

No. 42718-4-II

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION II

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PUGET SOUND CRAB ASSOCIATION; BRIAN E. ALLISON; JOHN  
RANTZ; VINTON WALDRON; KENNETH CREWS; BRIAN  
MELVIN; BRIAN MACKEY,

*Appellants,*

v.

STATE OF WASHINGTON and DEPARTMENT OF  
FISH AND WILDLIFE,

*Respondents.*

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STATE OF WASHINGTON  
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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF THURSTON COUNTY

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## I. INTRODUCTION

Appellants (petitioners below) are six individuals operating under licenses to commercially harvest and sell Puget Sound Dungeness Crab; and their association, the Puget Sound Dungeness Crab Association (PSCA). Appellants submit this Opening Brief in support of their appeal of the final order of the Thurston County trial court (Clerk's Papers (CP) 1037-1041) that dismissed appellant-petitioners challenge to amendments made by respondent the State of Washington/Department of Fish and Wildlife (WDFW) to WAC 220-56-330 (adopted February 4, 2011) and Puget Sound Crab Fishery Policy C-3609 (adopted October 1, 2010). Appellants also challenged a new interpretation of the term "fishing industry" in RCW 77.04.012, which WDFW made in the concise explanatory statement (CES) (AR 6-22) supporting the rule change here. (RCW 77.04.012 is provided in Appendix A.)

Appellants seek an order on review invalidating the challenged amendments to WAC 220-56-330 and Policy C-3609, rejecting the new agency interpretation of "fishing industry" and reversing the final order of the Superior Court. Appellants also seek fees and costs on appeal including under the Equal Access to Justice Act ("EAJA"), RCW

4.84.350.<sup>1</sup>

## **II. ASSIGNMENTS OF ERROR**

Did the trial court err in its final order entered October 14, 2011 (CP 1037-1041) and its oral ruling on October 7, 2011 (VRP Oct. 7, 2011 at 48-58) dismissing appellants/petitioners' claim?

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Do the WAC and Policy amendments challenged here, violate RCW 77.04.012's mandate that WDFW "shall enhance and improve recreational and commercial fishing"?

2. Do the WAC and Policy amendments here -- and the WDFW's new interpretation of "fishing industry" -- violate RCW 77.04.012's mandate that WDFW shall seek to "maintain the economic well-being and stability of the fishing industry" ?

3. Did WDFW and the trial court err as a matter of law in interpreting "fishing industry" in RCW 77.04.012 to include recreational crabbing activity; or spending by recreational crabbers on "support

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<sup>1</sup> The rule and Policy changes concern both areas where there is both commercial and recreational taking of Puget Sound Dungeness Crab, and areas where there is only recreational taking of Puget Sound Dungeness Crab. Appellants/petitioners do not object to the those parts of the rule and Policy amendments that expand the recreational season in the marine regions where there is no commercial crabbing for Puget Sound Dungeness Crab (in mid and South Sound, and the Hood Canal).

industries” such as gas stations, restaurants, hotels, grocery stores, boat and van sellers, airlines, bars and casinos; or spending by commercial crabbers on support industries?

4. Were the new rule and policy arbitrary and capricious, where WDFW based its action on a numerical disparity of 236,000 recreational crabbers versus just 160 commercial ones; or where WDFW relied on an economic report that said it should not be relied on; or where WDFW ignored obvious harm to commercial harvesters, ignored all impacts beyond the first season, and ignored impacts on businesses supplying the commercial group, or downstream impacts on wholesalers, transportation, grocery stores and restaurants from sales of commercially harvested crab?

5. Should fees and costs be awarded to appellants?

#### **IV. STATEMENT OF THE CASE**

**A. For Years, WDFW’s Pre-Season Targets and Seasons Adjustment System Achieved a Stable 32% Share for Recreational Takers and a 68% Share for Commercial Harvesters in the Puget Sound Dungeness Crab Fishery.**

The Puget Sound Dungeness Crab fishery is a legally distinct fishery in waters of Puget Sound; limited to one species of crab, and limited geographically to “Puget Sound,” which for this purpose encompasses American waters in the Strait of Juan de Fuca, around the

San Juan Islands, near Point Roberts, around Whidbey Island, and mid- and south- Puget Sound, and the Hood Canal. See CES at 1, 13-14, AR at 6, 18-19<sup>2, 3</sup> The Legislature created a limited-entry commercial license system for this specific fishery in 1980. See RCW 77.70.110. This system capped licenses at 250 and enacted restrictions on sale or transfer of licenses; today there are some 160 holders of the extant 249 licenses. See RCW 77.70.110; CES at 13-14, AR 18-19.<sup>4</sup>

The purpose of the limited-entry system was to “preserve and efficiently manage the commercial crab fishery” in Puget Sound. 1980

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<sup>2</sup> For cites to the CES appellants will cite both the CES and the administrative record (AR) page where such cite is found. Appellants also cite to the both the relevant report and the AR page when citing a State Auditor report and an economic report, discussed below.

<sup>3</sup> WDFW uses region numbers for Puget Sound Dungeness Crab commercial licensees. AR 137; see CES 1; AR 6. The commercial Crab Regions overlap “marine areas” for recreational crabbers. See AR 137. The most important Regions for the commercial harvesters, in terms of pounds caught, are Region 1 (San Juans and north) and Regions 2E (East of Whidbey) and 2W (Puget Sound west of Whidbey Island). Crab Region 3 includes the Strait and has fewer pounds caught. Crab Regions 4, 5 and 6 are mid Sound, the Hood Canal and South Sound, where for years there has been no commercial harvesting allowed. Appellants do not object to the expansion of recreational crabbing in those areas only.

<sup>4</sup> The 1980 enactment limits the number of licenses to 250. RCW 77.70.110(1), (2). The licenses may be transferred only to another licensee or a surviving spouse; or bequeathed or inherited; they are not saleable generally. RCW 77.65.020; RCW 77.70.110(5). The 1980 enactment also required WDFW to “maintain” at least 125 commercial licenses if the number of license holders drops below that. RCW 77.110(6).

Laws, chapter 133, § 1. In 1984 the Court of Appeals said the limited-entry legislative scheme was intended to “protect” the commercial Puget Sound Dungeness Crab harvesters economically, and protect their solvency and investments in license, boats and gear. *Weikal v. Wash. Dept. of Fisheries*, 37 Wn.App. 322, 326, 329, 679 P.2d 956 (1984).

Appellants/petitioners here are six individuals holding and operating commercial permits for Puget Sound Dungeness Crab, who have invested in boats, license and gear. See CP 6-122 and 8. The PSCA is a nonprofit representing these commercial harvesters. CP 8, ¶ 6.<sup>5</sup>

RCW Title 77 defines *commercial activity* as any taking or selling of food fish or shellfish for money. RCW 77.15.110(1). This is what the Puget Sound Dungeness Crab commercial harvesters do: they take and sell Puget Sound Dungeness Crab for money. They comply with extensive regulations concerning their gear, seasons, and reporting the catch.

In title 77, commercial use is distinct from recreational use, which is called “personal use.” RCW 77.32.470(1). Such “personal use” of these State resources is defined in law to exclude the “recreational” crabber taking shellfish *for sale* or barter. RCW 77.08.010(38). Thus, all recreational taking of Puget Sound Dungeness Crabs is not for sale or

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<sup>5</sup> There was no challenge to standing of petitioners.

barter and those crabs do not enter a stream of commerce leading from dealers to wholesalers to grocery stores or restaurants to consumers.

In contrast to the limit of 250 commercial licenses, there is no legal limit on numbers of Puget Sound Dungeness Crab recreational takers. In 2001 they numbered some 112,000 and by 2010, this more than doubled, to 236,000. CES at 14, AR 19.

For many years, WDFW had managed this fishery producing a relatively stable outcome of share as between commercial and recreational takers. WDFW would have the recreational group go first each year, with a summer season starting July 1 followed by the commercial season from October to the Spring. AR at 1457. Since the 1994 *Rafeedie* decision recognizing that Treaty Tribes have a right to half the shellfish, CES at 1; AR at 6, before each season WDFW and Treaty Tribes would set the overall harvest quota, and divide it equally into the State Share and Treaty Tribal share. Then, each year before the summer season, WDFW would make a preseason allocation and set target levels for the recreational and commercial groups, allocating the State share “between the state commercial and recreational fishers.” CES at 102; AR 6-7.

For years WDFW would then manage to reach or try to reach the targets by limiting the recreational season days to achieve the allocation targets. Id. “Of the one-half available for state harvest, the Commission,

through its policy and subsequent rule adoption, [would set] seasons, gear and area restrictions to allocate the harvest between the state commercial and recreational fishers.” Id. WDFW often “reduced the recreational season to limit the[ir] harvest opportunity” to fulfill or attempt to fulfill the targets. CES at 15; AR 20.

The outcomes produced by this system for years achieved a roughly 68% - 32% commercial-recreational split. CES at 13; AR at 18. In the CES, WDFW entitled the data showing an average 68%/32% allocation as the “catch histories” for this fishery. CES at 13; AR at 18. WDFW data for 2000-2008 confirms the two- thirds/one-third share outcome was steady within a narrow band of variation. See Appendix B hereto, citing AR 1473. WDFW data for the 1990-91 season through 2009 also shows the two-thirds/one-third allocation outcome was steady for almost two decades. See Appendix C, citing AR 39 (WDFW chart Jan. 8, 2011). A pie chart illustrating this historic 68%/32% (roughly two thirds-one third) allocation is provided in Appendix D.

