FILED
SUPREME COURT
STATE OF WASHINGTON
3/9/2018 9:29 AM
BY SUSAN L. CARLSON
CLERK

NO. 95029-6

SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE COUNTY, PIERCE COUNTY, DOUGLAS COUNTY, LEWIS COUNTY, and KITSAP COUNTY,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Respondent.

CORRECTED RESPONSE TO APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 6

A. Rules are Presumed to be Valid, and Do Not Exceed Statutory Authority When They are Consistent with the Enacting Statute 6

B. The Plain Language of RCW 77.55 Demonstrates That WDFW's Rules Are Within Its Statutory Authority 8

1. The Plain Language of the Statutes Does Not Limit WDFW's Jurisdiction to the Ordinary High Water Line 9

2. The Statutory Context Demonstrates That HPA Authority Is Not Limited to the Ordinary High Water Line 14

3. WDFW Regulates Both Direct and Indirect Impacts to State Waters in Order to Protect Fish Life 18

4. The Counties' Reliance on Hypotheticals Does Not Equate to Jurisdictional Limits in the Statutes 23

C. Even if the Statutes Are Ambiguous, WDFW's Interpretation Requires Deference 29

1. Upland Activities Can Affect the Bed or Flow of State Waters 30

2. A 2016 Attorney General Opinion Supports WDFW's Interpretation 32

3. The *Northwest Steelhead* Case and the Legislature's Acquiescence to the Decision Support WDFW's Interpretation 34

D. Although the Counties Waived Their Constitutional Challenge, the Rule is Not Void for Vagueness Because Certainty is Not Required in a Rule 35

E. The APA Provides for Limited Relief in a Rule Challenge 39

IV. CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Armstrong v. State of Washington,
91 Wn. App. 530, 958 P.2d 1010 (1998) 20

Ass'n of Wash. Bus. v. Dep't of Revenue,
155 Wn.2d 430, 120 P.3d 46 (2005).....6

Ass'n of Wash. Spirits v. Liquor Control Bd.,
182 Wn.2d 342, 340 P.3d 849 (2015).....30

Beatty v. Wash. Fish and Wildlife Comm'n,
185 Wn.App. 426, 341 P.3d 291 (2015).....8, 9, 30

Buchanan v. Int'l Brotherhood of Teamsters,
94 Wn.2d 508, 617 P.2d 1004 (1980).....35

Burns v. City of Seattle,
161 Wn.2d 129, 164 P.3d 475 (2007).....14

Chester v. Deep Roots Alderwood, LLC,
193 Wn. App. 147, 371 P.3d 113 (2016).....39

Citizens All. for Prop. Rights Legal Fund v. San Juan County,
184 Wn.2d 428, 359 P.3d 753 (2015)..... 32

City of Federal Way v. Koenig,
167 Wn.2d 341, 217 P.3d 1172 (2009).....35

Cornelius v. Dep't of Ecology,
182 Wn.2d 574, 344 P.3d 199 (2015).....30

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992).....38

Davis v. Cox,
183 Wn.2d 269, 351 P.3d 862 (2015).....12

Dept. of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, 43 P.3d 4 (2002) 7, 28, 29

D.W. Close, Inc. v. Dep't of Labor & Indus.,
143 Wn. App. 118, 177 P.3d 143 (2008) 7

Frias v. Asset Foreclosure Servs., Inc.,
181 Wn.2d 412, 334 P.3d 529 (2014) 13

Gerow v. Wash. State Gambling Comm'n,
181 Wn. App. 229, 324 P.3d 800 (2014) 7

Grange Ins. Ass'n v. Roberts,
179 Wn. App. 739, 320 P.3d 77 (2013) 37

Hallauer v. Spectrum Properties, Inc.,
143 Wn.2d 126, 18 P.3d 540 (2001) 24

Impoundment of Chevrolet Truck,
148 Wn.2d 145, 60 P.3d 53 (2002) 30

In re Bratz,
101 Wn. App. 662, 5 P.3d 759 (2000) 13

In re Dependency of K.D.S.,
176 Wn.2d 644, 294 P.3d 695 (2013) 12

Inland Foundry Co. v. Dep't of Labor & Indus.,
106 Wn. App. 333, 24 P.3d 424 (2001) 37

