mortality is *lower* than gillnet bycatch mortality, not higher as PSHA argues. “The recent studies demonstrate that Chinook salmon mortality rates are potentially much lower for fish released from *purse seines* than

⁶ AR 110-62.

have previously been assumed.” AR 152 (*italics added*). Although the actual mortality rate is highly dependent upon the fishery and location, the CTC report recommends using a total purse seine mortality rate that ranges from 29.1 percent for large Chinook to 63.9 percent for small Chinook. Again, this compares with 90 percent assumed for gillnets. *Compare* AR 155 with AR 157.⁷

Third, PSHA takes issue with the statement in the CES that “[t]ribal, state, and federal scientists assume that 100 percent 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.” AR 21. Specifically, PSHA argues that this statement is without basis because WDFW, in response to PSHA’s public records request, did not identify peer reviewed scientific data or studies as the source of the statement. Response at 25-26 (citing CP 181).

PSHA misses the point. It is *because* there are no peer reviewed scientific studies establishing lower gillnet release mortality rates for Puget Sound fisheries that state, tribal and federal scientists agree to assume 100 percent of coho and Chinook salmon encountered by gillnet gear will die from handling. Even the CTC study indicates that because “[N]o study directly addresses the mortality of immature Chinook salmon

⁷ Total purse seine mortality rates are derived from the sum of immediate mortalities and delayed mortalities. For terminal fisheries such as the Areas 10 and 11 fisheries, the CTC study recommends using a low rate of 1.1 percent delayed mortality (as compared with 23 percent for other fisheries). AR 157.

caught and released from gillnets,” the CTC will continue to assume a 90 percent mortality level.⁸ AR 157.

The CTC study therefore supports the statement in the CES that gillnet bycatch is higher than purse seine bycatch. It also contradicts PSHA’s argument that gillnet and purse seine bycatch rates somehow render arbitrary and capricious WDFW’s decision not to increase gillnet fishing opportunity in the 2008 commercial season for Areas 10 and 11. In any event, WDFW’s scientific opinion, as the agency with expertise responsible for managing the fisheries, is entitled to deference. *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501-02 n.12, 39 P.3d 961 (2002). It would be inappropriate to substitute PSHA’s judgment for WDFW’s.

3. Purse seine catch efficiency does not mandate guaranteeing gillnetters 50 percent of the catch

PSHA argues that the difference in catch efficiency between gillnetters and purse seiners requires that WDFW allocate actual fish harvested rather than the opportunity to harvest fish. As explained in WDFW’s opening brief, WDFW considered catch efficiency but concluded that it did not justify guaranteeing gillnetters a set percentage of the state’s harvestable chum. AR 14-16; Brief of Appellant at 32. Catch efficiency may be related to variations in fish abundance in addition to

⁸ One of the reasons such data does not exist is because “Chinook non-retention” (CNR) gillnet fisheries—i.e., gillnet fisheries that allow release of incidentally caught Chinook—“are unlikely to be implemented due to the high-expected mortality rate of the fish released.” AR 157. Thus, WDFW imposes requirements for release of fish incidentally caught by purse seines, WAC 220-47-325, but imposes no such requirements on gillnets.

differences in operation or fishing effectiveness of the two fleets. AR 15. Moreover, catch efficiency is variable and only one of many factors that affect a gear group's total harvest.

In a related argument, PSHA asserts that purse seine net depth requires greater allocation to the gillnet fleet. PSHA refers to one day during week 45 of the 2007 season in which the gillnet fleet took a large number of chum salmon from Areas 10 and 11. PSHA's Response at 19. The regulations challenged in this case are the 2008 regulations; the fact that purse seiners caught a large number of fish on one day during the 2007 season has limited relevance. In any event, WDFW concluded that the week 45 catch, a record for the purse seine fleet, resulted in part from purse seiners choosing to focus on Areas 10 and 11, rather than fishing in Hood Canal, which had been opened simultaneously. AR 15. WDFW did not attribute the record catch to purse seine net depth. Even with that large one-day harvest by purse seiners, gillnetters caught 31 percent of the non-treaty harvest in 2007 and WDFW met its conservation objective for the fishery. AR 11, 266.