The 68%/32% outcome in shares was the result of WDFW management for years. The prior version of Policy C-3609 adopted February 2000 directed WDFW to manage this fishery by setting preseason target levels for the recreational catch, then adjusting the days of the recreational season to manage to the allocation. CES at 15; AR 20.

This February 2000 Policy C-3609 also re-stated the directive in RCW 77.04.012 that WDFW “shall maintain the economic well being and stability of the fishing industry in the State.” AR 808.

In 2004, the State Legislature required the personal-use crabbers taking Puget Sound Dungeness Crab to obtain, in addition to the generic State fishing license, a special endorsement for Puget Sound Dungeness Crab, and to turn in Catch Record Cards to report their catch (numbers of crab caught, dates and locations). RCW 77.32.430(2), (3). The Legislature stated its intent in this 2004 enactment was to help assure WDFW’s “recreational allocation” was achieved and to enable WDFW to “more accurately estimate the preseason allocation . . . and monitor in-season catch.” Laws 2004, chapter 107 §§ 1 and 3.

Also in 2004, WDFW changed its season rules to cut the recreational summer season from five to four days a week, and reduce the recreational daily bag limit to five crabs per day. CES at 15; AR 20. This was to help achieve the target allocations. CES at 15, AR at 20.

In 2004 and at all times prior to the new interpretation challenged here, WDFW did not interpret “fishing industry” in RCW 77.04.012 as including economic impacts from spending on support industries nor did it study or even consider economic impacts on support or supplier industries from its cuts of recreational seasons.

Despite the fairly stable share outcomes in this fishery, often times the recreational group overfished their targets from 2005 through 2009. AR 103. This led to complaints by commercial harvesters. However, at no time did WDFW formally state or rule that this over-catch impacted spending on supplier industries or helped WDFW fulfill the mandate to “maintain the economic well-being and stability of the fishing industry.”

**B. 2010 Auditor Report Calls for Clarification and Reports Serious Violations by Recreational Crabbers**

On January 15, 2010, the State Auditor released its “Puget Sound Dungeness Crab Fishing Performance Audit Report No. 1002690.” CES 15, AR 20; AR 1446-1479 (Audit Report).

The State Auditor had two basic conclusions. First, he concluded that the “Fish and Wildlife Commission should clarify its policy on the commercial/recreational allocation.” AR 1471. The call for clarification was because the recreational groups often exceeded the target levels. Audit Report at 21, AR 1471.

Second, the Auditor found WDFW was not properly regulating recreational harvesters, who broke rules to a significant degree. The Auditor found they broke reporting rules, failing to report their catch, and WDFW had not dealt with this problem. See Audit Report at 11, AR 1461. The Auditor found only about 1/3 of summer recreational takers

submitting their CRCs or otherwise reporting; and in 2007 and 2008, some 45% of the recreational crabbers in 382 enforcement encounters with WDFW were violating reporting rules. *Id.*<sup>6</sup> The Auditor also found recreational takers violated rules protecting the crabs. CES 6, AR 11; Audit Report at 16; AR 1466 (recreational crabbers oft violated rules barring taking of undersized, female or soft-shelled crabs, or rules against mutilating crabs). The conclusion reached was that “Violations by some recreational crabbers may jeopardize the fishery.” CES 6, AR 11; Audit Report at 16; AR 1466. In sum, the Auditor found WDFW was not protecting the crabs sufficiently nor managing the fishery well.

**C. In Response, WDFW Amends Puget Sound Dungeness Crab Rules and Policy and Changes Its Interpretation of “Fishing Industry.”**

In response to the State Auditor Report, and complaints by commercial and recreational harvesters, WDFW undertook review of Policy C-3609 and its seasonal limits rules. In October 2010 it changed the Policy (CES at 15, AR 20; AR 1-5); in February 2011 the WDFW Commission voted to amend WAC 220-56-330 (AR 1287, 1302-1304); on April 11, 2011 WDFW issued the CES supporting the rule change and containing the new interpretation of “fishing industry” in RCW 77.04.012

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<sup>6</sup> Only 52% of the recreational crabbers who take CRCs report their catch. AR 1441. Data from 2007 shows 45% of those found with crabs violated reporting rules. Auditor Report at 11; AR 1461.

(see CP 127, AR 6-22); and also on April 11, 2011 WDFW filed its notice of rule adoption with the Office of Code Reviser. AR 23-24.

The changes made, that are challenged here, include these:<sup>7</sup>

1. Amendments to rules and Policy expand the summer recreational season from 4 days a week (Wed. to Sat.) to 5 days a week (Thur. to Mon.) and add a 7 day a week winter season. AR 1-5.<sup>8</sup>

2. Amendments to Policy C-3609 eliminate the directive to “maintain the economic well being and stability of the fishing industry.” AR 1, 808.

3. Changes to rule and policy end the former management system making a *preseason allocation* and setting area targets, then *adjusting recreational season* days to aim for the target. The new system in the Policy provides a fixed base summer recreational season in place of an adjustable one, and states for the first time recreational users have “priority” over commercial harvesters in Regions 1-3 (that is, Regions with both recreational and commercial crabbing). AR 3.<sup>9</sup> The fixed base

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<sup>7</sup> Some parts of the new policy such as continued monitoring or continued use of the 3-S system (size, season and sex rules on harvesting) are not challenged here.

<sup>8</sup> The fifth day adding a second weekend day, allowing recreational crabbers to take crabs both Saturday and Sunday, and also allowing them to leave pots out overnight on the weekend.

<sup>9</sup> As discussed below, this “priority” contradicts RCW 77.04.012’s language directing WDFW improve recreational and commercial fishing.

recreational season is from July to Labor Day 5 days a week, plus 7 days a week in winter. AR 3.

4. In the CES WDFW made a new rule, for the first time interpreting “fishing industry” in RCW 77.04.012 to include “support industries”: “the Department views the term ‘fishing industry’ as encompassing both commercial harvesters, their support industries, and the industries supporting recreational harvesters.” CES at 10, AR 15.

The CES cites a report by a California economist named Thomas C. Wegge, owner of “TCW Economics,” entitled “Economic Analysis of the Non-Treaty Commercial and Recreational Fisheries in Washington State, December 2008” (“TCW Report”). CES at 11 (AR 16). The TCW Report is at AR 1480-1528. This Report was commissioned by the Governor seeking to know the economic benefits of commercial and recreational fishing in the State. The governor did not ask for any definition of “fishing industry” in this report, and the Report speaks of economic impacts from commercial or recreational fishing or shellfish harvesting. It does not address Puget Sound Dungeness Crab specifically. See TCW Report 5-12, AR 1496-1503. The TCW Report concludes generally there is positive economic impact from both recreational and commercial fishing, but warns the Report should not be used for a “comparative analysis of the two fisheries,” recreational and commercial.

AR 1484.

The TCW Report indicates that it is counting as an economic benefit of recreational fishing (a) imputed satisfaction (“willingness to pay”) felt by recreational fishers for each day of recreational fishing, estimated at \$43/day based on survey responses, although this is not an actual cash transaction, TCW Report at 19-20, AR 1510-1511; and (b) recreational fishing and shellfish takers’ spending on businesses supplying or servicing them such as “casino hotels,” “drinking places,” airlines, gasoline sellers, restaurants, and sellers of hobby books, music, boats and vans. See TCW Report at 19, 24, 36; AR 1510, 1515, 1527. Those are the “support industries” WDFW in the CES deemed to be part of the “fishing industry.”

**D. Amendments and New Priority for Recreational Crabbers Boost Recreational Share, By Cutting Commercial Share.**

WDFW admitted in making these rule changes that this is a zero-sum fishery: “Because 100% of the harvestable amounts of crab are harvested by the three user groups, an increase in opportunity to one group necessarily means a reduction to another.” CES at 13, AR at 18.

The CES projects that recreational users’ share will rise from the historic 32% level to 48% in the first season alone under the new system, and this will cut the commercial share from 68% to 52%. CES at 10, 11,

13; AR 15, 16, 18. This is a projected fifty percent boost in recreational share, causing a twenty-four percent decrease in the commercial share. This is only for the first season under the new rules, as WDFW did not project the commercial share or catch level share in future seasons.

The shift in first-season share which cuts the commercial share from 68% to 52% is shown on the pie chart in Appendix E.

In the rule making process, WDFW staff told the Commission the expansion of recreational catch would be 555,617 pounds, causing the commercial catch to fall by 441,000 pounds in the first season. AR 1245, 1247.<sup>10</sup> There was no study of the cumulative loss of catch in pounds beyond one season. The projected recreational catch under the new rule and policy was to be the highest level ever for that group, some 1,832,417 pounds. CES at 11; AR 16. This is also higher than the 2000-2009 recreational average of 1,357,000 pounds, CES at 11; AR 16. The 1.8 million pound level was also known by the WDFW to be higher than the 2005-2009 recreational average of 1,276,800 pounds. AR 1245. The projected recreational catch level increase of 555,000 pounds from a 2005-2009 average of about 1.3 million pounds is about a 43% increase.

The 441,000 pound projected reduction in the commercial catch

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<sup>10</sup> The increase and decrease are not equal because the expanded recreational season includes areas in the mid-Sound and South Sound, and the Hood Canal, where there is no commercial harvesting.

compares to their harvest of 3 million pounds in 2009, and average catch in 2005-2009 of 2,766,034 pounds. AR 1247; CES at 12, AR 17.