Keene v. Board of Accountancy,
77 Wn. App. 849, 894 P.2d 582 (1995) 37, 38,

Kustura v. Dep't of Labor & Indus.,
169 Wn.2d 81, 233 P.3d 853 (2010) 24

Lake v. Woodcreek Homeowners Ass'n,
169 Wn.2d 516, 243 P.3d 1283 (2010) 14, 15, 23

Longview Fibre Co. v. Dep't of Ecology,
89 Wn. App. 627, 949 P.2d 851 (1998) 36, 37, 38, 39

NW Steelhead and Salmon Council of Trout Unlimited v. Dep't of Fisheries,
78 Wn. App. 778, 896 P.2d 1292 (1995) 34

Pierce County v. Dep't of Soc. & Health Servs.,
144 Wn. App. 783, 185 P.3d 594 (2008) 20

Port of Seattle v. Pollution Control Hearings Bd.,
151 Wn.2d 568, 90 P.3d 659 (2004) 29

Protect the Peninsula's Future v. City of Port Angeles,
175 Wn. App. 201, 304 P.3d 914 (2013) 35

Ralph v. Dep't of Nat. Res.,
182 Wn.2d 242, 343 P.3d 342 (2014) 14

Regan v. Dep't of Licensing,
130 Wn. App. 39, 121 P.3d 731 (2005) 37, 38

Reno v. Flores,
507 U.S. 292, 301, 113 S.Ct. 1439, 123 L. Ed. 2d 1 (1993) 36

Rios v. Dep't of Labor & Indus.,
145 Wn.2d 483, 508, 39 P.3d 961 (2002) 39

St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.,
115 Wn.2d 690, 801 P.2d 212 (1990) 8

State v. Chester,
133 Wn.2d 15, 940 P.2d 1374 (1997) 18

State v. Conte,
159 Wn.2d 797, 154 P.3d 194 (2007) 21

State v. Cooper,
156 Wn.2d 475, 128 P.3d 1234 (2006) 18

State v. Hall,
168 Wn.2d 726, 230 P.3d 1048 (2010) 16

State v. Reis,
183 Wn.2d 197, 351 P.3d 127 (2015) 13

Thurston County v. City of Olympia,
151 Wn.2d 171, 86 P.3d 151 (2004) 23, 32

Tuerk v. Dep't of Licensing,
123 Wn.2d 120, 864 P.2d 1382 (1994) 19

Washington Cedar & Supply Co. v. Dep't of Labor & Indus.,
137 Wn. App. 592, 154 P.3d 287 (2007) 36, 37

Wash. Pub. Ports Ass'n v. Dep't of Revenue,
148 Wn.2d 637, 62 P.3d 462 (2003) 7, 20

