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No. 95029-6

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

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

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF
FISH AND WILDLIFE,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Washington law requires anyone planning a construction project in state waters to secure a permit called a hydraulic project approval from the Department of Fish and Wildlife (DFW). The Legislature established the waters' edge as the jurisdictional limit to this obligation: Only construction work within the "ordinary high water line" that "will use, divert, obstruct or change the natural flow or bed" of state waters requires a permit. RCW 77.55.021(1); RCW 77.55.011(11).

DFW amended its implementing rules in 2015 and nevertheless required permits for projects exclusively above the ordinary high water line that have only the potential to change the natural flow or bed. Contingent or indirect effects on state waters are not the problems to which the Legislature addressed this law. A regulated "hydraulic project" is construction work that "will" alter the natural flow or bed of state waters. Only work within the ordinary high water line always meets this test. The Legislature did not address this law to the possibilities resulting from upland construction work that DFW now seeks to regulate (*See infra* Section V(B), pp. 8-18).

The balance of the statutory language confirms this conclusion. For example, the statute's requirements for a permit application provide that "[a] complete written application for a permit ... *must* contain ... [c]omplete plans and specifications of the proposed construction or work .

. . . *within the ordinary high water line.*”¹ RCW 77.55.021(2)(b) (emphasis added). “Must,” like the word “will,” is mandatory. Complying with this obligation is physically impossible for a project above the ordinary high water line. An applicant cannot include plans for in-water work in its application if it is not proposing in-water work. This statutory requirement is irreconcilable with DFW’s regulation of strictly upland construction work (*See infra* Section V(C), pp. 19-28).

By requiring permits for projects solely above the ordinary high water line, DFW’s rules exceed its statutory authority. Therefore this Court should declare them invalid under Washington’s Administrative Procedure Act. RCW 34.05.570(2)(c).

II. ASSIGNMENTS OF ERROR

1. The trial erred as a matter of law in entering the Order of August 25, 2017, denying the Counties’ request for declaratory relief and dismissing their claims on the basis that DFW’s permitting authority under Chapter 77.55 RCW was not limited to activities taking place at or below the ordinary high water line, and therefore, DFW did not exceed its statutory authority by adopting, implementing, and enforcing rules in Chapter 220-660 WAC that expressly or impliedly apply to activities above the ordinary high water line. (CP 147, Conclusions ¶¶ 2-3; CP 147-48, Order ¶¶ 1-2).

2. DFW erred as a matter of law when it promulgated regulations

¹ As used throughout this brief, the Counties intend “ordinary high water line” also to include the mean higher high water line of salt waters.

in Chapter 220-660 WAC that regulate hydraulic projects that occur above the ordinary high water line, in excess of its statutory authority under Chapter 77.55 RCW. (WAC 220-660-010; AR 705).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court commit an error of law in concluding that DFW's permitting authority under the Hydraulic Project Approval program, Chapter 77.55 RCW, is not limited to activities taking place at or below the ordinary high water line where Chapter 77.55 RCW limits permitting to construction work that "will" use divert, obstruct or change the natural flow or bed of state waters, that is, work below the ordinary high water line? (CP 147, ¶ 2) (Assignment of Error 1).

2. Did the trial court commit an error of law in concluding that DFW did not exceed its statutory authority under Chapter 77.55 RCW in adopting rules in Chapter 220-660 WAC that expressly or impliedly apply to activities above the ordinary high water line that only may use divert, obstruct or change the natural flow or bed of state waters when Chapter 77.55 RCW only applies to activities that "will" use divert, obstruct or change the natural flow or bed of state waters, that is, work below the ordinary high water line? (CP 147, ¶ 3) (Assignment of Error 1).

3. Did DFW commit an error of law in concluding that its permitting authority under Chapter 77.55 RCW extended to projects that occur above the ordinary high water line where Chapter 77.55 RCW limits permitting to construction work that "will" use divert, obstruct or change

the natural flow or bed of state waters, that is, work below the ordinary high water line? (WAC 220-660-010; AR 705) (Assignment of Error 2).

4. Did DFW commit an error of law in enacting regulations in Chapter 220-660 WAC that expressly or impliedly apply to activities above the ordinary high water line that only may use, divert, or obstruct the natural flow or bed of state waters when Chapter 77.55 RCW only permits regulation of activities that “will” use divert, obstruct or change the natural flow or bed of state waters, that is, work below the ordinary high water line? (WAC 220-660-010; AR 705) (Assignment of Error 2).

IV. STATEMENT OF THE CASE

Appellants are a coalition of Washington counties (the “Counties”) who regularly design, build, and repair highways, roadways, and other transportation improvement projects above and around state waters. Clerk’s Papers (“CP”) 56, ¶ 2 (Pierce County’s Statement of Substantial Prejudice Pursuant to RCW 34.05.570(1)(d) (“Pierce Statement”). The work the Counties perform is critical to public safety and commerce and is part of their statutory mandate to construct, maintain, and operate roadways within the State’s public transportation system. *Id.*, ¶ 3; *see, e.g.*, RCW 36.75.020 (counties shall layout, construct, repair and improve roads as agents of the state).

Pursuant to the Hydraulic Project Approval program, Chapter 77.55 RCW (formally titled “Construction projects in state waters”), “any person or government agency [that] desires to undertake a hydraulic project . . . shall, before commencing work thereon, secure the approval of

[DFW] in the form of a permit . . .” RCW 77.55.021(1). In 2015, DFW promulgated rules pursuant to Chapter 77.55 RCW that extend the permitting obligation to construction work above the ordinary high water line. *See* Chapter 220-660 WAC. Emblematic of this overreach is the water crossing (bridge) rule: “An HPA is required for all construction or repair/replacement of any structure that crosses a stream, river, or other water body *regardless of the location of the proposed work relative to the [ordinary high water line]* of state waters.” WAC 220-660-190 (emphasis added). In spite of the mandatory statutory language of RCW 77.55.011(11) (“will” use, divert, obstruct, or change the natural flow or bed of state waters), the agency purported to justify this rule based upon possible impacts to state waters: A permit is “required for bridge painting and other maintenance where there is *potential* for paint, sandblasting material, sediments, or bridge parts to fall into the water.” WAC 220-660-190 (emphasis added). According to DFW, between 2008 and 2013 approximately 32% of HPA permits issued would have been subject to the bridge rule. AR 491. This clear violation of state law is a material issue for the Appellant Counties who regularly need to restripe the center line, repair a guard rail, or resurface the road bed on county bridges. CP 56, 61.