The projection of a loss of 441,000 pounds was derived by projecting a new catch level of 2,324,077 pounds for the first season and comparing this to the 2005-2009 average. There was no study of ongoing or cumulative losses going forward, and WDFW knew the 2.3 million pounds projected catch was lower than the commercial catch in each of the prior 10 years and 13 of the 16 prior years. AR 1247. The WDFW Commission also knew the drop to some 2.3 million pounds was a 700,000 pound drop, compared to the last year catch level that was available at the time (the 2009 catch of 3 million pounds). AR 1247.

WDFW staff told the Commission the changes and expanded season for recreational crabbers would cause a cut in commercial revenue \$1.2 million the first season alone. VRP, administrative hearing of Dec. 4, 2010, at 28 (WDFW staff said the revenue decline will be \$4,900 per license; \$4,900 times 249 licenses is \$1,220,100). The \$1.2 million revenue loss projection was in the context of 2009 commercial revenues over \$8 million, AR 1248. WDFW projected a new revenue level of some \$6.2 million. See CES at 11-12; AR 16-17. There was no study of economic losses going forward after one season.

**E. CES Justifications: 236,000 Recreational Crabbers Have**

**Numerical Superiority and Their Spending at “Support Industries” -- Now Deemed Part of the “Fishing Industry” -- Creates Potential Economic Benefits to State Personal Income.**

The CES justification for the new rule is that the recreational fishers outnumber commercial ones by about 200,000 to 160. CES at 13; AR 18. The actual numbers were 236,000 to 160 in 2010 as recreational users more than doubled from 112,000 in 2001 to 236,000 in 2010. CES at 14, AR 19.

The CES states the new regime creates “potential economic benefits to the State,” CES at 1; 9-13, AR 6, 14-18, due to expected increase in recreational crabbing trips causing more spending on their support industries which will boost state personal income some \$5 million a year. CES at 11, AR 16.

The CES compares the projected commercial revenue of \$6.2 million to a multiyear past average for 2000-2009 of \$6,498,000, and takes this difference of some \$250,000 to mean the new system will result in commercial revenues for 2011 “likely . . . approximately equal” to 2000-2009 average revenue. See CES at 11-12; AR 16-17. In the period 2000-2009, the revenues were increasing steadily. AR 16.

The CES does not study or consider the decline in spending at commercial crabber support industries; downstream economic impacts from reduced commercially catch as that would affect wholesalers and

dealers, grocery stores, restaurants or other food outlets; nor how much of this projected \$5 million increase in state personal income takes place at “casino hotels,” “drinking places,” airlines, travel agents, gas stations, minimarts, groceries or bars or places selling gear, hobby books, music, boats or vans. See TCW Report at 19, 24, 36; AR 1510, 1515, 1527. Nor does the CES discuss how much of the alleged \$5 million potential benefit is composed of imputed non-cash recreational users’ imputed personal satisfaction. There is no projection of impacts beyond one year, and no discussion in the CES of the estimate of a \$1.2 million revenue loss previously given to the Commission, nor any cumulative economic impacts assessment or assessment of changes in stability going forward from a new system giving recreational takers priority and ending the prior system.

There is no discussion in the CES of how many crabbers need expanded recreational access. The prior rule allowed 5 crabs a day 4 days a week, or 20 crabs a week. WDFW data in the rule making file shows only 35 recreational takers caught over 100 crabs a season (out of 109,098 reports filed); some 98% of them only crab five days a season or less, 0.77% crab 6-10 days; and 0.16% crab 11 days a season or more. AR 213-17.

**F. Procedural History of this Case**

On March 7, 2011 petitioners below (appellants) filed a petition

challenging the new rules and Policy under RCW 34.050.510 et seq. CP 6. The Petition alleged the new rules and policy, and interpretation of “fishing industry,” violated RCW 77.04.012 and were adopted arbitrarily and capriciously. CP 6 et seq. On April 29, 2011 petitioners moved for a preliminary injunction barring implementation of the expanded season for recreational crabbers in the summer 2011 season. See CP 127-233, 234-336, and 337-362. On June 8, 2011 the trial court denied the motion. CP 252-254. The Court adopted the interpretation of “fishing industry” taken by WDFW. VRP May 13, 2011 at 3-9.

On October 7, 2011, after hearing argument on the merits of the petition, the trial Court dismissed the petitioners’ claims. VRP Oct. 7, 2011 at 48-58; see also CP 1037-1041. The trial court again agreed with the WDFW interpretation of “fishing industry” and found the rule adoption was not arbitrary or capricious. See VRP of Oct. 7, 2011 at 48-58.

Petitioners timely appealed, filing their notice of appeal on October 24, 2011. CP 1042-1052. The Notice sought review of the both the final order and the order denying the preliminary injunction. *Id.* Here, appellants contend only the propriety of the final order.

## **V. SUMMARY OF ARGUMENT**

The new rule and policy here create a new management system

giving recreational harvesters priority, and ending the practice of adjusting their seasons, projected to boost their share from 32% to 48%, and to cut the commercial share from 68% to 52% -- changing historic levels that prevailed for years. The new system is based on the finding that numerical superiority is relevant to shifting share outcomes, via a new interpretation of “fishing industry” to include recreational “support industries” of all kinds. Thus, spending by 236,000 recreational crabbers for boats, vans, gear, food and drink, plus bar tabs, hotel bills, and betting at casinos, now means WDFW can here boost their share, and cut the share and status of the commercial group. This reasoning means WDFW may or should do so the same in the future when the recreational numbers continue to grow.

These changes violate RCW 77.04.012 and were arbitrary and capricious. Under the interpretation of “fishing industry” adopted here, WDFW could now further boost the recreational share as their numbers grow, or eliminate commercial crabbing in this fishery. It could also cut commercial allocations in the salmon fishing and commercial shrimp fisheries on the same basis. There will always be more recreational takers than commercial ones. The new interpretation of “fishing industry” and reasons given here, destabilize and harm this commercial fishing sector.

The Legislature knew there are recreational-commercial conflicts.

It told WDFW how to handle demands of recreational crabbers or recreational fishers competing with commercial ones in RCW 77.04.012, by providing WDFW shall improve both “recreational and commercial fishing.” This bars the priority given to recreational crabbers here, bars the entire set of rule and policy changes, and bars the interpretation of fishing industry adopted for the first time here. The mandate to improve both commercial and recreational fishing, bars improving recreational fishing by taking from commercial fishing, in a zero-sum fishery like this one. It bars giving more to recreational takers just because there are more of them. That action does not improve commercial fishing: it takes from its share, harms its ability to catch the resource, and can lead to its elimination by WDFW. Therefore it is barred. The changes challenged should be invalidated as outside the agency authority under the improve-commercial-fishing mandate in RCW 77.04.012.

They also violate the mandate in RCW 77.04.012 to maintain the economic well-being and stability of the fishing industry. The plain meaning of “fishing industry” includes commercial fishers or harvesters of shell fish, and other businesses handling fish or shellfish for sale, such as wholesalers and processors. This excludes all “support industries” that do not sell fish or shellfish products but sell other things such as air trips, gas boats, insurance or hotel services. Those are the airlines industry, gas

industry or boat or insurance or hotel industries -- their income is income in those industries and is not part of the "fishing industry." "Fishing industry" does not include recreational fishing at all because that is personal use activity, for which Title 77 bars any commercial sale of the crabs. If the recreational crabbers themselves are not the fishing industry, neither are their "support industries." The novel broad and unbounded interpretation by WDFW contradicts its own prior de facto interpretation, as it did not take this view in 2004 when it cut recreational days. The WDFW view leads to the outrageous result that WDFW may cut down or eliminate commercial fishing and others in the fishing industry, by the mere expedient of considering spending at support industries for recreational takers who vastly outnumber the commercial operators. This is not what the Legislature intended when told WDFW to maintain the economic well being and stability of the "fishing industry." The WDFW new interpretation here utterly defeats the legislative purpose.

The amendments are arbitrary and capricious, too. WDFW ignored all impacts beyond one season or from future cumulative loss of share, as recreational numbers grow. It ignored the obvious fact the new priority for them will mean ever-growing cuts in commercial share. It ignored the TCW Report warning that that report should not be relied on, and the obvious fact that continued growth in recreational crabbing under

the new system would sooner or later spell the end of commercial harvesters. It did not even look at look at support industry impacts from the projected drop in commercial pounds.

The rule changes, policy changes and new interpretation of “fishing industry” should be invalidated, the final order of the trial court reversed, and appellants/petitioners should be awarded fees and costs under the EAJA.

## **VI. ARGUMENT**

### **A. Standard of Review**

A court will invalidate a challenged agency rule if it violates the statutory authority of the agency, or if its adoption was arbitrary and capricious. *Washington Federation of State Employees v State Dept. of General Admin.*, 152 Wn.App. 368, 377-378, 216 P.3d 1061, quoting *Wash. Pub. Ports Ass’n v. Dept. of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). As stated in *Puget Sound Harvesters Ass’n v. Washington State Dept. of Fish and Wildlife*, 157 Wn.App. 935, 944-945, 239 P.3d 1140, 1145 ( Div. 2,2010), the court on review will invalidate the rule if it finds that it violates or exceeds the agency’s statutory authority, was adopted without compliance with statutory rule-making procedures; or is arbitrary and capricious. *Id.*, citing RCW 34.05.570(2)(c).