Weden v. San Juan County,
135 Wn.2d 678, 958 P.2d 273 (1998) 38

Weyerhaeuser Co. v. Dep't of Ecology,
86 Wn.2d 310, 545 P.2d 5 (1976) 29

Statutes

RCW 34.05 6

RCW 34.05.566(4) 6

RCW 34.05.570(1)(a) 6

RCW 34.05.570(2)(c) 6

RCW 34.05.574(1), (2) 39

RCW 43.21B.110(1)(*l*) 22, 40

RCW 43.21C 4

RCW 43.21C.031 31

RCW 77.15.300 27

RCW 77.55 ..... *passim*

RCW 77.55.011 ..... *passim*

RCW 77.55.011(1) 9

RCW 77.55.011(11) 8, 12, 14, 18

RCW 77.55.011(16) 8, 9, 10

RCW 77.55.011(18) 9

RCW 77.55.011(23) 15

RCW 77.55.011(25) 8, 9, 10

RCW 77.55.021 ..... 8, 24

RCW 77.55.021(1) 9, 26, 30

RCW 77.55.021(2) 10, 23

RCW 77.55.021(2)(a) 11

RCW 77.55.021(2)(b) 11, 24

RCW 77.55.021(7)(a) 8, 9, 21

RCW 77.55.021(8) 22, 40

RCW 77.55.021(9)-(11) 15

RCW 77.55.021(12), (14)-(16) 40

RCW 77.55.031 17

RCW 77.55.041 17

RCW 77.55.051 17

RCW 77.55.081 9

RCW 77.55.091 9

RCW 77.55.141(2)(a) 11

RCW 77.55.151 ..... 15, 16, 17

RCW 77.55.161 29

RCW 77.55.161(2), (3) 11

RCW 77.55.171 17

RCW 77.55.181 17

RCW 77.55.221 ..... 16, 40

RCW 77.55.231 ..... 8, 9, 21

RCW 77.55.231(1) 9, 32

RCW 77.55.291 27

RCW 77.55.321 12

RCW 77.55.321(1) 12

RCW 77.55.361 17

RCW 90.58 13

RCW 90.58.030 ..... 15, 34

RCW 90.58.030(2)(d) 13

RCW 90.58.030(2)(h) 15

RCW 90.58.150 13

Regulations

WAC 197-11-400 31

WAC 220-110 ..... 5, 26

WAC 220-110-030(14) 25

WAC 220-110-070 25

WAC 220-110-070(1)(a)-(g) 25

WAC 220-660 5

WAC 220-660-020 - 090 3

WAC 220-660-030(55) 8

WAC 220-660-030(77) 9

WAC 220-660-030(127) 15

WAC 220-660-030(156) 34

WAC 220-660-050(3)(ii), (iv) 40

WAC 220-660-050(4)-(7) 40

WAC 220-660-050(8) 9

WAC 220-660-050(9)(b)-(c) 40

WAC 220-660-050(9)(c)(iii)(C) 24

WAC 220-660-050(14)(a) 8, 9

WAC 220-660-050(14)(b) 40

WAC 220-660-100(2) 32

WAC 220-660-120 3

WAC 220-660-130 - 370 32

WAC 220-660-140(2) 16

WAC 220-660-190 .....3, 5, 24, 25, 26, 40, 41

WAC 220-660-260(3) 29

WAC 220-660-330(1) 28

WAC 220-660-330(3) 28

WAC 220-660-330(3)(i) 25, 27, 28

WAC 220-660-370(3)(a) 10

WAC 220-660-380(2) 16, 31

WAC 220-660-430(3) 29

WAC 220-660-460 - 470 .....22, 40

Other Authorities

Op. Att'y Gen. 6 (2016) 33

I. INTRODUCTION

The Hydraulic Project Approval (HPA) program ensures that construction projects affecting the bed or flow of state waters protect fish. Construction projects can affect state waters in a variety of ways, such as eliminating shade which provides critical cool water, blocking upstream and downstream flow, contaminating water with chemicals, or increasing sediment. The Washington Department of Fish and Wildlife (WDFW) designed the HPA rules to implement best management practices for a wide variety of construction projects, avoid direct and indirect impacts to fish, and, avoid, minimize, or compensate for unavoidable impacts. The rules are consistent with the Legislature's directive to WDFW to protect fish life.

The governing statutes in the Hydraulic Code, RCW 77.55, are unambiguous and do not explicitly limit WDFW's authority to construction projects below the ordinary high water line. WDFW has implied authority to regulate impacts to the bed or flow of state waters regardless of whether the impact source originates above or below the ordinary high water line.

If this Court determines that the governing statutes are ambiguous, appellate authority, an attorney general opinion, and deference to WDFW's technical expertise all support its authority to regulate those projects above the ordinary high water line that affect the bed or flow of state waters.

The Counties challenged the 2014 HPA rules because some of the rules describe activities above the ordinary high water line. The Counties' Opening Brief relies on hyper-technical arguments that ignore the plain language of the statutes. The Counties' interpretation renders several statutory provisions superfluous and results in unlikely, absurd, or strained consequences. To support its claims, the Counties argue that WDFW may use its rules in a future, hypothetical situation to regulate a project that does not affect the bed or flow of state waters. The Counties fail to explain why their right to appeal would not correct this error. Under the Counties' reasoning, WDFW will be prevented from regulating upland activities that affect the bed or flow of state waters, such as clearing bank vegetation to the waterline, which increases sedimentation and changes water temperature, which can harm spawning fish.

