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IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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SPOKANE COUNTY, a political subdivision of  
the State of Washington; et al.,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF  
FISH AND WILDLIFE,

Respondent.

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APPELLANTS' ANSWER TO AMICUS BRIEFS

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## I. INTRODUCTION

The Counties agree with the amici that protection of fish life is important and that the Legislature enacted the Hydraulic Code with that goal in mind.<sup>1</sup> However, the Counties disagree that this policy objective therefore permits the Department of Fish and Wildlife (“DFW”) to go as far as it has with its rule. The Legislature’s statutory grant of authority constrains an agency’s power to regulate. *Wash. Indep. Tel. Ass’n v. Telecomms. Ratepayers Ass’n for Cost-Based & Equitable Rates*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994) (“If an enabling statute does not authorize either expressly or by necessary implication a particular regulation, that regulation must be declared invalid despite its practical necessity or appropriateness.”). The language of the Hydraulic Code limits DFW’s regulatory power and precludes permitting of projects that have no in-water component. The statute does not support the amici’s arguments to the contrary and this Court should reject them.

## II. ARGUMENT

### A. **Both amici impermissibly rely on evidence not contained in the record, which the Court should strike or disregard.**

In their brief, amici Swinomish Indian Tribal Community, Squaxin Island Tribe, Nisqually Indian Tribe, Stillaguamish Tribe of Indians, Sauk-Suiattle Indian Tribe, and Skokomish Indian Tribe (the “Tribes”) rely extensively on a Biological Opinion the National Marine Fisheries Service (“NMFS”) prepared that analyzed the impacts of a Regional Road Maintenance Program under the federal Endangered Species Act. This

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<sup>1</sup> The Counties address both amicus briefs in this single response.

document was not part of the record before the trial court and is not part of the record on appeal. *See* Tribes Br. at 10-13; 16.

Similarly, amici Confederated Tribes and Bands of the Yakama Nation (“Yakama”) cite the Declaration of Paul Ward, dated March 22, 2018, that was neither part of the record below, nor part of the record on appeal. Additionally, Yakama relies on the Declaration of Philip Rigdon, dated June 27, 2017, which was part of the record below, but was not made part of the record on appeal.

The Court should only take additional evidence under the terms set forth in RAP 9.11, which amici have not followed here. Amici’s reliance on these extra-record documents in their arguments on the merits is inappropriate and in violation of the appellate rules. *See* RAP 10.3(e); RAP 10.3(a)(5)-(6) (“Reference to the record must be included for each factual statement.”) Further, the additional documents are irrelevant in this statutory interpretation case, which requires the Court to determine what the law is, not what the amici believe it should be. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014) (declining to consider submissions that make factual assertions and public policy arguments). The Court should strike or disregard these documents and the arguments made in reliance upon them.

**B. The Legislature’s definition of “hydraulic project” does not extend DFW’s jurisdiction to projects with no in-water work.**

Like DFW, the Tribes argue that the definition of “hydraulic

project” is based solely on the *impact* of the project on state waters.<sup>2</sup> That interpretation ignores statutory language that demonstrates that the *location* of the work is also a critical component of the “hydraulic project” definition and together determine the scope of DFW’s authority. A “hydraulic project” is “the construction or performance of work that will use, divert, obstruct, or change the natural flow or *bed* of any of the *salt or freshwaters of the state*.” RCW 77.55.011(11) (emphasis added). “Bed” and “state waters” are locations, and the Legislature further defined them by reference to the physical feature of the “ordinary high water line.” See RCW 77.55.011(1) (defining “bed” as “the land **below** the ordinary high water lines of state waters”) (emphasis added); RCW 77.55.011(25) (defining “waters of the state” and “state waters” as “all salt and freshwaters **waterward** of the ordinary high water line...”) (emphasis added). A “hydraulic project” requires place as well as impact.