An appellate court reviewing agency rule-making action sits in the same position as the superior court, applying standards of the WAPA directly to the administrative record before the agency. *Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n*, 149 Wn.2d 17, 24, 65 P.3d 319, 322 (2003).

Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Id.*, citing *Wash. Fed'n of State Employees v. Dep't of Gen. Admin*, 152 Wn.App. 368, 387, 216 P.3d 1061 (2009) and *Wash. Indep. Tel. Ass'n v. Wash Utils. & Transp Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). The reviewing court considers the rule-making file and the agency's explanations. *Puget Sound Harvesters*, 157 Wn.App. at 944-45 citing *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 906, 64 P.3d 606.

An agency has only the authority granted by statute. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 537, 869 P.2d 1045 (1994). The appellate court reviews a ruling as to the meaning of a statute under the de novo standard, as a question of law. *Waste Mgmt of Seattle, Inc. v. Utilities & Transp Commn*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). The court has ultimate authority to decide the meaning of the statute. *Waste Mgmt.*, 123 Wn.2d at 627, 869 P.2d 1034. A court does not defer to an agency interpretation of an unambiguous statute, *City of Pasco v. Pub.*

*Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992), nor defer to an agency interpretation that conflicts with the statute. *Waste Mgmt.*, 123 Wn.2d at 628, 869 P.2d 1034.

The APA defines a rule as any order or directive of general applicability creating a penalty or sanction. RCW 34.05.010(16). Such policies or directives require the rule-making process. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 397-400, 932 P.2d 139 (1997) (policies setting water priority). This includes notice to concerned members of the public. *Hillis*, 131 Wn.2d at 399, 932 P.2d 139. Policies of general applicability must be treated as rules and comply with those procedures. *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 901-902 (citation omitted). Here, appellants challenge three “rules”: changes to WAC 220-56-330, changes to Policy C-3609 and the new interpretation of “fishing industry” in the CES.

**B. WDFW Violated RCW 77.04.012**

**1. Plain Meaning, Dictionaries, & Statutory Construction**

To consider if the agency violated the statute governing the agency, the Court must apply the plain meaning rule. *State v. Hirschfelder*, 148 Wn.App. 328, 336-337, 199 P.3d 1017 (Div. 2, 2009), citing *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). The plain meaning rule requires that a Court first determine the plain meaning of the statutory text in question, by considering all related

provisions, reading them as a whole, *Christensen*, 162 Wn.2d at 373, and giving effect to all words. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

If relevant terms are not defined in the statute, the court uses an ordinary dictionary to find their meaning. *City of Spokane ex rel Wastewater Mgmt. Dep't v Dep't of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002); *Western Telepage, Inc. v. City of Tacoma*, 95 Wn.App. 140, 147-148, 974 P.2d 1270 (1999), *aff'd*, 140 Wn.2d 599 (2000); *see also State v. Johnson*, 159 Wn.App. 766, 770-771, 247 P.3d 11, 13-14 (Div. 2,2011) (using dictionary definition).

The court applies the plain meaning of statutory words “regardless of contrary interpretation by an administrative agency.” *Western Telepage*, 140 Wn.2d at 611-612, quoting *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-206, 142 P.3d 155 (2006). Courts are not to read into statutes things not there, or modify them by construction. *King County v. City of Seattle*, 70 Wn.2d 988, 991 (1967). There is no resort to statutory construction or interpretation unless the court finds more than one reasonable plain meaning. *Christensen*, 162 Wn.2d at 373. In construing a statute, the Court will give effect to its purpose and avoid unlikely, absurd or strained consequences. *State v. Stannard*, 109 Wn.2d 29, 742 P.2d 1244 (1987); *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). The Court

also may look to relevant case law. *Christensen*, 162 Wn.2d at 373; *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

## **2. Relevant Provisions of RCW 77.04.012 Are Mandatory**

“Shall” in a statute normally is imperative, creating a mandatory duty in a statute. *Ballasiotes v. Gardner*, 97 Wn.2d 191, 195, 642 P.2d 397, 399 (1982). The Court considers the context of the word “shall” in a statute including whether or in the statute the Legislature clearly distinguished mandatory and discretionary provisions. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040, 1041 (1994).

Here, the central claim of WDFW is that it has discretion to manage this fishery as it may, here, shifting allocation in its discretion, for example, deciding to give more share to recreational crabbers because they outnumber commercial ones 236,000 to 160. However, there is no such grant of such discretionary authority in RCW 77.04.012 and the plain meaning of the provisions regarding “commercial fishing,” “recreational” fishing and the “fishing industry” negates the notion the Legislature gave WDFW the discretionary powers it claims. This is based on the use of mandatory and discretionary provisions in RCW 77.04.012 itself, and a context in which full discretion for WDFW to adjust these “tensions” as it will, could severely harm or eliminate commercial fishers or the fishing industry.

The text of RCW 77.04.12 is in **Appendix A**. It states in part:

**RCW 77.04.012**

**Mandate of department and commission.**

. . . . 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.

*The commission shall attempt to maximize the public recreational game fishing and hunting opportunities of all citizens, including juvenile, disabled, and senior citizens.* [Bold italics and underlining added.]

The above statute says WDFW “shall” protect and conserve the State resources; consistent with that goal, it “shall seek to maintain economic well being of the fishing industry”; and it “shall enhance and improve recreational and commercial fishing.” These provisions do not use the word “may,” or refer to WDFW “judgment” in those sections. The statute uses “may” and refers to WDFW judgment in the sentence concerning WDFW’s setting restrictions on take or harvest to not impair supply of resources.

Thus, here there is a clear distinction between mandatory and discretionary provisions. The provisions concerning protection for the fishing industry and commercial fishing are mandatory, not discretionary as WDFW claims. The provisions concerning preserve and protect the fish and shellfish, and improving recreational and commercial fishing, are mandatory. Where conservation of the resource is not at issue the language stating WDFW shall seek to maintain the economic well being and stability of the fishing industry is mandatory.

There is no “may” or “discretion” in the provisions relating to commercial fishing or the fishing industry. WDFW does not have discretion to set share or manage seasons for the purpose of regulating recreational-commercial conflicts, as it claims.

**3. WDFW Has Violated the Mandate that It “[S]hall . . . Improve . . . Commercial Fishing”**

RCW 77.04.012 provides WDFW “shall enhance and improve recreational and commercial fishing.”<sup>11</sup> This provision directly addresses recreational-commercial conflict. Plainly, it means WDFW may not regulate those conflicts as it may choose, nor shift share just because recreational fishers are greater. The provision plainly bars robbing

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<sup>11</sup> It is agreed recreational crabbers are within “recreational . . . fishing” and commercial crabbers are within “commercial fishing” in RCW 77.04.012.

commercial Peter to pay recreational Paul: WDFW must improve fishing for *both* Peter and Paul.

The changes expanding recreational share and providing priority here, ending the system of adjusting recreational seasons, projected to mean a large cut in the historic 68% share for the commercial group, do not improve commercial fishing, and thus were outside the statutory authority of the agency. The new system is highly destabilizing as it sets in place a system in which in future years, growth in recreational numbers and take would cause larger reductions in share for the commercial group. They are at risk; before they had a stable two-thirds. This harms and destabilizes commercial fishing utterly. The new system and claim of full discretion allows the commercial operators to be wiped out sooner or later. This is not “improv[ing] commercial fishing.” Because the changes do not enhance and improve commercial fishing, the amendments to the WAC and Policy violate RCW 77.04.012 and should be invalidated.

Obviously the Legislature knows of commercial-recreational conflicts. It specifically addressed them in this specific fishery in 2004 -- intending to strengthen the preseason target and in season monitoring system protecting commercial fishers by setting targets for the recreational take. WDFW has ended that, flouting the legislative purpose. The Legislature in coupling recreational and commercial fishing in RCW

77.04.012, plainly sought to prevent WDFW from choosing to elevate recreational fishing over commercial fishing, as done here.

WDFW cannot rewrite “and” to mean “or” as this would deprive this part of the statute of all meaning. To hold WDFW may improve recreational fishing, at its discretion, because they demand it, rewrites this provision and that is not allowed. *King County v. City of Seattle*, 70 Wn.2d 988, 991 (1967) (one may not rewrite statutes by construction).

All other statutory context supports this conclusion. The purpose of a limited entry commercial Puget Sound Dungeness Crab system, RCW 77.70.110(2), (6), was to “preserve” the “commercial crab fishery in the waters of Puget Sound,” 1980 Laws, ch. 133 §1; *Weikal*, 37 Wn.App. at 326-329. This purpose is defeated if WDFW may choose to reduce the commercial take or eliminate it at its discretion.

The 2004 legislative changes’ purpose to strengthen the preseason allocation and manage-to-target system in this fishery is defeated if WDFW has discretion to give recreational takers priority and a fixed base season, essentially abandoning a real target system.

The entire structure of Title 77 shows an intent to have stable, managed commercial fisheries. WDFW cannot disrupt a limited-entry fishery by issuing even a single new license, over the cap; so it cannot totally disrupt the future of the commercial group here, by setting in place

a system in which 236,000 recreational crabbers (soon to be 300,000 or more) have priority.