II. STATEMENT OF THE CASE

In July 2011, WDFW began a three-and-one-half year rulemaking process to amend the Hydraulic Code rules. The prior significant HPA rulemaking was in 1994. Administrative Record (AR) 1, 345. WDFW identified five reasons for modifying the rules: (1) incorporating current fisheries science, technology advancements, and best management practices; (2) making the rules consistent with statutory changes enacted since 1994; (3) simplifying the permitting process for certain types of

projects; (4) updating administrative procedures for submitting and processing HPA applications; and (5) establishing a baseline for adaptive management. AR 345. The rulemaking was not intended to change the scope of permitting authority, and WDFW's authority was discussed extensively in the Concise Explanatory Statement, Environmental Impact Statement, and comments.[1]

Because the rulemaking incorporated current science and technology, WDFW staff reviewed over 1,900 peer-reviewed scientific journal articles, books, symposia literature, theses/dissertations, and technical reports. AR 345, 563. This science was used to develop the rules' technical provisions, which identify the measures known to protect fish life by project type. WAC 220-660-020, -090. For example, a project to construct a bridge over a fish-bearing river will have staging areas; sediment, erosion, and pollution containment; isolation or removal of fish from the construction work area; and design limits so that fish can move freely after the project is completed. WAC 220-660-120, 220-660-190. Some of the elements of the rules apply within the water, and some apply

[1] AR 358, 375-77, 381-82, 384-85, 387-88, 393-94, 401, 407, 411, 418-19, 423-24, 426, 460, 534-36, 548-49, 590, 594, 625-26, 653, 656, 677-78, 705, 707-09, 712, 741, 745-46, 748-49, 757, 765, 770, 774, 781-82, 786-87, 789, 822, 828-29, 832, 841, 880-81, 899, 958, and 965-67.

above, but all are designed to protect fish life from changes to the bed or flow of state waters during and after completion of the project.

As part of the rulemaking process, WDFW invited 18 representatives from the regulated community, non-governmental organizations, tribes, and state and federal agencies to form a stakeholder advisory group. AR 163, 355. The Washington State Association of Counties (Association of Counties) was a member of this group. AR 1005. The stakeholder advisory group met multiple times at the start of the rulemaking, between October and December of 2011. AR 355. In addition, throughout the rulemaking, WDFW continually posted pertinent documents on its website for public review. *Id.* WDFW also held seven public meetings, and submitted the proposed rules to a forest practices policy committee, made up of a wide variety of stakeholders. AR 355-56. WDFW also met separately with the Association of Counties, and other stakeholders, after the CR 101 was filed to discuss the rule update. AR 355.

In addition to the public process requirements for APA rulemaking, WDFW also received public comment and feedback through its State Environmental Policy Act (SEPA, RCW 43.21C) review. AR 356-57. The SEPA process began in 2012, and WDFW issued a draft Programmatic Environmental Impact Statement in October 2013. AR 356. The Association of Counties commented on various issues, including the scope

of WDFW's authority on HPA permits. *See, e.g.,* AR 702, 965, 967, 975, 991-92. In September and October of 2014, the Department reviewed, summarized, and prepared responses to all of the public comments and finalized the Programmatic Environmental Impact Statement. AR 357. The EIS analyzed the environmental impacts of the rules, as well as alternatives to the proposed rules. AR 531. It did not identify site-specific impacts because individual projects receive additional SEPA review. *Id.*

WDFW also prepared a cost-benefit analysis, which included a detailed review of eight county-owned bridges. AR 505-18. The analysis concluded that seven of the eight county bridges would have complied with the requirements in WAC 220-660-190, and that the rule is consistent with the requirements for bridges in the Army Corps of Engineers' regulations. AR 474, 496.

The Washington Fish and Wildlife Commission (Commission) held a public hearing in August 2014. AR 356. The Commission adopted the HPA rules in December 2014 (AR 357) and they became effective July 1, 2015. AR 173. The rulemaking culminated in a recodification of the entire chapter. AR 2. The prior rules were in WAC 220-110, and the challenged rules are in WAC 220-660.

The Counties initiated superior court litigation in late 2016, Clerk's Papers (CP) at 6-19, and filed an amended petition for review in June 2017.

CP 20-32. The Counties asked the court to invalidate certain provisions of the rules and declare that WDFW was without authority to implement or enforce those same provisions. CP 31 (Relief, ¶¶1, 2). The Counties also asked for a declaration that HPA authority was limited to the ordinary high water line and did not extend to any construction projects above the ordinary high water line. *Id.* (Relief, ¶3). The Counties also requested an injunction prohibiting WDFW from enforcing the rules. *Id.* (Relief, ¶5). Pursuant to RCW 34.05.566(4), the parties agreed to a shortened, stipulated record. CP 36-38.