The verbs the Legislature employed confirm this conclusion. A party will only “use, divert, [or] obstruct” state waters by acting below the ordinary high water line. The Tribes do not argue otherwise except by reference to upland work with uncertain and contingent impacts, an argument that in turn is inconsistent with other parts of the statute. See Appellants’ Opening Br. at 11-18, and Reply Br. at 5-7; 8-9 (indirect or contingent effects from upland work, such as accidentally dropping something into a river while repairing a bridge, do not meet the

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<sup>2</sup> See Tribes Br. at 7.

requirement that the project “will” change the natural flow or bed of state waters).

The Tribes also argue that exclusively upland projects like a dike, levee, or marine bulkhead, are “hydraulic projects” under the statute because they “change” the bed or flow of state waters.<sup>3</sup> Tribes Br. at 10-12. That argument ignores that the Hydraulic Code specifically requires permits for these types of upland projects. *See* RCW 77.55.131 (dike vegetation management); RCW 77.55.141 (marine bulkheads); RCW 77.55.021(9)–(15) (stream bank stabilization). As the Counties explained in their opening brief (at 25), these provisions are appropriately read as express statutory exceptions to the general rule that no permit is required for upland work. Otherwise, if DFW had plenary authority to require permits for upland projects these provisions would be superfluous.

**C. The rule of ejusdem generis is applicable here.**

The word “change” as used in the definition of “hydraulic project,” RCW 77.55.011(11), should not alter this conclusion. The Tribes mistakenly argue that it is improper to invoke the rule of ejusdem generis because this case involves an unambiguous statute. To the contrary, this Court has applied the rule of ejusdem generis in cases involving unambiguous statutes. *See, e.g., In re Estate of Jones*, 152 Wn.2d 1, 10-11, 93 P.3d 147 (2004) (holding that statute was not ambiguous, but

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<sup>3</sup> As noted above, the Tribes specifically rely on extra-record evidence in making their arguments about the alleged connection between upland impacts from floodplains and floodpaths on the bed or natural flow of a watercourse. The Court should, therefore, disregard these arguments.

nonetheless applying the rule of ejusdem generis to interpret the meaning of the statute).

Further, the Tribes' contention that the rule does not apply to the term "change" in RCW 77.55.011(11), because that term follows the terms "use, divert, obstruct," is also incorrect. The rule of ejusdem generis is not limited to statutes with lists of terms that include the phrase "or otherwise..." The rule has been applied to statutes with language analogous to the language at issue here. *See, e.g., State v. Hutsell*, 120 Wn.2d 913, 918, 845 P.2d 1325 (1993).

For example, in *Hutsell*, this Court applied the rule to a mitigating circumstances statute, which provided: "The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." *Id.* at 918. Like the statute here, the statute in *Hutsell* included four terms that, as the Tribes state, "equally and directly describe different ways" that the defendant's conduct could have been affected. *See Tribes Br.* at 9. Nevertheless, this Court applied the rule of ejusdem generis to "interpret the term 'compulsion' in a manner consistent with the other words in the sequence, *i.e.*, duress, coercion, and threat." *Hutsell*, 120 Wn.2d at 918 (citing *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972)). After determining that the terms "duress, coercion, and threat" all "connote the influence of an outside force," this Court held the statute did not encompass compulsive disorders like drug dependency. *Id.*

Here, under the rule of *eiusdem generis*, the Court must interpret the word “change” in a manner consistent with the other words in the sequence, *i.e.*, “use, divert, obstruct.” All three of those words connote actions that occur waterward of the ordinary high water line. For example, work that “uses” the natural flow or bed of a watercourse requires an action below the high water line, *e.g.*, installing bridge supports in a river bed. Similarly, work that “diverts” or “obstructs” the flow of water requires an action below the ordinary high water line, *e.g.*, installing a channel to redirect the flow of a stream, or installing a dam to hold back a stream. So too then, as used in the definition of a “hydraulic project,” the word “change” must also be read to reference an action that occurs below the ordinary high water line. Before requiring a permit, the Court should require not only impacts to the bed or natural flow of state waters but also construction work in a location below the ordinary high water line.