RCW 77.04.012 also states “The commission shall attempt to maximize the public recreational game fishing and hunting opportunities of all citizens.” Including game fishing and hunting in this “maximize” provision -- but not food fish taking or shellfish -- means the Legislature was directing WDFW to *not maximize* recreational taking of shellfish or food fish. See *ATU Legislative Council of Wash. State v. State of Wash.*, 145 Wn.2d 544, 552-53, 40 P.3d 656 (2002) (inclusion of certain things in a list means there was intent to exclude what is not mentioned); *Jacobsen v Dep't of Labor & Indus*, 127 Wn.App. 384, 392, 110 P.3d 253 (2005)<sup>12</sup>

Courts are not to read into statutes things not there, or modify them by construction. *King County v. City of Seattle*, 70 Wn.2d 988, 991 (1967). The WDFW here has modified RCW 77.04.012 to give it discretion to improve recreational fishing by harming, taking from or

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<sup>12</sup> WDFW may argue it has not yet “maximized.” The new system and its basis means the writing is on the wall, though: future growth in recreational numbers, means more for them, less for the commercial group. The refusal to look beyond one season makes this clear. WDFW may also argue “there is still other commercial fishing in the state.” However, the Legislative purpose to create and maintain this specific fishery’s commercial fleet is clear. In any event, the WDFW argument would create a true slippery slope, allowing ever-reduced commercial catch, as long as some commercial catch is left. This is very destabilizing and does not improve commercial fishing, which needs stability.

subordinating commercial fishing. This violates the plain meaning of the commercial-recreational prong of RCW 77.04.012. The Court should invalidate the challenged changes on that basis.<sup>13</sup>

**4. WDFW Has Violated the Mandate it “Shall Seek To Maintain the Economic Well-Being and Stability of the Fishing Industry.”**

“Fishing industry” not being defined in Title 77, the starting point is consideration of related provisions, *Christensen*, 162 Wn.2d at 373, and consultation of an ordinary dictionary. *City of Spokane*, 145 Wn.2d at 454, *Western Telepage*, 140 Wn.2d 599.

Notably, neither the trial court nor WDFW in this case has supplied any dictionary definitions.

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<sup>13</sup> WDFW may seek to argue there is no harm to the commercial sector because its projected revenue level under the first season of the new system are about the same as a 2000-2009 average. But this avoids the obvious: there is a large shift in pounds of crabs out of the “commercial” column and into the “recreational column.” Without this shift, the commercial sector would do much better economically.

WDFW also ignores its own projection the loss is \$1.2 million in one season alone. This also avoids the obvious fact that the new system sets up this fishery for continued shifts in share to the recreational group in the future. Finally, to compare one year going forward with nine years in the past is like saying, “Real estate values in 2013 are not going to be much below the average of real estate values for 2000-2009.” The use of many years in the past to compare to one year in the future obscures a significant drop in the first year in the present, or downward turn in trend lines. There is no question the new system does not improve commercial fishing, the commercial group opposed it, and it leads to a large cut in pounds and share for the commercial group, and WDFW made these changes seeking to enhance recreational fishing, not commercial fishing.

Ordinary dictionaries define “industry” and, helpfully, the phrase “the [specific] industry” as follows: “Industry” means commercial production and sale of goods or services and “specific named industry” means manufacture and trade in the specifically named product. Webster’s II New Riverside Dictionary, Houghton Mifflin 1996 (“Riverside”) at 354.

The Random House Webster’s Unabridged Dictionary, 2d Edition, 1998 (“Unabridged”) is in accord: “industry” means “trade or manufacture in general”; the “x industry” means “enterprises in a particular field . . . *automobile industry; the steel industry*”; “*tourist industry.*” Unabridged at 976 (emphasis added). These definitions are in Appendix F.

The Compact Edition of the Oxford English Dictionary, Oxford University Press 1971 (“OED”) agrees: “industry” refers to is a particular branch of trade or manufacture. *Id.* at 1472.

Under the WDFW view, all industries are mixed up in the “fishing industry” if they merely “support” or sell to people who fish. This erases the lines between different industries. Entities selling gas, boats, insurance, airline tickets drinks, food, hotel services, casino services, books or vans, or even fishing gear and supplies, are in the gasoline industry, the boat industry, the insurance industry, the airline industry or the outdoor goods industry, not the fishing industry. The automobile

industry buys steel and rubber. This does not make steel or rubber makers' income from spending by automobile makers part of the automobile industry.

Under the dictionary definitions “fishing industry” means activity for trade or commerce involving production and sale of fish or shellfish commercially. This includes commercial fishing, wholesaling, buying, or processing fish or shellfish, for sale. Logically enough, all of that is regulated and licensed by WDFW already. See RCW 77.65.010-520 and RCW 77.65.010(1). WDFW is thus mandated to maintain the businesses it regulates so heavily. Title 77 defines commercial activity as any taking or selling food fish or shellfish for money. RCW 77.15.110(1). This fits with defining “fishing industry” to include commercial fishers, wholesalers and others licensed to handle or sell State resources, subject to WDFW regulation.

Since recreational crabbing excludes sale or barter of crabs, RCW 77.32.470(1) and RCW 77.08.010(38), recreational crabbing is not for commerce or trade purposes, and is not within “fishing industry.”<sup>14</sup> If

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<sup>14</sup> Webster’s Unabridged at 1613 defines recreation as “refreshment by means of some pastime, agreeable exercise, or the like,” or “a pastime, diversion, exercise or other resource affording relaxation and enjoyment.” The distinction with “industry” is clear.

recreational crabbing is not part of the fishing industry,<sup>15</sup> it is odd indeed to then leap over the recreational crabber and say their support industries are in the term “fishing industry.” The new WDFW definition mashes together the many industries supporting fishing, even bars and hotels, into the “fishing industry,” expanding the term “fishing industry” beyond all bounds. Commercial crabbers spend money for gas, too, but gas stations are not part of the “fishing industry” and a rise in their income is not part of the economic well being WDFW must maintain.

*Kim v. Pollution Control Hearing Bd.*, 115 Wn.App. 157, 162-163, 61 P.3d 1211 (2003) involved the meaning of the term “industry.” There the Court looked to a Webster’s dictionary and found a statute concerning water for “industrial purposes” included water used by “commercial nurseries but not noncommercial gardens.” This is contrary to the new definition of “fishing industry” found by WDFW here.

WDFW rested its rule and policy changes on its new interpretation of “fishing industry,” claiming potential economic benefit to State personal income due to increased spending by recreational crabbers on their “support industries.” But RCW 77.04.012 did not ask WDFW to look to state personal income, or well-being of “support industries.” It

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<sup>15</sup> Even the CES recognizes recreational users are not industry, noting small business impact rules do not apply as recreational crabbers are not business or “industry.” CES at 1.

mandates WDFW to maintain economic stability of the fishing industry. Because the amendments to Policy and rule challenged here expressly rest on the new and erroneous interpretation of “fishing industry,” the Court should reverse the trial court’s order, invalidate the WDFW’ new interpretation, rule and policy changes challenged here, and restore the status quo ante.

All other statutory context supports this. “Maintain” means upholding something against forces of threat or diminishment or attack. See Webster’s Unabridged at 1160; Riverside at 414 (defining maintain as “to carry on, continue, to keep in a desirable condition, [or] defend as against attack or danger”). “Economic” refers to production or distribution of income, wealth or commodities. Unabridged at 618; Riverside at 220. “Well being” means a state of good condition, or prosperity. Unabridged at 2158; Riverside at 769 (prosperous). Recreational crabbers have no economic stability or well-being to be maintained by WDFW. Commercial fishers, crabbers, and others licensed by WDFW to handle food fish or shellfish, do. And since their economic well-being and stability already is within the purview of WDFW (through its ability to regulate them), it makes sense to hold “fishing industry” means the core businesses regulated by WDFW and not a vast array of

airlines, gas stations, hotels, marinas, bars, or even boat sellers or life jacket sellers, as WDFW would have it.

The WDFW interpretation means WDFW now must maintain the economic stability of all manner of businesses such as bars and restaurants. This is not reasonable. WDFW manages fish, wildlife, and shellfish and their harvesters and the user groups. It has no mandate to maximize economic impacts or state personal income generally, nor to look after the economic stability of gas stations, airlines, hotels or even marine supply shops or Bayliner sellers.

Significantly, both WDFW and the Legislature took actions in the Puget Sound Dungeness Crab fishery for years without claiming the RCW 77.04.012 mandate related to “support industries.” WDFW never thought its 2004 cutbacks on the recreational season or other adjustments of the recreational season over the years, would require it to consider impacts on support industries. The 2004 legislation put more controls on recreational crabbing and strengthened the prior management system set forth in Policy C-3609 – it did not deal with the recreational group as if it were part of the fishing industry. The Legislature ratified the prior management system of setting a preseason allocation and target and adjusting the recreational season, based on a clear distinction between recreational and commercial. The new WDFW interpretation of “fishing industry” erases this clear

distinction and lumps the two groups together, to subordinate one to the other. This flouts the will of the Legislature in 2004 to strengthen the prior system.

The relevant context includes the limited-entry system that exists to protect the investment and stability of the “commercial crab fishery in the waters of Puget Sound.” 1980 Laws, ch. 133 §1; *Weikal*, 37 Wn.App. at 326-329. The new interpretation of “fishing industry” by WDFW removes or could remove that protection and harm those investments, merely because WDFW sees greater state personal income impact at the recreational support industries. Much of Title 77 concerns the sharp distinction between personal use and commercial activity; the new interpretation of “fishing industry” by WDFW erases that distinction.

If resort must be had to statutory construction, the prior practice of WDFW was consistent with the definition of “fishing industry” urged by appellants here. The prior practice is inconsistent with the WDFW interpretation adopted only recently and challenged here. WDFW never before considered recreational support industry impacts, when cutting the recreational season, or adjusting its days.