Beyond bridges, the rules go on to cover construction work in general and to require permits for actions unrelated to the natural flow or bed of state waters: WAC 220-660-050(2) (stating that “[c]onstruction and other work activities in *or near water bodies* can kill or injure fish life,” and therefore establishing six different categories of HPA permits)

(emphasis added); WAC 220-660-080(2) (requiring numerous mitigation activities such as upland re-vegetation because “[w]ork conducted in *or near water* can negatively impact fish life”) (emphasis added); WAC 220-660-110(2) (imposing limitations on times of year work can be performed because “[w]ork in *or near watercourses* can harm fish life...”) (emphasis added).

Following DFW’s promulgation of its 2015 rules, the Counties contacted the Washington State Attorney General to express their objection to the scope of DFW’s new rules. CP 57, ¶ 6, Exhibit A (letter dated December 3, 2015 to Attorney General Ferguson). In their letter, the Counties explained that DFW’s rules “negatively impact important public works projects required for safety and commerce, and may result in increased delays in completing critical repair and maintenance work on roads, bridges, and related infrastructure.” *Id.* At the request of DFW, the Attorney General later issued a formal opinion on the scope of the agency’s statutory authority. CP 57, ¶ 7; *see* Regulatory Authority Under the Hydraulic Project Approval Process Related to Activities Above the Ordinary High Water Line, 2016 Op. Att’y Gen. 6 (2016) (“AGO 2016 No. 6”). The Attorney General erroneously confirmed DFW’s misinterpretation of its statutory authority. AGO 2016 No. 6.

As local governments with limited budgets, the Counties did not easily come to the decision to proceed with this action. CP 57, ¶¶ 5-7. However, having failed to resolve this matter through negotiation, the Counties filed this action in Thurston County Superior Court in October

2016. CP 57, ¶ 7; CP 8-19 (Petition for Judicial Review). On August 25, 2017, the lower court entered its Order Denying Request for Declaratory Judgment and Injunction and Dismissing Petitioners' Claims (the "Order"), CP 146-148. In the Order, the trial court concluded, as relevant here, that:

1. The Hydraulic Code, Title [sic] 77.55, is not ambiguous regarding the extent of WDFW's Hydraulic Project Approval permitting and/or regulatory authority;
2. Such permitting and/or regulatory authority is not limited to activities taking place at or below the Ordinary High Water Line; [and]
3. Therefore, WDFW has not exceeded its statutory authority in adopting, implementing and enforcing rules in Title [sic] 220-660 WAC that expressly or impliedly apply to activities above the Ordinary High Water Line[.]

CP 147. The trial court thereby ordered that the Counties' request for declaratory judgment and injunction were denied, and that the Counties' causes of actions were dismissed with prejudice. CP 147-48. The Counties thereafter filed their Notice of Appeal to the Supreme Court on September 22, 2017. CP 149-55.

V. ARGUMENT

A. Standard of Review

This Court must declare Chapter 220-660 WAC invalid if "[t]he rule violates constitutional provisions; [or] the rule exceeds the statutory authority of the agency[.]" RCW 34.05.570(2)(c). While the Counties

carry the burden of proof, *Washington Federation of State Employees v. Department of General Administration*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009), courts nevertheless possess the ultimate authority to interpret statutes, *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). “When reviewing an agency’s interpretation or application of a statute, [a court] uses the error of law standard and may substitute its interpretation of the law for the agency’s.” *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007) (internal quotation marks omitted). Critically, under longstanding Washington law, courts do not defer to an agency’s decision as to the scope of its own authority. *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 894 n.4, 83 P.3d 999 (2004) (“[T]he court does ‘not defer to an agency the power to determine the scope of its own authority.’” (quoting *US West Commc’ns, Inc. v. Wash. Utils. & Trans. Comm’n.*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997))); see also *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994) (same). Whether DFW may regulate above the ordinary high water line goes directly to the scope of its authority, and this Court must decide this question of law without any deference to the agency’s own legal interpretation.

To interpret a law, courts begin with the statute’s plain language which is “used as the embodiment of legislative intent.” *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013). Courts will also “consider the statutory context, related statutes, and the entire statutory scheme when ascertaining the [statute]’s plain

meaning.” *Id.* at 582. “[W]hen the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings.” *State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008).

Finally, opinions of the Attorney General are not controlling. *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 679 n.10, 381 P.3d 1 (2016). Moreover, courts give even “less deference to such opinions when they involve issues of statutory interpretation.” *Id.*

B. Chapter 220-660 WAC exceeds DFW’s statutory authority by regulating construction projects performed solely above the ordinary high water line.

The Hydraulic Project Approval program, Chapter 77.55 RCW, regulates only construction work below the ordinary high water line of state waters. Such work will in all cases, directly and without contingency, use, divert, obstruct or change the natural flow or bed of state waters. A review of the statutory language demonstrates that this is all the Legislature intended to regulate.

1. The statutory language presupposes an act below the ordinary high water line.

The definition of “hydraulic project” includes four categories of construction work, that is, work that will “use, divert, obstruct or change” the natural flow or bed of state waters. RCW 77.55.011(11). The first three words in this list all suggest an act within the ordinary high water line—a pipe to withdraw water, a channel to redirect the flow, a dam to hold back a stream, or some other physical entry into state waters or their bed below the ordinary high water line. As a general word following at

the end of a list of specific words, the Court should ordinarily limit its interpretation of “change” to the types of things that precede it—impacts resulting from a physical entry into the area below the ordinary high water line of state waters. *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972) (under ejusdem generis canon of statutory construction, “specific terms modify or restrict the application of general terms where both are used in sequence”).

The other statutorily defined terms within the meaning of “hydraulic project” likewise support this interpretation. Each of the terms relates exclusively to the area below the ordinary high water line. “‘Bed’ means the land *below* the ordinary high water lines of state waters.” RCW 77.55.011(1) (emphasis added). Similarly, “[w]aters of the state’ and ‘state waters’ means all salt and freshwaters *waterward* of the ordinary high water line and within the territorial boundary of the state.” RCW 77.55.011(25) (emphasis added). The Legislature defines the term “ordinary high water line” itself by reference to what it separates—the area of state waters and their bed from the abutting upland:

“Ordinary high water line” means the mark on the shores of all water that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in ordinary years as to mark upon the soil or vegetation a character distinct from the abutting upland...

RCW 77.55.011(16). There is nothing in any of these definitions that clearly suggests the Legislature intended to regulate exclusively upland construction work as DFW has now done.