In August 2017, the Thurston County Superior Court issued an order affirming the HPA rules and dismissing the Counties' case. CP 146-148. In September 2017, the Counties sought direct review by this Court. CP 149-155.

III. ARGUMENT

A. Rules are Presumed to be Valid, and Do Not Exceed Statutory Authority When They are Consistent with the Enacting Statute

Under the Administrative Procedures Act, RCW 34.05 (APA), a court can declare a rule invalid if it finds that the rule exceeds the statutory authority of the agency. RCW 34.05.570(2)(c); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). The challenger has the burden to demonstrate invalidity. *Id.*; RCW 34.05.570(1)(a).

In a rulemaking review, this Court sits in the same position as the superior court, and applies the standard of review directly to the agency's record. *Gerow v. Wash. State Gambling Comm'n,* 181 Wn. App. 229, 237 ¶16, 324 P.3d 800 (2014) (citation omitted). To determine whether WDFW's rules were within its statutory authority, this Court interprets the governing statutes in RCW 77.55. *D.W. Close, Inc. v. Dep't of Labor & Indus.,* 143 Wn. App. 118, 125-26 ¶9, 177 P.3d 143 (2008) (citations omitted). "An agency's interpretation of a statute ... is an issue of law subject to de novo review." *Id.* at 126 (citation omitted).

The reviewing court "accord[s] substantial weight to the agency interpretation." *Id.* (citation omitted). This Court's primary purpose should be "to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Statutory provisions "must be read in their entirety and construed together, not by piecemeal." *Id.* at 11.

A duly enacted rule is presumed to be valid, and rules are upheld when they are reasonably consistent with the statute they implement. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). The reviewing court cannot consider the wisdom or desirability of

a rule. *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990).

B. The Plain Language of RCW 77.55 Demonstrates That WDFW's Rules Are Within Its Statutory Authority

The plain language of three statutes delineate the scope of HPA permitting authority: RCW 77.55.011, 77.55.021, and 77.55.231. The Legislature and the Court of Appeals strictly limited WDFW's authority to deny or condition HPA permits, and it may only do so to protect fish life.[2] RCW 77.55.021(7)(a); WAC 220-660-050(14)(a); *Beatty v. Wash. Fish and Wildlife Comm.,* 185 Wn. App. 426, 445, 341 P.3d 291 (2015) (challenge to mineral prospecting HPA permit).

RCW 77.55.011 defines the relevant terms. A "hydraulic project" is defined as "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). The waters of the state are defined as salt and fresh water waterward of the ordinary high water line. RCW 77.55.011(25). The "ordinary high water line" is defined as the shoreline mark that distinguishes the abutting upland. RCW 77.55.011(16). The construction permit issued is referred to as a Hydraulic Project Approval (HPA permit), and the rules distinguish the three types of HPA permits:

[2] "Fish life" means all species of fish and shellfish, including all stages of development of those species. WAC 220-660-030(55).

written, oral (in the case of emergencies), or pamphlet.[3] RCW 77.55.011(18); WAC 220-660-030(77).

RCW 77.55.021 contains the basic permitting requirements, providing that before starting a hydraulic project the proponent must secure a permit from WDFW. RCW 77.55.021(1). HPA approvals may not be unreasonably withheld or conditioned. RCW 77.55.021(7)(a).

RCW 77.55.231 further limits the conditions on an HPA permit to those that provide "proper protection of fish life." WDFW's conditions to protect fish must be "reasonably related to the project." RCW 77.55.231(1); WAC 220-660-050(14)(a); *Beatty,* 185 Wn. App. at 445.

1. The Plain Language of the Statutes Does Not Limit WDFW's Jurisdiction to the Ordinary High Water Line

Reference to the ordinary high water line is found seven times in RCW 77.55, and none of those references use the term to limit the scope of WDFW's HPA authority.