4. Other variables

The Concise Explanatory Statement discussed several considerations informing WDFW's view that allocating opportunity rather than catch would be more equitable. These included fleet size, fishing effort, market forces, economic investment of fishers, and the number of individuals employed by each fleet. AR 11, 17. PSHA denigrates several of these factors as speculative, irrelevant, or actually supporting their view

that the non-treaty chum salmon in Areas 10 and 11 should be allocated based on a 50/50 split of the fish between gillnetters and purse seiners. *See* PSHA Response at 34-46.

Here again, PSHA's argument misses the point. The number of fishing days is only one of many variables that influence season outcome. AR 17. Were WDFW to endeavor to allocate catch shares, rather than fishing opportunity, it would need to collect and monitor information concerning these other variables, both to select a defensible pre-season allocation and to adjust catch shares based on changes in these conditions over time.⁹ WDFW does not currently have access to much of this information, nor the resources to acquire it and manage the fishery on this intensive basis. AR 17. Simply stated, WDFW concluded that its limited resources are better spent elsewhere.¹⁰

⁹ For example, once an initial catch allocation were set and a fishing schedule adopted, WDFW would have to affirmatively act to ensure that the actual proportional catch shares that emerged throughout the season were consistent with the initial targets contemplated in the preseason regulations. This would require adoption of in-season emergency regulations opening or closing fisheries for gillnet or purse seine fleets.

¹⁰ PSHA points out that the North of Falcon process includes predicting fish abundance and allocating fish between treaty and non-treaty fishers. While WDFW is required to allocate on the basis of fish as between treaty and non-treaty fishers, it is not required to allocate on this basis among the non-treaty fishers.

PSHA points to the Lake Washington Sockeye fishery as another example of WDFW allocation of fish among non-treaty fishers. *See* PSHA's Response at 14 n.6. The non-treaty fishery in Lake Washington is managed primarily as a recreational fishery. WDFW's policy states that if the allowable non-treaty stock is above 200,000 fish, "commercial harvest may be considered." AR 223. Commercial harvest is not a matter of right, let alone at any guaranteed level as PSHA asks this Court to impose.

5. The record reflects that WDFW considered its management objectives in setting the 2008 season

PSHA reviews each of WDFW's management objectives and argues that WDFW has "failed to provide the necessary rational basis justifying using these management objectives to vastly advantage purse seine vessels." PSHA Response at 22-23. That argument is founded on the erroneous premise that anything other than a 50-50 split in actual catch unfairly favors one gear group over the other. As discussed above, WDFW did *not* advantage purse seine vessels. It declined to restrict them so as to assure gillnetters catch 50 percent of the fish. Nonetheless, WDFW will review each management objective and respond to PSHA's specific arguments.

a. Ensure the conservation of target species—meet spawning goals

WDFW has consistently met its conservation objectives for the Areas 10 and 11 fisheries. AR 11. WDFW indicated that to ensure it continued to meet those objectives, it would apply a conservative approach to in-season management, and that it was unlikely to allow the fishery to be open for the entire number of days scheduled. AR 16. WDFW does have the ability to impose in-season emergency closures, and regularly does so to ensure it does not exceed the state's non-treaty share. However, requiring that WDFW also make in-season adjustments to assure particular catch outcomes for individual non-treaty fishing groups would take significantly more resources than WDFW chooses to commit, given other priorities. AR 17.

b. Minimize catch or incidental effects on species (bycatch)

WDFW addressed this issue in section II.D.1 of this brief. The record is clear that WDFW did not limit gillnetter opportunity based on bycatch concerns. Nonetheless, it is also clear that the record does not support any argument by PSHA that bycatch concerns strongly favor increasing opportunity to gillnetters. “[M]ortality rates on salmon incidentally caught by gillnetters are much greater than for purse seiners.” AR 21.

c. Monitor and sample all fisheries

The Concise Explanatory Statement indicates that to help WDFW meet its objective of monitoring and sampling all species, WDFW expects to increase direct monitoring of gillnet gear. AR 21. Differences between gillnet and purse seine fishing make monitoring of gillnets more complicated. AR 20-21. Gillnetters typically fish at night on small boats with one to two crew. Purse seiners, in contrast, fish during the day, using larger boats and crews, but there are significantly fewer purse seine than gillnet vessels. Fish and Wildlife Comm’n Tr. 12/8/07, at 30; AR 229, 232. WDFW considered these differences, and indicated that an inability to implement sufficient monitoring and sampling could lead to more conservative management strategies to ensure bycatch levels do not exceed planning expectations. The Concise Explanatory Statement noted