2. *The Legislature's use of the mandatory language "will" confirms this interpretation.*

The Legislature specifically limited the RCW 77.55.021(1) permitting obligation to construction work that “will use, divert, obstruct, or change the natural flow or bed...” RCW 77.55.011(11) (emphasis added). As used throughout the law, the word “will” is mandatory and requires a future certainty not a mere possibility: “Will” is “[a]n auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must.’ It is a word of certainty, while the word ‘may’ is one of speculation and uncertainty.” *Black’s Law Dictionary* 1598 (6th ed. 1990); see *Sullivan v. Boeing Aircraft Co.*, 29 Wn.2d 397, 402–05, 187 P.2d 312 (1947) (in a collective bargaining agreement, “will” conceded to be mandatory whereas “shall have regard” found to be contingent).

Other courts interpreting “will” have recognized that it requires certainty. In *Prismatic Development Corp. v. Somerset County Board of Chosen Freeholders*, 236 N.J. Super. 158, 564 A.2d 1208 (N.J. Super. Ct. App. Div. 1989), *overruled on other grounds*, *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 N.J. 748, 650 A.2d 748 (N.J. 1994), the court determined that statutory language stating that a construction bid “will . . . set forth in the bid the name or names of . . . all subcontractors,” required disqualification of a bid that listed only optional subcontractors:

[W]e should ordinarily read language [in a statute] in accordance with its plain and ordinary meaning. Application of this principle further reinforces our view that [the] statute prohibits [plaintiff’s] proposed practice [of listing optional subcontractors in its bid]. The statute

requires the bidder to list the subcontractors “to whom the bidder *will* subcontract. . .” [Plaintiff’s] proposed construction would construe the word “will” to mean “may.”

Id. at 161, 164-65 (emphasis in original) (internal citations omitted). Similarly, in *Regional Transportation District v. Outdoor Systems, Inc.*, 34 P.3d 408, 420 (Colo. 2001), the court held “the meaning of ‘will’ is mandatory rather than hortatory.” *See also Burnell v. Smith*, 471 N.Y.S.2d 493, 496, 122 Misc.2d 342 (N.Y.Sup.Ct. 1984) (“[T]he word ‘will’ is defined as ‘an auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must’ . . . It is a word of certainty, while the word ‘may’ is one of speculation and uncertainty.” (quoting *Black’s Law Dictionary* 1771 (4th ed. 1951))).

Chapter 77.55 RCW does not define a hydraulic project as work that “might,” “may,” or “has the potential” to change the natural flow or bed. The law does not even address likelihoods or probabilities. Instead, the law limits the permitting obligation to those types of construction that, in all circumstances and without contingency or intervening action, “will” use, divert, obstruct or change the natural flow or bed of state waters—for example, installation of a water withdrawal pipe, excavation of a new channel, or construction of a dam. The Legislature addressed this law only to definite impacts from construction work, as was its prerogative, and thus chose to draw a bright jurisdictional line at the waters’ edge.

DFW is nevertheless quite open about its intent to regulate contingent and indirect possibilities that may (or may not) affect the

natural flow or bed of state waters. The agency introduces its rule in its Programmatic Environmental Impact Statement with a broad expansion of its regulatory power that is contrary to the explicit statutory language of RCW 77.55.011(11):

WDFW protects fish life by using its authority to provide approvals for construction or work that *might* affect the flow or bed of waters of the state.

AR 529 (Programmatic Environmental Impact Statement (PEIS)) (emphasis added); *see also* AR 346 (Concise Explanatory Statement (CES)) (“The following discussion illustrates the *potential* impacts from hydraulic projects. . .”); AR 353 (CES) (“Using heavy machinery above and below the [ordinary high water line] of any water body *increases the risk of* fish exposure to construction-related contaminants such as fuels, oil, grease, [etc.]” (emphasis added)).

In addition to the bridge maintenance work discussed at *supra* pages 4-5 above (in which the regulation itself assumes only an accidental discharge of paint, sand blast grit, or dropping a bridge part), the scope of these “possibilities” sweeps up much of the work that the Counties and many other citizens do: “Road widening and new roads; power line corridors; residential, commercial, and industrial development; trails; utility infrastructure; agriculture; and other activities *have the potential* to disturb and degrade riparian conditions.” AR 628 (PEIS) (emphasis added). Counter to the express statutory language set out in RCW 77.55.011(11), DFW reserves the right to require a permit for all of these types of work because of their *potential* to change the bed or natural flow

of state waters.

During the rulemaking process, DFW dismissed public comments regarding its lack of statutory authority to regulate work above the ordinary high water line by misquoting the statute:

Although both “waters of the state” (RCW 77.55.011(25)) and “bed” (RCW 77.55.011(1)) are defined as land or waters waterward of the “ordinary high water line” (RCW 77.55.011(16)), hydraulic projects that occur landward of the ordinary high water line *can* affect the “bed” and/or “natural flow”. For this reason, the department will continue to regulate hydraulic projects that occur landward of the ordinary high water line.

AR 705 (PEIS Appendix A) (emphasis added). “Can” means “may possibly.” *Webster’s Third New Int’l Dictionary* 323 (1986). It is not the same as the statutory “will.” RCW 77.55.011(11). By replacing the Legislature’s chosen word, DFW has re-written the express conditions for the permit. In doing so, DFW has improperly gone beyond what the statute authorizes to give itself the discretion to regulate possible impacts to state waters.

The Attorney General in his Opinion is similarly unconstrained by the statutory language. He suggests that the rules are valid because:

bulldozing a steep bank directly above a river *could* change the river bed . . . [and] placement of structures in a floodway above the ordinary high water line *can* redirect flood flows. . .

AGO 2016 No. 6, at 4 (emphasis added). Again, the Legislature did not use “can,” “may,” or “might,” to describe the conditions under which a permit would be required; it expressly chose to use mandatory language.

At various places DFW embedded this unsupported expansion of the permit obligation directly into its rules. As above with the bridge rule (*supra* pp. 4-5), DFW now requires a permit “for bridge painting and other maintenance where there is *potential* for paint, sandblasting material, sediments, or bridge parts to fall into the water.” WAC 220-660-190 (emphasis added). And, “[w]hen specifying authorized work times for hydraulic projects, the department must consider the construction techniques, mitigation measures proposed, location of the project, and characteristics of habitats *potentially affected by the project.*” WAC 220-660-330(3)(i) (emphasis added). A project with “potential” impacts does not meet the statutory language.