The new WDFW interpretation of “fishing industry” leads to strange and unlikely results. It can cause severe reduction or elimination of the Puget Sound Dungeness Crab commercial harvesters. Recreational

crabbers' numbers will continue to grow. Once they reach 300,000 or 400,000 in number, their spending at supplier industries will be even higher. Under this new erroneous definition of "fishing industry," WDFW can then decide -- indeed, should decide -- to boost state income or maintain it by giving the recreational group more share of the Crab. The commercial group is outnumbered and under the new definition it will lose the contest sooner or later. This is an unreasonable outcome.

The WDFW new, erroneous interpretation would apply to salmon or shrimp fisheries, too. Those fisheries may have greater numbers of recreational takers who spend at support industries, too. The new definition would or could lead to cutbacks in salmon or shrimp commercial share, too. The result is unlikely indeed: a provision to maintain the fishing industry, is interpreted to allow its severe reduction, curtailment or outright elimination.

The Legislature is aware there are hundreds of thousands if not millions of recreational fishers and shellfish takers in the State. Yet RCW 77.04.012 tells WDFW *not to maximize* recreational taking of food fish or shellfish. The new interpretation of RCW 77.04.012's "fishing industry" prong ineluctably leads to maximizing recreational taking of food fish or shellfish. This result is inconsistent with the legislative purpose. The Legislature intended to protect commercial fishing in the commercial

fishing prong, in the economic well being prong, and in the maximization prong, and the WDFW interpretation of “fishing industry” undoes all that protection.

If the Legislature thought greater numbers of recreational takers justifies giving them more and more, it would have provided that “WDFW shall maximize recreational or personal use harvesting of shellfish and food fish.” It did not do so for a purpose. The WDFW defeats that purpose.

The WDFW interpretation is fundamentally unreasonable as it turns the fishing industry mandate into a license to destroy commercial fishing which is clearly a large part of the fishing industry. This is a strained interpretation, and assumption of awesome power. All of Title 77 from the limited entry provisions, to the specific changes for this fishery in 2004, to the distinction of recreational or personal use from commercial activity, to the specific mandates concerning fishing industry, commercial fishing and what is to be maximized, contradict the new WDFW interpretation. To adopt an interpretation of fishing industry that leads to the result that it may be eliminated chunk by chunk, in different fisheries, across the state, is unreasonable. Millions of dollars of investment are at stake. The Legislature knew this, and told WDFW to maintain the commercial fishing industry whenever resource levels allow that, as they

do here. The new rules and policy challenged here are based on an interpretation that contradicts the plain meaning of the statute, and leads to defeat of the legislative purpose in protecting commercial fishing and the fishing industry in RCW 77.04.012.

In general, zero-sum fisheries with both recreational and commercial harvesters are “managed to allow large numbers of [recreational] fishermen to take a limited number of fish,” while “[c]ommercial fisheries, on the other hand, are managed to allow for proper escapement and maximum commercial take.” *Washington Kelpers Ass’n v. State*, 81 Wn.2d 410, 414, 502 P.2d 1170 (1972). Here WDFW has turned traditional management upside down, relying on a new and erroneous interpretation of “fishing industry” to give recreational fishers priority and shift a large part of the State Share to them, reducing the commercial take.

Not only does the commercial group face one season of reduced share from the new interpretation and system, in the future it will see recreational crabbers grow in number even more, leading to future cuts in its share.

The Court should reject the WDFW interpretation, invalidate the rule and policy amendments challenged here, and restore the status quo

ante, because the new interpretation and system violate the mandate to maintain the economic well-being and stability of the fishing industry.<sup>16</sup>

### C. The Agency Action Is Arbitrary and Capricious

An agency rule is arbitrary and capricious if the rule-making file and agency explanations show its adoption was “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 905-906, 64 P.3d 606 (2003); *Puget Sound Harvesters Ass’n v. Wash. Dept. of Fish and Wildlife*, 157 Wn.App. 935, 944-945, 239 P.3d 1140 (2010). In *Puget Sound Harvesters*, the Court of Appeals, struck down regulations giving purse seiners greater access (to salmon) compared to gillnetters, where WDFW failed to place a limit on the total catch of either group. *Puget Sound Harvesters*, 157 Wn.App. at 938. The Court of Appeals

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<sup>16</sup> WDFW tries to say there is no real economic change for the PSCA members or commercial crabbers, saying the projected revenue of some \$6.2 million is in line with past averages. But this is selective cherry picking. It ignores the new system of priority and the new interpretation that in the future will lead to greater cuts in share for the commercial group. It also ignores the loss of 441,000 pounds of crab, and the WDFW projection of a \$1.2 million loss in revenue. The record shows a new system giving priority to recreational takers, a new interpretation of “fishing industry” allowing their spending on support industries to give them ever-more crab in the future. These changes and cuts are destabilizing and do not maintain the well-being of the fishing industry in this fishery. WDFW was simply giving recreational crabbers what they wanted -- it was not *seeking to maintain* the economic well-being and stability of the fishing industry.

invalidated the new rule, finding that it arbitrary under RCW 77.04.012 and other statutes showing the Legislature's intent to assure a sustainable and stable level of salmon for commercial fishers. Id. at 946-947.

The agency action here is more arbitrary and capricious than the agency action in *Puget Sound Harvesters*.

The agency action here ignores the fact that recreational takers of Puget Sound Dungeness Crab are continually growing in number -- and will continue to do so. Now, they have priority. Now, their spending on support industries counts. If their greater numbers today are a reason to shift 24% of the commercial catch to them then future growth in their numbers will result in their taking, or being shifted, more and more of the commercial catch in the coming seasons. WDFW steadfastly ignores the future recreational catch in the new system, refusing to look beyond the first season under the new system. The obvious future under the new system is ever-growing numbers of recreational crabbers, and ever-greater catch for them. They doubled in nine years. WDFW ignores that obvious fact by refusing to project beyond one season. If past trends continue, in a few years they will increase to 360,000 – or 500,000. Under the new system they have priority. WDFW will under the new system cut the commercial share even more. In ignoring and refusing to study impacts beyond one season, WDFW was arbitrary and capricious.

Indeed, in claiming its own inability to predict the future, WDFW is in essence abandoning management of this fishery, which is arbitrary and capricious. WDFW ignores the obvious: its new interpretation and “numerical advantage” reasoning means an ever-decreasing share for commercial harvesters. Ignoring this was arbitrary and capricious.

The State Auditor also noted many problems and rule breaking by recreational crabbers. The Auditor identified recreational crabbers’ rule-breaking as a threat to the resource. To react to this with an expanded season for recreational crabbers rewards their rule breaking, will increase the rule breaking and harm crabs. This is arbitrary and capricious.

The Auditor Report cited a need to clarify the recreational-commercial allocation system. The call was to strengthen it, much as the Legislature sought in in 2004. Yet the WDFW response was not to strengthen the prior system but to end it, ending the practice of adjusting recreational season, and replacing that with a fixed base season and priority for recreational crabbers. This was an arbitrary and capricious response to the State Auditor Report. It is abandonment of traditional management of a fishery with unlimited numbers of recreational takers, and a small number of commercial licensees. That change is arbitrary and capricious, too.

The economic justifications of WDFW also were arbitrary and capricious. WDFW in effect justifies its new rule and expansion of access for recreational takers on the ground that the positive impact of higher spending on their support industries, outweighed the negative impact from cutting the commercial share. Yet it relied on a TCW report that that said it should not be relied on, for this kind of comparative analysis. TCW Report at ES-2, AR 1484. This is arbitrary and capricious.

WDFW ignored supplier industry impacts of spending by commercial crabbers. They spend on labor, moorage, gas, bait, food, insurance, engine repair, even sometimes hotels or drinking establishments too. While it is improper to consider this “support industry” spending at all, under the proper definition of “fishing industry,” to consider only the benefit to recreational support industries and not the harm to commercial support industries was arbitrary and capricious. WDFW also ignored effects from loss of 441,000 pounds of crab in the downstream stream of commerce in commercially caught crabs, including effects at wholesalers, dealers, grocers or restaurants, their workforce, and so one. WDFW simply ignored any full economic analysis. This is arbitrary and capricious.

Finally, the TCW report is not even based on spending impacts relating to Puget Sound Dungeness Crab. It only considers shellfish

generically. TCW Report at 5-12, AR 1496-15-3. Relying on it therefore was arbitrary and capricious.

The WDFW economic “study” here in effect amounted to a few graphs by staff, who did not even predict future catch levels beyond one season, and reliance on a 2008 generic report by a California economist, who simply sketched in broad terms the fact there is economic benefit from recreational and commercial fishing. This is used here to prefer recreational fishing over commercial fishing leading to a large shift in share, through re-interpreting the relevant statutes erroneously or ignoring them, and considering the fact that vast numbers of recreational fishers spend a great deal of money on boats, bans, or at Cabella’s or marinas. This is fundamentally arbitrary and capricious as fisheries management is not a numbers game, and is not based on head counts.

WDFW ignored too much, starting with failing to look beyond one season or to look at how continued growth in recreational numbers would take ever-greater shares of the crab. There was no consideration of “sustainable and stable” levels for the commercial catch of Puget Sound Dungeness Crab where WDFW refused to project beyond the 441,000 pounds lost the first season. See *Puget Sound Harvesters*, 157 Wn.App. at 946-947. The rule and policy changes challenged here were arbitrary and

capricious, so the Court should invalidate them, restoring the status quo ante.