Definitions: Ordinary high water line is referenced in the definitions of "bed," "ordinary high water line," and "waters of the state." RCW 77.55.011(1), (16), and (25). The three definitions are descriptions of those terms. "Bed" is described as the land below the ordinary high water line of state waters. RCW 77.55.011(1). "Ordinary high water line" is

[3] WDFW issues pamphlets for removal of aquatic noxious weeds and small-scale mineral prospecting. RCW 77.55.081, .091; *see also* WAC 220-660-050(8).

determined by examining the banks of a waterbody to locate marks created by "common and usual"[4] water action and locating the boundary between upland and aquatic vegetation. RCW 77.55.011(16). Waters of the state are all salt and freshwater areas waterward of the ordinary high water line within the territorial boundaries of the state. RCW 77.55.011(25). These definitions do not delineate the jurisdictional boundary for the hydraulic code, but assist the regulated community in identifying the circumstances in which an HPA application is required.

HPA Application: A complete HPA application includes (1) general plans for the overall project; (2) complete plans and specifications of the proposed construction or work within the ordinary high water line; (3) complete plans and specifications for the proper protection of fish life; (4) notice of compliance with SEPA; and (5) payment of applicable application fees. RCW 77.55.021(2). This information is logical for a permit whose purpose is to regulate construction of a project to ensure projects that affect the bed or flow of state waters are properly conditioned to meet best management practices. The statute requires more detailed information (complete plans and specifications) for the portions of the

[4] The ordinary high water line may change over time. Although unusual, sea level rise or an upstream or downstream blockage in freshwater could change the "common and usual" location. *See* RCW 77.55.011(16); WAC 220-660-370(3)(a). The statutory definition also includes an alternative description for both salt and freshwater, if the line is not discernable.

hydraulic project taking place within the water. RCW 77.55.021(2)(b). The applicant must also include general plans for the *entire* project; those plans would be superfluous if WDFW's jurisdiction was limited to construction projects entirely below the ordinary high water line. *See* RCW 77.55.021(2)(a).

Bulkheads: Normally, marine bulkheads cannot be located more than six feet waterward of the ordinary high water line. RCW 77.55.141(2)(a); AR 625. The bulkhead statute limits where that particular type of project can be located, and does not describe the general scope of HPA permitting authority.

Stormwater: The stormwater statute is similarly an express limitation of HPA authority for that specific type of construction project. WDFW may not require changes to the project above the ordinary high water line, but can condition the construction of the outfall device or the direct impacts of the water discharge. RCW 77.55.161(2), (3); AR 559, 625-26. This limitation on this type of project would be unnecessary if WDFW had no general authority above the ordinary high water line. The Legislature's restriction of HPA jurisdiction on stormwater projects to the ordinary high water line means that HPA authority extends beyond that line for other types of projects.

HPA Application Fee: When the rules were developed and adopted, the Legislature required an application fee of $150 for projects at or below the ordinary high water line, and also exempted certain types of projects from the fee. RCW 77.55.321. During the course of this litigation, the fee requirement expired. RCW 77.55.321(1). The existence of an application fee does not create a jurisdictional boundary. The language that limits the fee to projects "at or below" the ordinary high water line would be superfluous if WDFW had no authority over projects above the ordinary high water line. *In re Dependency of K.D.S.,* 176 Wn.2d 644, 656 ¶21, 294 P.3d 695 (2013) ("It is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any sections or words of the statute.") (citation omitted).

Contrary to the Counties' assertion, the authorizing statutes do not limit WDFW's authority to the ordinary high water line. The primary statute relied on by the Counties, RCW 77.55.011(11), defines a "hydraulic project" that requires a permit. The definition does not explicitly restrict WDFW's authority to projects occurring below the ordinary high water line. This Court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Davis v. Cox,* 183 Wn.2d 269, 282, 351 P.3d 862 (2015). That is because this Court's task is

to "discern[] what the law is, not what it should be." *Frias v. Asset Foreclosure Servs., Inc.,* 181 Wn.2d 412, 421, 334 P.3d 529 (2014).

The Counties failed to identify a single statutory provision that clearly limits HPA authority to the ordinary high water line. "It is not this court's job to remove words from statutes or to create judicial fixes, even if we think the legislature would approve. Statutes that frustrate the purpose of others, though perhaps unintentionally, are purely a legislative problem." *State v. Reis,* 183 Wn.2d 197, 215, 351 P.3d 127 (2015). The plain language of the statutes should control.