The Court may legitimately ask whether any project involving impervious pavement (*e.g.*, a road, a shopping mall parking lot, or even a home owner’s installation of a driveway or patio) above the ordinary high water line requires a permit under DFW’s interpretation of the law because it will reduce rainfall infiltration to the soil and thus increase and concentrate runoff to some distant state waters changing its natural flow. According to DFW, the answer to this question is “yes”:

Modifications to the landscape through human-caused land-use activities, including development, forestry, and farming has [sic] resulted in negative effects to all the characteristics of a flow regime. A decrease in areas with native soils and vegetation and corresponding increases in impervious surfaces reduces the infiltration, interception, and evapotranspiration of precipitation and can reduce groundwater recharge and increase surface water runoff. This in turn can result in more frequent and abnormally

intense peak stream flows, reduced base flows, and other hydrologic effects.

AR 611 (PEIS).

The causal chain need not stop there. By ignoring the word “will” and the statutory requirement for a direct and immediate impact on the natural flow or bed of state waters, such remote actions as the upland construction of a coal-fired power plant could require a hydraulic project approval permit because the project would contribute to global warming, change rainfall patterns, and thus indirectly make substantial changes to the “natural flow” of state waters. DFW in its environmental impact statement for this rule extensively discussed climate change impacts. *See* AR at 616, 652–54 (PEIS, at 3-14, and 4-28 to 4-30).

The Attorney General acknowledged that under his interpretation of the statute the causal chain can become so attenuated that there would be no basis to regulate. AGO 2016 No. 6, at 9 (“Whether a given type of project is too far from a waterway to be subject to HPA review depends on the facts of the particular situation.”). However, DFW provides no standards or criteria by which it would judge when a project and its contingent or indirect effects is too remote or too attenuated so as to fall beyond the agency’s permitting authority—its rule is entirely silent.

DFW’s inability to state affirmatively any limit to its own discretion to regulate upland work presents a vagueness problem. A regulation is unconstitutionally vague when it relies on standardless agency discretion. *See Burien Bark Supply v. King Cty.*, 106 Wn.2d 868,

871, 725 P.2d 994 (1986) (“The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law.”). For instance, in *Burien Bark Supply*, the Supreme Court held that a zoning ordinance that prohibited processing beyond a “limited degree” was void for vagueness, because it “unconstitutionally leaves to the discretion of county officials the substance of determining what activities are prohibited.” *Id.* at 871.

Similarly, the Idaho Supreme Court struck down as void for vagueness a regulation that disciplined professionals where the regulation failed to define the grounds for the discipline. *H & V Eng’g Inc. v. Id. State Bd. of Prof. Eng’rs and Land Surveyors*, 113 Idaho 646, 649–50, 747 P.2d 55 (1987). The agency argued that a “detailed description” of grounds for discipline was unnecessary because discipline was based on the “expertise and experience” of the agency. *Id.* at 650. The court, however, rejected this argument because it relied on the agency’s interpretation of its authority on an ad hoc basis. *Id.* This approach failed to warn professionals of those actions that violated the professional standards and meant courts had no “backdrop against which the court can review discipline[.]” *Id.* In effect, the court would be forced to “rubberstamp . . . the [agency’s] action.” *Id.*

When interpreting statutory language, this Court generally avoids creating constitutional problems if possible. *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) (courts will adopt a construction that sustains the statute’s constitutionality, if possible).

DFW's rule invites endless challenges to the upland scope of its regulatory power based upon its failure to articulate any standard by which it will judge what change to the natural flow or bed is too attenuated or too remote. This Court should instead constrain the agency's rule and enforce the bright regulatory line of the waters' edge that the Legislature provided in the law. The Legislature expressly intended that only those projects that "will" in every case directly cause some material change to the natural flow or bed of state waters require a permit. All projects built below the ordinary high water line automatically meet this simple test.

3. *Other statutory language confirms that "will" is mandatory.*

The Legislature's use of the word "may"² throughout the statute strongly suggests it meant something else when it chose to write "will." *Flores*, 164 Wn.2d at 14 ("[W]hen the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings."). Likewise, the Legislature's intent when it elsewhere uses the word "will" is inconsistent with DFW's statutory interpretation.

The law provides that "[t]he department may, after consultation with the permittee, modify a permit due to changed conditions." RCW 77.55.021(10). However, "the burden is on the permittee to show that changed conditions warrant the requested modification and that such a

² *E.g.*, RCW 77.55.241(1) ("The department may approve off-site mitigation plans that are submitted by permit applicants."); RCW 77.55.021(16) ("The department may issue an expedited written permit in those instances where normal permit processing would result in significant hardship for the applicant or unacceptable damage to the environment.").

modification *will* not impair fish life.” RCW 77.55.021(11) (emphasis added). In this context, “will” requires a future certainty—the permittee must prove that its proposed modification will not impair fish life in all circumstances. DFW is under no obligation to grant the modification if the proponent proves only that the modification *may* not harm fish.

This modification provision clearly demonstrates the error of DFW’s position. If in the definition of “hydraulic project” the word “will” instead means “may” (such that the law authorizes the agency to require permits for upland work that “may” change the natural flow or bed), then DFW is also under an obligation immediately to grant a modification request if the upland work also “[may] not impair fish life.” That result is absurd and the Court should reject it. *Thurston Cty. ex rel. Bd. of Cty. Comm’rs v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004) (“We will adopt the interpretation of statutes which best advances the legislative purpose and avoids unlikely, absurd, or strained consequences.”). “Will” cannot be mandatory in the definition of hydraulic project and at the same time be permissive in the modification section.

C. The balance of the statutory language confirms the Legislature intended only to regulate work below the ordinary high water line.

DFW contends that there can be strictly upland projects that it knows with a sufficient degree of certainty “will” change the natural flow or bed of state waters so as to meet the definition in RCW 77.55.011(11). The proposition seems doubtful given, for example, the language of the

bridge rule—the “potential for ... bridge parts to fall into the water” sounds like an accident rather than a certainty. WAC 220-660-190. Nevertheless, the balance of the authorizing statute’s express language shows that the Legislature did not intend to regulate strictly upland construction projects.

1. DFW’s rules do not conform to the law’s permit application provision.

DFW cannot reconcile its rule with the Legislature’s requirement for the contents of a project proponent’s permit application. This is a critical point to the proper resolution of this case—DFW’s only solution is either to change or ignore the statutory language.