**D. Appellants Are Entitled to Attorneys Fees on Appeal**

Appellants are entitled to fees under RAP 18.1. Also, the EAJA (RCW 4.84.350) requires award of reasonable fees and costs to a qualified party prevailing in review of agency action unless agency action was substantially justified, or circumstances make an award unjust. *Puget Sound Harvesters*, 157 Wn.App. at 951-952. There is a statutory cap for each level of review of the agency action. *Id.*, citing *Costanich v Dep't of Soc. & Health Servs*, 164 Wn.2d 925, 934, 194 P.3d 988 (2008).

Substantial justification involves a reasonable person standard. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). The State must show that its position has a reasonable basis in law and fact. *Const. Indus. Training Council v Wash. State Apprenticeship & Training Council*, 96 Wn.App. 59, 68, 977 P.2d 655 (1999).

Here, the WDFW position has no reasonable basis. WDFW absurdly held “support industries” are the “fishing industry,” including spending at bars and casinos, without conducting any plain meaning textual analysis, or citing a single dictionary definition for this new interpretation. WDFW did not even give notice to affected groups like

commercial salmon fishers. It claimed “fishing industry” includes spending on boats, vans, airlines, and hotels by 236,000 recreational crabbers. This is unreasonable. WDFW expressly based its action on mere numerical superiority, which is unreasonable. WDFW ignored its prior practice in which it never considered economic impacts on support industries, when it adjusted the recreational days, or cut the recreational days from 5 to 4 in 2004. WDFW ignored the warning in the TCW report, failed to project share outcomes in future seasons, and did not even assess impact from cutting commercial catch on the commercial support industries.

WDFW ignored clear “shall” mandates in 77.04.012 to improve commercial fishing, claiming this was discretionary, despite the obvious plain meaning and the obvious need a small group of commercial fishers has for protection against greater numbers of recreational takers. WDFW simply succumbed to numbers and failed to protect the specific 160 commercial fishers it was mandated to protect.

To oppose the new erroneous interpretation of “fishing industry” -- which could lead to dramatic changes in fishery management in salmon and other fisheries -- six individuals and a small association with just some 80 members brought this suit. All circumstances make award of EAJA fees and costs proper.

The Court should award EAJA fees and costs on appeal and below, and remand for determination of the amounts and any dispute as to whether petitioners qualify under the eligibility provisions of the EAJA.

## VII. CONCLUSION

For the foregoing reasons, this Court should invalidate the changes to WAC 220-56-330 and WDFW's Puget Sound Crab Fishery Policy C-3609 challenged herein, reject the new interpretation of "fishing industry" in the CES, reverse the final orders of the trial court, and award attorneys fees and costs to appellants. The Court should allow an application for fees on appeal, and remand for consideration of fees under the EAJA for fees for the time incurred below.

DATED this 10th day of January 2012.

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STATE OF WASHINGTON  
COUNTY OF KING  
DIVISION II

12 JAN 11 PM 10:02

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**DECLARATION OF SERVICE**

LISALOU GOGAL states and declares under penalty of perjury of the laws of the State of Washington, as follows:

On this day, I caused the foregoing to be served upon counsel for defendants by mail by depositing same postage prepaid in the US mail, addressed to:

Michael S. Grossman  
William C. Frymire  
Attorney General of Washington  
PO Box 40100  
1125 Washington Street SE  
Olympia, WA 98504-0100

I also emailed the foregoing to said counsel at their e mail addresses listed with the Washington State Bar Association and used by them in connection with this case.

DATED this 10th day of January 2012 at Seattle, King County, Washington.



\_\_\_\_\_  
LisaLou Gogal

# APPENDIX A

## **RCW 77.04.012**

### **Mandate of department and commission.**

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.

The commission shall attempt to maximize the public recreational game fishing and hunting opportunities of all citizens, including juvenile, disabled, and senior citizens.

Recognizing that the management of our state

wildlife, food fish, game fish, and shellfish resources depends heavily on the assistance of volunteers, the department shall work cooperatively with volunteer groups and individuals to achieve the goals of this title to the greatest extent possible.

Nothing in this title shall be construed to infringe on the right of a private property owner to control the owner's private property.

[2000 c 107 § 2; 1983 1st ex.s. c 46 § 5; 1975 1st ex.s. c 183 § 1; 1949 c 112 § 3, part; Rem. Supp. 1949 § 5780-201, part. Formerly RCW 75.08.012, 43.25.020.]

# APPENDIX B

## APPENDIX B

### Annual Washington State Commercial and Recreational Dungeness Crab Harvest by Crab Management Region

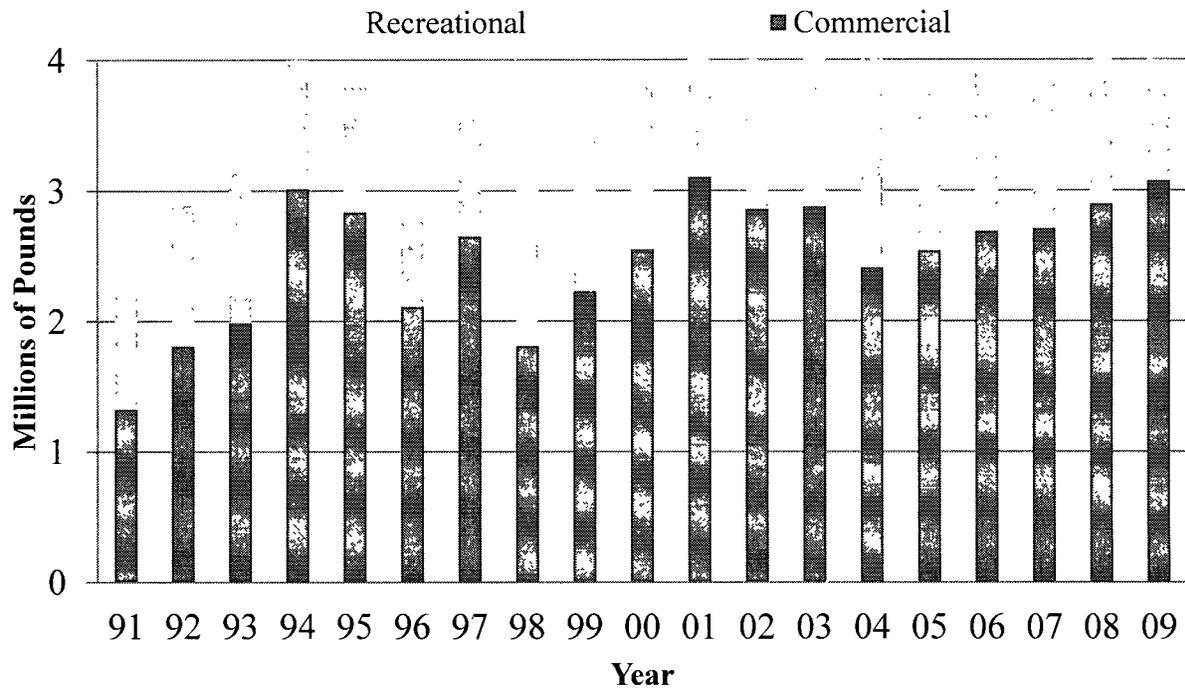
	Region 1	Region 2E	Region 2W	Region 3	Region 4	Region 5	Region 6	All Regions	% of State Total
<b>State Commercial</b>									
2000-01	1,746,366	319,608	91,055	389,663	0	0	0	2,546,692	64%
2001-02	2,188,883	560,879	101,940	254,170	0	0	0	3,105,872	71%
2002-03	1,959,864	465,387	99,492	324,129	8,982	0	0	2,857,854	68%
2003-04	1,961,635	576,042	73,831	266,111	0	0	0	2,877,619	63%
2004-05	1,690,230	429,512	74,298	212,892	0	0	0	2,406,932	60%
2005-06	1,727,998	511,364	81,053	215,856	0	0	0	2,536,271	68%
2006-07	1,964,604	488,207	39,335	199,629	0	0	0	2,691,775	69%
2007-08	1,919,995	504,688	57,055	228,054	0	0	0	2,709,792	70%
<b>Average</b>	<b>1,894,947</b>	<b>481,961</b>	<b>77,257</b>	<b>261,313</b>	<b>1,123</b>	<b>0</b>	<b>0</b>	<b>2,716,601</b>	<b>66%</b>
<b>State Recreational</b>									
2000-01	360,807	548,122	55,906	96,200	29,500	345,308	4,908	1,440,751	36%
2001-02	307,375	430,171	98,581	91,128	44,800	242,483	41,600	1,256,138	29%
2002-03	357,045	370,972	59,154	139,837	35,869	289,187	62,480	1,314,544	32%
2003-04	547,714	390,504	82,748	177,487	35,798	356,439	84,329	1,675,019	37%
2004-05	483,066	456,959	80,767	137,937	42,572	294,864	97,721	1,593,886	40%
2005-06	304,018	417,159	68,803	119,713	53,237	181,890	55,417	1,200,237	32%
2006-07	374,653	423,451	39,754	110,526	60,398	138,564	61,913	1,209,259	31%
2007-08	433,762	355,396	41,701	84,979	67,685	103,004	61,706	1,148,233	30%
<b>Average</b>	<b>396,055</b>	<b>424,092</b>	<b>65,927</b>	<b>119,726</b>	<b>46,232</b>	<b>243,967</b>	<b>58,759</b>	<b>1,354,758</b>	<b>34%</b>
<i>Source: Based on Department of Fish and Wildlife data</i> <i>Note: Recreational harvest occurs in all regions. Commercial harvest occurs in Regions 1, 2E, 2W and 3 only.</i>									