The Legislature could have easily included a clear boundary on WDFW's jurisdictional authority, as it has in the Shoreline Management Act (SMA), chapter 90.58 RCW. The SMA limits upland regulatory jurisdiction to 200 feet landward of the ordinary high water line. RCW 90.58.030(2)(d); 90.58.150; AR 539. There is no similar language in the Hydraulic Code. "Where the Legislature uses certain language in one instance, but different, dissimilar language in another statute, a difference in legislative intent is presumed." *In re Bratz,* 101 Wn. App. 662, 675, 5 P.3d 759 (2000) (citation omitted).

RCW 77.55 requires an HPA permit for hydraulic projects, which are "construction or performance of work that will <u>use, divert, obstruct, or change</u> the natural flow or bed of any of the salt or freshwaters of the state."

RCW 77.55.011(11) (emphasis added). Although the Counties argue that the principle of *ejusdem generis* should apply to the word "change," Opening Brief at 9-10, doing so would conflict with the principle of statutory interpretation that no word should be construed as superfluous. *Ralph v. Dep't of Nat. Res.,* 182 Wn.2d 242, 248, 343 P.3d 342 (2014) ("We must interpret a statute as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant.").

This Court's inquiry can and should end with the plain language of the statute. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (if the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end). The plain language of the statutes does not limit WDFW's jurisdiction to construction projects located entirely below the ordinary high water line.

2. The Statutory Context Demonstrates That HPA Authority Is Not Limited to the Ordinary High Water Line

"The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *Burns v. City of Seattle,* 161 Wn.2d 129, 146, 164 P.3d 475 (2007). The context of the hydraulic code

demonstrates that HPA authority is not limited to the ordinary high water line. *See Lake*, 169 Wn.2d at 526 (court considers the context of the statute, related provisions, and the statutory scheme as a whole).

Numerous statutory provisions regarding HPA permits refer to activities located above the ordinary high water line, which would be superfluous and irrelevant if WDFW lacked jurisdiction above the line. For example:

- "Streambank stabilization" requires an HPA permit. RCW 77.55.021(9)-(11). This term is defined to include bank re-sloping, planting of woody vegetation, and placement of jetties, all of which is work above the ordinary high water line. RCW 77.55.011(23).
- Regular maintenance activities for marinas or marine terminals require an HPA permit. RCW 77.55.151. These activities include boat ramp maintenance, repair of existing *overwater* structures, shoreline armoring or bank protection, maintenance of wetland or riparian habitat,[5] and repairs of existing outfalls. *Overwater* structures, by their very nature, cannot be below the water line. The delineated activities in

[5] Wetland or riparian habitat is an area landward of the ordinary high water line. *See* WAC 220-660-030(127) (definition of riparian zone is land adjacent to water bodies which are "transition areas between aquatic and upland habitats often with elements of both ecosystems"), (156) (wetland definition refers to RCW 90.58.030); RCW 90.58.030(2)(h) (shoreline management act defines wetland as inundated areas supporting vegetation adapted to saturated soils).

RCW 77.55.151 include work above the ordinary high water line. If this Court adopts the Counties' reasoning, WDFW would lack the authority to require grating on a dock that shades fish habitat because the dock is built above the water line. *See* WAC 220-660-140(2), 220-660-380(2). This is precisely the type of strained or absurd result that decades of jurisprudence seeks to avoid. *E.g., State v. Hall,* 168 Wn.2d 726, 737, 230 P.3d 1048 (2010).

- RCW 77.55.221 authorizes maintenance agreements with counties for bank stabilization, bridge repair, and other flood damage work without obtaining permits for specific projects. This statute would be meaningless if WDFW did not have jurisdiction over bank stabilization and bridge repair, both of which take place above the ordinary high water line.

The Counties argue that the above provisions are exceptions to an unidentified statutory rule that limits HPA authority to the ordinary high water line. Opening Brief at 25. As explained above, there is no such statutory limit. The Counties rely on a circular argument based not on the statutory language, but on their erroneous assumption that hydraulic projects must involve activities at or below the ordinary high water line.

The Counties also argue that these statutes would be unnecessary if HPA permits were already required for work above the ordinary high water

line. *Id.* Not so. The fact that the Legislature adopted certain provisions relating to the permitting of specific types of projects says absolutely nothing about whether those projects were already covered by the general permitting requirement. Using the Counties' logic, projects such as marinas and marine terminals (RCW 77.55.151), watershed restoration (RCW 77.55.171), and fish habitat enhancement (RCW 77.55.181) would not fall under the definition of "hydraulic project." This Court should reject this illogical argument.