Subsection (1) of RCW 77.55.021 imposes the requirement to secure a permit for a hydraulic project and subsection (2) sets out the requirements for the permit application. Importantly, a project proponent’s application “*must*” contain complete plans and specifications for the in-water work:

(2) A complete written application for a permit may be submitted in person or by registered mail and *must* contain the following:

(a) General plans for the overall project;

(b) *Complete plans and specifications of the proposed construction or work within the mean higher high water line in saltwater or within the ordinary high water line in freshwater[.]*

RCW 77.55.021(2)(b) (emphasis added). “Must” is mandatory, not permissive. *Kelleher v. Ephrata Sch. Dist. No. 165*, 56 Wn.2d 866, 872, 355 P.2d 989 (1960) (statute stating that claims “must” be filed by a

certain time creates a mandatory obligation). The statute requires a project proponent to submit complete plans for its in-water work because that is the work the law regulates. Someone proposing a strictly upland project cannot physically comply with the obligation in RCW 77.55.021(2) because the person is not going to perform in-water work and would have no such plans to present with his or her application. There is no plausible way to read this language in any other manner: The permit applicant must submit the plans for its in-water work but cannot possibly do so for a strictly upland construction project. Nor did the Legislature add any qualifying phrase, such as “if applicable,” to this requirement. It should therefore be clear that only in-water work requires a permit. Strictly upland work does not require a permit.

DFW’s rule and the State’s position in this litigation require the Court to ignore this express statutory mandate, a result that this Court should avoid if at all possible. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (in interpreting a statute, the Court must interpret the statute to “give effect to all language, so as to render no portion meaningless or superfluous”). A proper resolution to this case will give meaning to *all* of the statutory language, not just some of it. *Travelers Casualty & Surety Co. v. Wash. Trust Bank*, 186 Wn.2d 921, 930, 383 P.3d 512 (2016) (“A statute’s meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” (internal quotation marks omitted)). The Court should not read the law in such a way that it

imposes impossible or meaningless obligations on the regulated community. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“[I]n construing a statute, a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” (internal quotation marks omitted)). The Counties’ reading of this statute gives meaning to this provision; DFW’s position in this case instead requires the Court to ignore it.

Further, critically missing from the RCW 77.55.021(2) permit application section is any language supporting DFW’s regulation of upland work. In an attempt to reconcile this incongruity with its rules, DFW actually changed the statutory language when it wrote its regulation:

(iii) A complete application package for an HPA must contain:

...

(C) Complete plans and specifications *for all aspects* of the proposed construction or work waterward of the mean higher high water line in salt water, or waterward of the ordinary high water line in fresh water;

WAC 220-660-050(9)(c)(iii)(C) (emphasis added). The italicized words do not appear in the authorizing statute. *Compare* RCW 77.55.021(2)(b) and WAC 220-660-050(9)(c)(iii)(C). DFW simply added them. The addition makes it sound like not all permitted projects have work below the ordinary high water line: Permit applicants should submit the detailed plans of just those aspects of their project that involve in-water work. If they do not have any, then they do not need to submit the plans.

“Must” is unequivocal and mandatory. The applicant must submit

detailed plans for its in-water work. If there is no in-water work, the law does not require a permit. The resolution here should not simply be to ignore this language or rewrite it as the agency has done.

2. *What the Legislature did not say is also important.*

The permitting provisions of RCW 77.55.021 nowhere mention construction work “above” the ordinary high water line or impose any obligation on such work. The Legislature had the terminology at hand to create a permitting requirement for work “near” state waters but it did not do so. As noted above, the Legislature defined the “ordinary high water line” as the point where the “action of waters are so common and usual, and so long continued in ordinary years as to mark upon the soil or vegetation a character distinct from *the abutting upland.*” RCW 77.55.011(16) (emphasis added). The statutory sections addressing both the permit obligation and the permit application (RCW 77.55.021(1) and (2)) do not refer to plans or specifications for work in the “abutting upland,” nor do they refer to construction work on “dry land” or “landward” of the ordinary high water line. The Legislature did not define “hydraulic project” to include “the construction or performance of work in *or near* state waters” because it intended DFW to regulate in state waters, not the adjoining uplands.

DFW is not merely filling a gap with its extension of its regulatory power to upland construction work. It is changing the law just as surely as it changed the words in RCW 77.55.021(2)(b) when it wrote its rule on the permit application. The Legislature is entitled to address different

problems with different solutions. Dozens of other laws and regulations protect fish. *See* Appendix A. The Legislature chose to target its regulatory power here on the direct and certain impacts to the natural flow or bed of state waters resulting from in-water construction projects rather than possibilities arising from upland work. Work in a river will always and immediately affect the natural flow or bed. Some but not all construction work in adjoining uplands near state waters may affect the bed or natural flow. The effects may occur in some circumstances or at some times, or maybe not at all. The Legislature chose not to regulate construction work located in places that may have only contingent or indirect impacts on the natural flow or bed of state waters.

3. *DFW's interpretation of "hydraulic project" renders other sections of the law superfluous.*

DFW's interpretive position (*i.e.*, because upland work might change the natural flow or bed of state waters and negatively impact fish, DFW may require permits for such work) is inconsistent with other parts of the statute. Because this Court should seek to harmonize all of the law and to leave no section meaningless, it should reject DFW's interpretation. *Rivard*, 168 Wn.2d at 783; *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995).

RCW 77.55.021(2)(b): As discussed above, the statute specifies that the permit application "*must* contain ... [c]omplete plans and specifications of the proposed construction or work within the mean high water line in saltwater or within the ordinary high water line in

freshwater.” RCW 77.55.021(2)(b) (emphasis added). This section is meaningless if DFW may require permits for work solely above the ordinary high water line. It is not physically possible to comply with this mandatory direction for a project above the ordinary high water line. There is nothing about this subsection that suggests it is conditional, or only applicable in some cases: “Must” does not mean “where applicable.”

RCW 77.55.131, .141, and .151: In his opinion, the Attorney General cited statutory permitting requirements for work in certain upland areas such as dike vegetation management (RCW 77.55.131), marine bulkheads (RCW 77.55.141), certain marina work (RCW 77.55.151), and stream bank stabilization (RCW 77.55.021(9)–(15)). AGO 2016 No. 6, at 9. Rather than proof of a legislative intent to create a general permitting obligation for exclusively upland work, these requirements are appropriately read as express statutory exceptions to the general rule that no permit is required for upland work. If upland work requires a permit in any event, there is no need to create specific requirements in these four circumstances. These provisions would be superfluous if the agency had plenary power to require permits for work above the ordinary high water line. *See J.P.*, 149 Wn.2d at 450 (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” (internal quotation marks omitted)).

RCW 77.55.161: The Attorney General also argued that a clause in RCW 77.55.161(3)(c) (italicized below) is superfluous if DFW cannot generally regulate above the ordinary high water line. AGO 2016 No. 6,

at 5. A careful reading of this complicated provision, however, reveals that other relevant portions of this section (underlined below) demonstrate to the contrary:

(1) Notwithstanding any other provision of this chapter, all permits related to stormwater discharges must follow the provisions established in this section.