AR

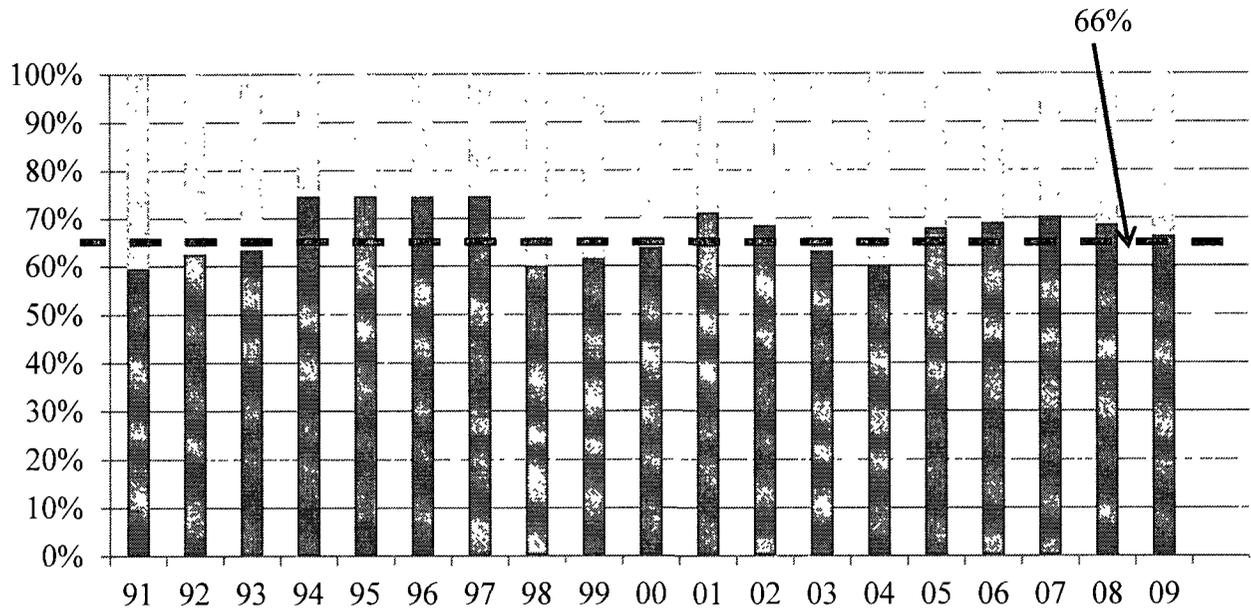
00001473

# APPENDIX C

## Puget Sound Dungeness Crab Harvest (1991-2009)



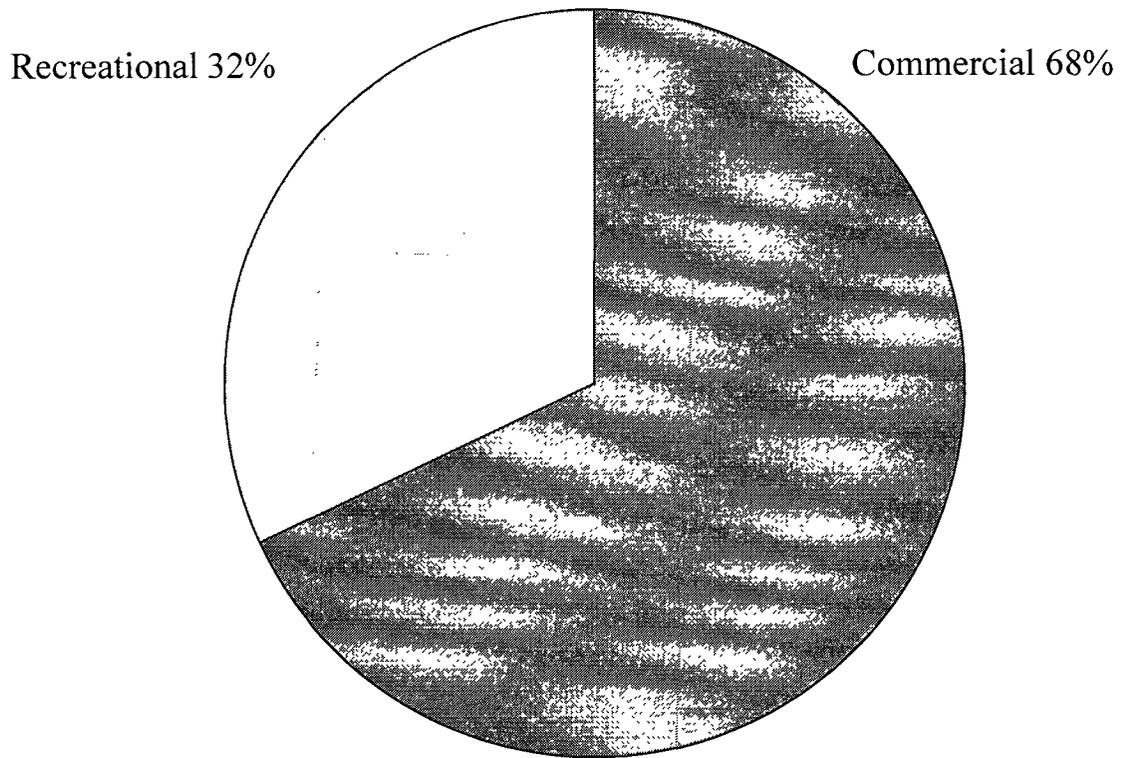
Source: AR 39, January 8, 2011 Childers Presentation.



Source: AR 39 changed to a percentage basis.

# APPENDIX D

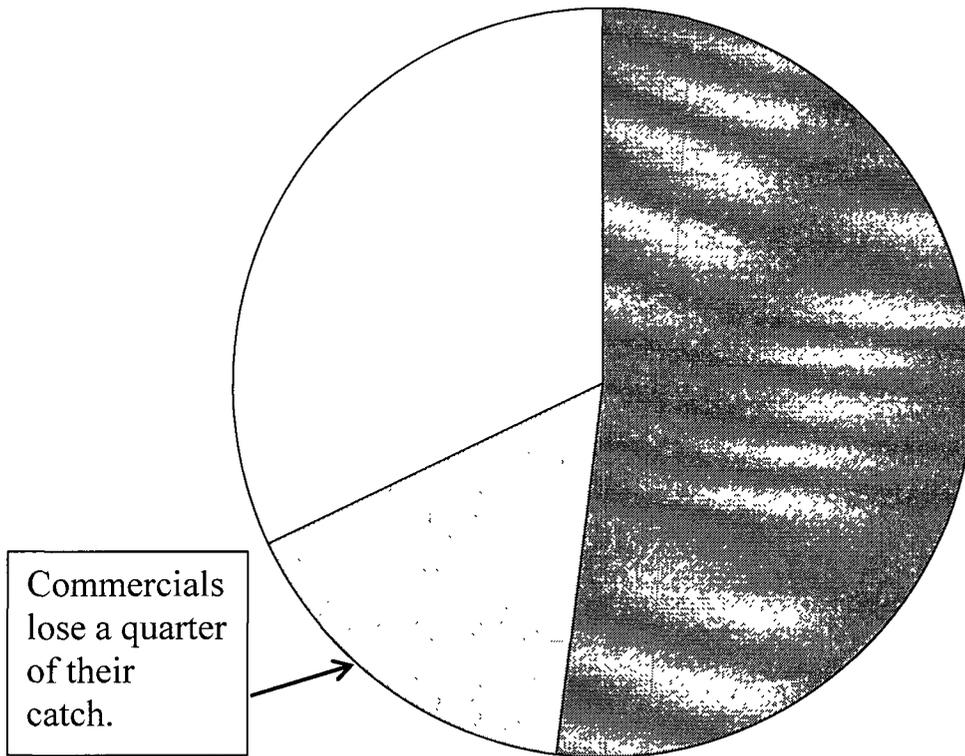
## CES "Catch Histories"



Source: CES 13; AR 18 (WDFW data from 1990 to 2009).

# APPENDIX E

**CES Projection: Commercial Share  
Declines from 68% to 52%**



Source: CES 13; AR 18.

# APPENDIX F

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**in·dus·try** (in'də-strē) *n.*, *pl.* -tries. 1. The commercial production and sale of goods and services. 2. A branch of manufacture and trade <the electronics *industry*> 3. Industrial management as distinguished from labor. 4. Diligence.  
-*ine suff.* Of or resembling <serpentine>

**in·dus·try** (in/də strē), *n.*, *pl.* **-tries** for 1, 2, 7. **1.** the aggregate of manufacturing or technically productive enterprises in a particular field, often named after its principal product: *the automobile industry; the steel industry.* **2.** any general business activity; commercial enterprise: *the Italian tourist industry.* **3.** trade or manufacture in general: *the rise of industry in Africa.* **4.** the ownership and management of companies, factories, etc.: *friction between labor and industry.* **5.** systematic work or labor. **6.** energetic, devoted activity at any work or task; diligence: *Her teacher praised her industry.* **7.** *Archaeol.* an assemblage of artifacts regarded as unmistakably the work of a single prehistoric group. [1475–85; earlier *industrie* < *L. industria, n.* use of fem. of *industrius* **INDUSTRIOUS**]  
—**Syn.** **6.** application, effort, assiduity, industriousness.