**D. The Tribes’ interpretation of “hydraulic project” is inconsistent with the application requirements of RCW 77.55.021(2).**

As the Counties have already explained, Appellants’ Reply Br. at Section II(D), their interpretation does not “[nullify] the requirement [under RCW 77.55.021(2)] that applicants submit ‘general plans for the overall project’ nor render any other part of the HPA application requirements superfluous.<sup>4</sup> It is the Tribes’ and DFW’s interpretation that wipes away statutory words.

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<sup>4</sup> Tribes Br. at 14.

The Tribes argue that subsection (b) of the application provision—which requires the submission of complete plans and specifications of work within the OHWL—“is facially irrelevant to projects that propose no in-water activity.” Tribes Br. at 15. That is precisely the problem with their position in this case. The Tribes declare these words “irrelevant” because they want DFW to regulate strictly upland work and they know these words are inconsistent with that desire. The Court should not start with the Tribes’ preferred outcome and work backward from there to interpret the statute. A project proponent “must” include complete plans and specifications for its in-water work in its permit application. These words strongly suggest that the Counties’ statutory interpretation was correct from the outset: A hydraulic project is, in part, defined by the location of the work, and that location is waterward of the ordinary high water line.

If, as the Tribes suggest,<sup>5</sup> this Court should consider the other ways the Legislature could have more clearly limited permits to in-water work, then the Court should likewise look at the words the Legislature could have used here: It did not say “or,” “and/or,” “may,” or “if applicable,” when describing the components of an HPA application in RCW 77.55.021(2). It said “must.” This Court should work with what the Legislature has given it, and not with words that were never written. Inclusion of complete plans and specifications for in-water work is mandatory, and it is physically impossible to include such plans for upland

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<sup>5</sup> *E.g.*, Tribes Br. at 8 n.8.

work, for example, bridge maintenance work that has no in-water component.

**E. Yakama’s argument that the public interest requires DFW to be allowed to regulate upland work is irrelevant in this case involving statutory interpretation.**

Yakama admits that this “matter is a straightforward case of statutory interpretation,” Yakama Br. at 4, but then goes on to argue that the public interest in the protection of fisheries requires that DFW be allowed to regulate work above the ordinary high water line. Yakama cites no case law supporting its proposition that the public interest in the investment of time, effort, and money in protecting and restoring fisheries is a basis for authorizing DFW to regulate beyond the boundaries of its authorizing statute. The Legislature took the public interest into consideration when enacting the Hydraulic Code. This Court should not trump the language of statutes with its own understanding of the public interest. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 109, 285 P.3d 34 (2012) (“The legislature, not this court, is in the best position to assess policy considerations.”).

### **III. CONCLUSION**

For the reasons set forth above, as well as in the Counties’ Opening Brief and Reply Brief, the Court should hold that DFW’s authority under the Hydraulic Code does not extend to projects that take place exclusively above the ordinary high water line and involve no in-water work.

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The Court should therefore hold that DFW exceeded its statutory authority when it enacted the rules in Chapter 220-660 WAC that require a Hydraulic Project Approval (HPA) permit for projects regardless of their location below the ordinary high water line.

DATED this 1st day of May, 2018.

Respectfully submitted,

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## DECLARATION OF SERVICE

Peggy Mitchell declares as follows:

1. I am over the age of 18 and am competent to testify herein.
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3. On May 1, 2018, I caused the foregoing document to be filed with the court and also to be sent by United States mail, postage prepaid, and by email to the following attorneys of record:

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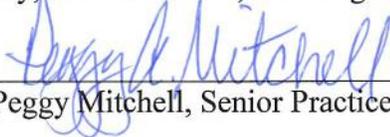
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I declare under penalty of perjury under the laws of the State of  
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Dated this 1st day of May, 2018 at Seattle, Washington.

  
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