...

(3)(a) In locations not covered by a national pollution discharge elimination system municipal stormwater general permit, the department may issue permits that contain provisions that protect fish life from adverse effects, such as scouring or erosion of the bed of the water body, resulting from the direct hydraulic impacts of the discharge.

(b) Prior to the issuance of a permit issued under this subsection (3), the department must:

(i) Make a finding that the discharge from the outfall will cause harmful effects to fish life;

(ii) Transmit the findings to the applicant and to the city or county where the project is being proposed; and

(iii) Allow the applicant an opportunity to use local ordinances or other mechanisms to avoid the adverse effects resulting from the direct hydraulic discharge. The forty-five day requirement for permit issuance under RCW 77.55.021 is suspended during the time period the department is meeting the requirements of this subsection (3)(b).

(c) After following the procedures set forth in (b) of this subsection, the department may issue a permit that prescribes the discharge rates from an outfall structure that will prevent adverse effects to the bed or flow of the waterway. The department may recommend, but not specify, the measures required to meet these discharge

rates. The department may not require changes to the project design above the mean higher high water mark of marine waters, or the ordinary high water mark of freshwaters of the state...

RCW 77.55.161(3) (emphasis added).

This section *presumes* construction within the bed or natural flow of state waters and a direct impact (the installation of a stormwater outfall the discharge from which scours the bed of a river). Read in its entirety, this section provides as follows: (a) All permits for storm water discharge projects must follow this section (RCW 77.55.161(1)); (b) This section expressly incorporates “local ordinances or other mechanisms” as a means for a project proponent to mitigate the “adverse effects resulting from the direct hydraulic discharge,” such as “scouring or erosion of the bed” (RCW 77.55.161(3)(b)(iii)); (c) Local ordinances may include such stormwater runoff reduction actions as infiltration trenches, dry wells, rain gardens, vegetated roofs, and cisterns, all of which reduce the volume of flow to the state waters but necessarily exist above the ordinary high water line (*e.g.*, Seattle Municipal Code 22.805.070, Table A); and (d) Though a project proponent *may* choose to use these local mitigation activities above the ordinary high water line, DFW may not *require* them (RCW 77.55.161(3)(c)).

In short, the Attorney General’s cited clause in RCW 77.55.161(3)(c) merely limits DFW’s ability to *require* such mitigation actions. For purposes of the construction of stormwater discharge outfalls that cause scour of a river bed, the statute expressly opens the door for

permittees to consider and propose use of locally-approved flow reduction actions as part of their proposal for construction work below the ordinary high water line—the express statutory prohibition against DFW *requiring* such upland mitigation work simply states DFW may not order a party to do so.

RCW 77.55.321: This section states that “[t]he department shall charge an application fee of one hundred fifty dollars for a hydraulic project permit or permit modification issued under RCW 77.55.021 where the project is located at or below the ordinary high water line.” The Attorney General argued this would be superfluous if DFW lacked the plenary power to regulate activities above the ordinary high water line. AGO 2016 No. 6, at 5. However, as noted above, the statute contains several express exceptions to the general rule limiting DFW’s regulatory authority to projects below the ordinary high water line—stream banks, certain marina work, etc. Properly read, this section merely states that DFW may not charge fees for these exceptional projects.³

D. The law does not grant DFW unlimited power to protect fish life.

A striking feature of DFW’s rule is just how far beyond “work that will use, divert, obstruct or change the natural flow or bed” of state waters the agency extends its reach. The Legislature designed this statute to protect fish from the direct physical alteration of the natural flow or bed of

³ It is noteworthy that RCW 77.55.321 expired by its own terms on June 30, 2017, further detracting from the Attorney General’s argument that this statute supported the position that DFW has the power to regulate activities above the ordinary high water line.

state waters resulting from the construction of a hydraulic project, yet the agency has assumed nearly universal power to protect fish. As demonstrated by the laws described in Appendix A, numerous other laws and regulations protect fish in Washington.

Water Quality: Water quality no doubt can affect fish, but it has no meaningful connection to the use, diversion, obstruction, or other change to the *natural flow or bed* of state waters. Nevertheless, DFW expands its regulation to the water quality arena: “An HPA [permit] is also required for bridge painting and other maintenance where there is potential for paint, sandblasting material, sediments, or bridge parts to fall into the water.” WAC 220-660-190 (emphasis added). DFW even regulates the kind of hydraulic fluids used in construction equipment: “Equipment used in or near water must use environmentally acceptable lubricants composed of biodegradable base oils. These are vegetable oils, synthetic esters, and polyalkylene glycols.” WAC 220-660-120(5)(d).

Shade and water temperature: DFW has designated overhanging trees growing on stream banks (stream and river banks, by definition, are above the ordinary high water line (WAC 220-660-030(11)) to be “freshwater habitats of special concern” because “[v]egetated stream banks shade the water from the warming effects of the sun.” WAC 220-660-100(2)(a). Thus, DFW may, for example, limit removal of upland vegetation to one side of a stream or river. WAC 220-660-120(4)(d). Shade and temperature are no doubt important to fish, but they have nothing to do with the natural flow or bed of state waters.

Sound: DFW requires an applicant to “[u]se appropriate sound attenuation to minimize harm to fish from impact pile-driving noise.” WAC 220-660-140(7)(e). The same is true for marina construction. WAC 220-660-160(7)(c). Again, this has no connection to the natural flow or bed of state waters.

Light: When designing a marina, DFW also requires “low-intensity lights that are located and shielded to prevent light from attracting fish” if artificial nighttime lights are used. WAC 220-660-160(4)(f). Light does not change the natural flow or bed of state waters, but DFW regulates it nonetheless.

Upland work: DFW assumes the power to extensively regulate how work is done in the uplands above the ordinary high water line. The agency purports to limit: authorized work times (WAC 220-660-110); site access such as where to put roads or when and where a permittee may remove the upland vegetation (WAC 220-660-120(4)); what types of equipment can be used in muddy areas (WAC 220-660-120(5)); restoration requirements for the disturbed upland bank area (WAC 220-660-120(13)(a)); and vegetation restoration in “riparian” areas (again, defined as land “adjacent” to waters of the state (WAC 220-660-030(127)), WAC 220-660-120(13)(i)–(m).