that increased sampling of gillnets is important given their higher mortality rate. AR 21.¹¹

d. Maintain the economic well being and stability of the fishing industry

PSHA's main argument with respect to this objective is that there is no evidence in the record to show that the purse seine industry demands two-thirds of the allocated harvest in order to remain stable. PSHA Response at 28. PSHA has it backwards. This management objective operates as a safety net, not as a ceiling. As discussed in section II.C.1. of this brief, there *is* a great deal in the record to show that maintaining the well being and stability of the fishing industry, including the gillnet industry, does not require that WDFW structure the fishery to assure the gillnet fleet catches 50 percent of the fish. WDFW did conclude, however, that providing some additional time to gillnetters via the addition of mid-week (Wednesday) openings would contribute to the economic well-being of the gillnet fleet and the industry at large by providing catch at a time that is convenient for sale to weekend local markets. AR 17, 19. For this reason, WDFW scheduled 12 fishing days for gillnetters but only 8 for purse seiners.

¹¹ In most weeks, the schedule adopted by WDFW provided for gillnet openings on Wednesdays. However, in weeks 44 and 46, WDFW provided gillnet openings on Thursdays instead, so that WDFW could collect data from purse seine vessels on Wednesdays in weeks 44 and 46, consistent with historic data collection methodology agreed to with the Tribes. RP (Oct. 3, 2008) at 64 l. 1 to 67 l. 10. *See* AR 21.

e. Fully utilize the non-Indian allowable catch

WDFW considered this objective and concluded that the season structure would enable it to fully utilize the non-Indian allowable catch. AR 22. Allocating catch rather than opportunity might be less likely to meet this objective, should one gear group or another fail to harvest its entire catch share in Areas 10 and 11 because, for example, it chose to fish elsewhere instead.

f. Fairly allocate harvest opportunity between gear groups

PSHA reiterates its objection that the allocation embodied in WDFW's 2008 Puget Sound Commercial Fishing Regulations for Areas 10 and 11 are not fair given the purse seiners' greater fishing power. PSHA Response at 29. Fairness is inherently a subjective concept that is highly dependent upon the values that one brings to bear. It is not surprising that competing commercial fishers have very different views of what is fair.

It is WDFW, however, that is statutorily delegated the responsibility to manage the Puget Sound commercial fisheries. WDFW attempts to do so in a manner that fairly allocates harvest opportunity. WDFW considered a multitude of factors and arguments, and decided as follows:

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

AR 11. Clearly, WDFW considered the facts and circumstances when it made its policy decision on how to structure the fishery. The Court should defer to WDFW's judgment, as the agency the Legislature empowered to make such decisions.

D. Award of Attorneys' Fees is Improper

PSHA requests attorneys' fees on appeal pursuant to the Equal Access to Justice Act, RCW 4.84.350. PSHA Response at 44. As explained in WDFW's opening brief, the superior court abused its discretion in awarding attorneys' fees. Brief of Appellant at 35-40. WDFW's actions were substantially justified. For these same reasons, and because the superior court erred by invalidating WAC 220-47-311 and 220-47-411 with respect to the commercial salmon fishing schedule for Areas 10 and 11, this Court should decline to award attorneys' fees on appeal.

III. CONCLUSION

WDFW's adoption of WAC 220-47-311 and 220-47-411 was not arbitrary and capricious. This Court should reverse the superior court's

///

///

///

ruling otherwise, and should hold that the superior court abused its discretion in awarding attorneys' fees.

RESPECTFULLY SUBMITTED this 26th day of October, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Joe Shorin", written over the printed name of Joseph E. Shorin III.

JOSEPH E. SHORIN III
WSBA #19705
Senior Assistant Attorney General
P. O. Box 40100
Olympia, WA 98504-0100
360-753-2496

FILED
COURT OF APPEALS
DIVISION II

09 OCT 28 AM 11:55

PROOF OF SERVICE

STATE OF WASHINGTON

I certify that I served a copy of this document on David S. Mann, BY DEPUTY

Gendler & Mann, LLP, 1424 Fourth Avenue, Suite 1015, Seattle, WA

98101 on the date below as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

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

DATED this 26th day of October, 2009, at Olympia, WA.

Carol Carney
Carol Carney
Legal Assistant

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
09 OCT 26 PM 2:56
BY RONALD R. CARPENTER
CLERK