Fish feeding: It would appear that DFW even assumes the power to regulate how fish feed. DFW limits the removal of trees above the ordinary high water line because “[i]nsects drop off overhanging vegetation and provide food.” WAC 220-660-100(2)(a). But the

Legislature did not grant DFW power to regulate “phytoplankton primary productivity and . . . food-web interactions,” AR 627 (PEIS), as the agency seems to think. This statute is only about changes to the natural flow or bed of state waters.

The Counties agree that water quality, shade, sound, and light can be important to fish and their habitat. This case is not a dispute about the science upon which the agency relies. Instead, the Counties ask this Court to acknowledge the Legislature’s prerogative to weigh competing societal needs and to make limited policy choices. An agency is not empowered to expand upon the Legislature’s decisions no matter how helpful or beneficial the agency regulation may be. *Wash. Indep. Tele. Ass’n v. Telecomm. 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.”). There are already other laws and regulations in this State protecting fish. *See* Appendix A. None of DFW’s rules on water quality, shade, light, or sound have anything to do with “the natural flow or bed of state waters,” yet DFW regularly applies them to construction projects above the ordinary high water line. The question for this Court is not whether DFW has created a useful rule, but whether a rule regulating work above the ordinary high water line fairly derives from the statutory grant of authority. It does not.

E. The Court should declare Chapter 220-660 WAC an unlawful exercise of DFW's authority.

An agency has only that authority the legislature grants either expressly or by necessary implication. *Wash. Fed'n of State Emps. v. State Dep't of Gen. Admin.*, 152 Wn. App. 368, 383, 216 P.3d 1061 (2009). In *Washington Federation of State Employees*, the authorizing statute allowed an agency to create rules affecting bid submissions and evaluation. *Id.* The agency, however, created a rule that addressed pre-bid activities reasoning that the rule would “assist in carrying out the statute’s objectives.” *Id.* The Court of Appeals struck down the rule because regulating pre-bid activities was not authorized “‘expressly or by necessary implication’ as ‘procedures to ensure that bids are submitted and evaluated in a fair and objective manner.’” *Id.* (quoting *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156–57, 60 P.3d 53 (2002)). Similarly, DFW’s regulation of construction projects above the ordinary high water line is not necessarily implied from a statute that regulates work performed below the ordinary high water line.

This Court has not hesitated to invalidate environmental rules that exceed the agency’s statutory authority. *See, e.g., Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993) (holding that cease and desist orders that Department of Ecology issued precluding irrigation farmers from appropriating ground water were invalid because enabling statutes did not grant Ecology authority to determine water rights); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992) (invalidating Department of Ecology rule under Model Toxics Control

Act, Chapter 70.105D RCW, that was beyond its statutory authority); *see also Littleton v. Whatcom Cty.*, 121 Wn. App. 108, 117-18, 86 P.3d 1253 (2004) (Department of Ecology rule was invalid because it altered the statutory definition of waste by defining waste to include agricultural manures); *H & H P'ship v. State*, 115 Wn. App. 164, 170-71, 62 P.3d 510 (2003) (invalidating Department of Ecology rule because it impermissibly modified 21-day appeal period in the Shoreline Management Act).

For example, in *Rettkowski*, the Department of Ecology had issued cease and desist orders to water users that it believed were infringing on senior water rights. 122 Wn.2d at 221. Ecology argued that it had authority to issue the orders because of Washington's "first in time, first in right" rule, under RCW 90.03.010, and various enabling statutes that provided Ecology with authority to "regulate and control the diversion of water in accordance with the rights thereto." *Id.* at 226-27 (quoting RCW 43.27A.064(3)). The Supreme Court held that, because the statutes did not vest Ecology with authority to conduct adjudications or regulatory adjudications of water rights, Ecology's cease and desist orders were invalid. *Id.* at 227. *Rettkowski* confirms that an agency's authority is limited to that which the legislature provided by statute. It also demonstrates that, even where the agency's action is seemingly consistent with the purpose of the statute, if the statute does not authorize the agency to so act, such actions are invalid. Because DFW exceeded its statutory authority under Chapter 77.55 RCW, the Court should declare the rule regulating work above the ordinary high water line invalid.

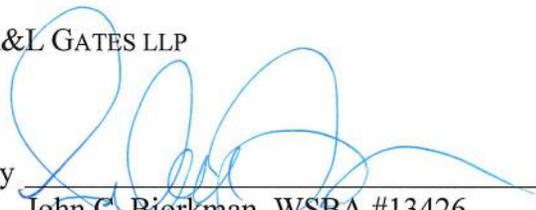
VI. CONCLUSION

For the reasons set out above, the Court should hold that Chapter 77.55 RCW only authorizes DFW to regulate construction work within the “ordinary high water line” that “will use, divert, obstruct or change the natural flow or bed” of state waters, that is, work below the ordinary high water line. Accordingly, the Court should further hold that DFW exceeded its statutory authority when it enacted rules in Chapter 220-660 that require a Hydraulic Project Approval (HPA) permit for projects above the ordinary high water line and hold that the entirety of Chapter 220-660 WAC is inapplicable to construction work above the ordinary high water line.

DATED this 7th day of December, 2017.

Respectfully submitted,

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APPENDIX A

General Statutes and Regulations that Protect Fish Life

- The Clean Water Act, 33 U.S.C. § 1251 *et seq.* protects “water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. § 1251(a)(2); *accord PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700 (1994). Section 404 of the Clean Water Act regulates “the discharge of dredged or fill material into the navigable waters” of the United States. 33 U.S.C. § 1344(a). The CWA allows the Environmental Protection Agency administrator to deny a permit to discharge materials where doing so will, among other things, adversely impact fishery areas. 33 U.S.C. § 1344(c). The CWA also establishes the National Pollutant Discharge Elimination Permit System, which regulates wastewater discharges from point sources to surface waters. The EPA may prohibit disposal “whenever [it] determines...that the discharge of such materials into such area will have an unacceptable adverse effect on...shellfish beds and fishery areas (including spawning and breeding areas)...” 33 U.S.C. § 1344(c).
- The Rivers and Harbors Appropriations Act (“RHAA”), 33 U.S.C. § 401, allows the federal government to regulate “construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States.” Pursuant to the RHAA, the U.S. Army Corps of Engineers (“Corps”) requires a Section 10 Permit for construction that affects the navigable waters of the U.S., and this requirement incorporates protections from the Endangered Species Act, 16 U.S.C. § 1531, and the Clean Water Act, 33 U.S.C. § 1251. 33 C.F.R. § 325.2(b)(5), (e)(1)(ii).
- The Magnuson-Stevens Act (“MSA”) provides for designating and protecting Essential Fish Habitat (“EFH”). 16 U.S.C. §§ 1853(a)(7) & 1855(b). By designating EFHs, the National Marine Fisheries Service (“NMFS”) may protect fish within waters subject to the authority of

the MSA. 50 C.F.R § 600.805(b)(2). While the EFH process typically involves fishery-related activities, it also includes non-fishery-related activities such as construction of roads and bridges. *See* Final Environmental Assessment and Regulatory Impact Review: Pacific Coast Salmon Plan Amendment 18 at 90 (Sept. 2014), available at http://www.westcoast.fisheries.noaa.gov/publications/habitat/essential_fish_habitat/bc95_final_ea_rir_am_18_fonsi__appendices.pdf (last accessed on December 7, 2017). Many non-fishery actions include a federal nexus because a federal permit is required to undertake many of these activities. *Id.* “As such, the Federal action agency must consult with the NMFS, which will issue EFH Conservation Recommendations . . .” *Id.* Further, while the MSA does not require state agencies to consult with the NMFS on EFH, NMFS “will use existing coordination procedures or establish new procedures to identify state actions that may adversely affect EFH, and to determine the most appropriate method for providing EFH Conservation Recommendations to state agencies.” 50 C.F.R. § 600.925(c).

- The Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, protects listed fish and marine life.
- The Shoreline Management Act master programs must include “a conservation element for the preservation of natural resources, including but not limited to . . . vital estuarine areas for fisheries . . .” RCW 90.58.100(2)(f). The legislature has declared proper management of shorelands to be of paramount importance and that any permitted uses must minimize any resultant ecological or environmental damage. *See* RCW 90.58.020.
- RCW 77.57.030(1) requires “a dam or other obstruction across or in a stream” to provide “a durable and efficient fishway approved by the director.” The Washington Department of Ecology regulates permits for these projects pursuant to Chapter 173-175 WAC.
- Surface water cleanup standards under the Model Toxics Control Act, chapter 70.105D RCW, are based upon a determination of “no adverse

affects on the protection and propagation of . . . fish, and other aquatic life.” WAC 173-340-730(3)(b)(ii), (2)(b)(i)(B), and (4)(b)(ii).

- Under the Water Pollution Control Act, chapter 90.48 RCW, the Water Resources Act, chapter 90.54 RCW, and chapters 173-200 and 173-201A WAC, Ecology regulates water quality standards for ground and surface waters in the State and defines pollution as “contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, . . . as will or is likely to create a nuisance or render such waters harmful . . . to . . . fish, or other aquatic life.” WAC 173-200-020(22); WAC 173-201A-020. Ecology further regulates water quality standards for surface waters to be consistent “with . . . the propagation of fish, shellfish, and wildlife, pursuant to the provisions of chapter 90.48 RCW.” WAC 173-201A-010(1). The Water Pollution Control Act has also spawned several other regulations that protect fish, including one requiring Ecology to consider “[s]pawning areas; [n]ursery area; . . . [and] [s]hellfish harvest areas” before authorizing a sediment impact zone. WAC 173-204-415(3).
- The Puget Sound Highway Runoff Program requires implementation of best management practices to prevent “pollution” that may render waters “harmful, detrimental or injurious to . . . fish.” WAC 173-270-030; WAC 173-270-020(16) (defining “pollution”).
- Under the Growth Management Act, the Legislature states that rural land development should “be compatible with the use of the land by wildlife and for fish and wildlife habitat.” RCW 36.70A.011. Certain areas can be designated fish and wildlife habitat conservation areas. WAC 365-190-130. Local jurisdictions pass ordinances to protect these areas and establish construction buffers. For instance, Kitsap County identifies “regulated fish and wildlife habitat conservation areas and establish[es] habitat protection procedures and mitigation measures that are designed to achieve no net loss of fish and wildlife species and habitats due to new development or regulated activities.”

Kitsap County Code 19.300.305. The Kitsap County Code establishes buffers and building setbacks to protect these areas. Kitsap County Table 19.300.315;⁴ *see also* Edmonds City Code Chapter 23.90.⁵

- The State Environmental Protection Act, chapter 43.21C RCW, includes fish migration routes and habitats among the “elements of the environment” considered during a SEPA review. WAC 197-11-444(1).
- The Department of Natural Resources (“DNR”) regulates aquatic lands, which includes 1,300 miles of tidelands, 6,700 acres of harbor areas, and 2,000 square miles of marine beds of navigable waters (and an undetermined amount of freshwater shoreland and bed). WAC 332-30-100. DNR prohibits “[f]illing, grading, lagooning or dredging which would result in substantial detriment to navigable waters by reason of erosion, sedimentation or impairment of fish and aquatic life[.]” WAC 332-30-163(9).

Regulations that Protect Fish Life for Specific Construction Projects

- Municipal solid waste landfills must be located and managed to avoid impacts on wetlands, flood plains, and fish. WAC 173-351-130(4)(ii)(D).
- All onshore and offshore oil handling facilities must prepare plans for the protection of fisheries from oil spills. WAC 173-180-610(1).
- Offshore energy exploration may not “[i]njure the marine biota or other fish and wildlife, beds, or tidelands of the waters.” WAC 173-15-030(6)(a)(iii).
- Seashore Conservation rules prohibit such things as campfires on shellfish beds. WAC 352-37-105.

⁴<http://www.codepublishing.com/WA/KitsapCounty/html/Kitsap19/Kitsap19300.html> (last accessed December 7, 2017).

⁵<http://www.codepublishing.com/WA/Edmonds/html/Edmonds23/Edmonds2390.html> (last accessed December 7, 2017).

- The Forest Practices Board regulates the construction and maintenance of forest roads with a policy goal of protecting water quality and riparian habitats. WAC 222-24-010. The regulations states that riparian and wetland areas provide essential habitats for fish. *Id.* (“Providing for fish passage at all life stages;” ...“Assuring no-net-loss of fish habitat.”). The regulations prohibit “new stream-adjacent parallel roads” in “natural drainage channels, channel migration zones, sensitive sites, equipment limitation zones, and riparian management zones when there would be substantial loss or damage to fish...” WAC 222-24-202(2).

DECLARATION OF SERVICE

Peggy Mitchell declares as follows:

1. I am over the age of 18 and am competent to testify herein.
2. I am a Senior Practice Assistant at the law firm of K&L GATES LLP.
3. On December 7, 2017, 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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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 7th day of December, 2017 at Seattle, Washington.



Peggy Mitchell, Senior Practice Assistant

K & L GATES LLP

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Appellants' Opening Brief

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