The Legislature was aware of its ability to exclude certain projects when it identified four categories of projects that are not required to obtain an HPA permit. Driving across a ford, spartina control, removal of derelict fishing gear, and forest practices do not require an HPA permit (citing RCW 77.55.031, .051, .041, and .361); *see also* WAC 220-660-040(2). As with the challenged rules, portions of these activities occur above the water line, and portions are below.

In summary, a permit from WDFW is required for *all* hydraulic projects. The Legislature chose to define "hydraulic project" by *effect* (work that will use, divert, obstruct, or change waters) and not *location*, in contrast to its approach in the Shoreline Management Act. The Legislature did not limit the jurisdiction of the hydraulic code to projects below the

ordinary high water line, and the Counties' circular arguments cannot change this fact.

3. WDFW Regulates Both Direct and Indirect Impacts to State Waters in Order to Protect Fish Life

To understand WDFW's authority, this Court must refer to multiple statutes and definitions in the hydraulic code. The statutory scheme, when reviewed in its entirety, authorizes WDFW to regulate both direct and indirect impacts to state waters in order to meet its legislative mandate to protect fish life.

The Legislature limited hydraulic projects to work that will affect the natural flow or bed of state waters. RCW 77.55.011(11). It did not limit hydraulic projects to work that is within the water. *See id.* "Where the legislature omits language from a statute, whether intentionally or inadvertently, this court will not read into the statute the language it believes was omitted." *State v. Cooper,* 156 Wn.2d 475, 480, 128 P.3d 1234 (2006); *State v. Chester,* 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) ("The court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately.").

The Counties focus on the word "will" in the statutory definition of "hydraulic project," RCW 77.55.011(11), and argue that the Department cannot issue an HPA permit unless there is an absolute certainty that a

project will affect the bed or flow of state waters. Opening Brief at 1, 9, 11-14, 19. The Counties equate this certainty with location, claiming that effects on flow or bed are only inevitable for activities below the ordinary high water line. *Id.* at 9.

The Counties disregard the practical realities in their narrow focus on the word "will." For work to have an effect on the bed of a waterbody does not mean the work must be within the water. *See* AR 705. As described above, there are many types of projects – many of which are explicitly recognized in the statutes – that have components above the water but that affect the bed or flow of the water below. The most obvious example is an overwater structure, such as a residential dock or ferry terminal. It is constructed above the water, not under the water, but its construction and operation will affect the bed of the state waters beneath it.

As a creature of statute, WDFW has the powers expressly granted by the Legislature, as well as powers implied from its statutory delegation of authority. *Tuerk v. State Dep't of Licensing,* 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (citation omitted).

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> Agencies have implied authority to carry out their legislatively mandated purposes. When a power is granted to an agency, "everything lawful and necessary to the effectual execution of the power" is also granted by implication of law. Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. Agencies also have implied authority to determine specific factors necessary to meet a legislatively mandated general standard.

Id. at 125 (citations omitted). WDFW's mandate in the hydraulic code is to protect fish life by requiring an HPA permit for construction projects that affect the bed or flow of state waters. Regulating indirect impacts to state waters is within the agency's implied authority to accomplish its purpose because rules may fill gaps in an existing statute. *Washington Pub. Ports Ass'n,* 148 Wn.2d at 646; *Armstrong v. State of Washington,* 91 Wn. App. 530, 541, 958 P.2d 1010 (1998); *Pierce County v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008).

This Court should also reject the Counties' argument that since there are other laws that might incidentally protect fish, HPA permits should be limited to work below the ordinary high water line. Opening Brief at 24, 31, Appendix A. The Counties cite to no authority or principle of law that suggests the Legislature may not enact numerous or even overlapping authorities to ensure the protection of fish. The Legislature is presumed to be aware of the other laws it has enacted and nowhere has the Legislature

directed that HPA permits are only required if no other law applies. *State v. Conte,* 159 Wn.2d 797, 808, 154 P.3d 194 (2007). The Programmatic Environmental Impact Statement describes the role of HPA authority in the context of the other laws, and explains how the HPA permit fills a regulatory gap that no other law can fill. AR 548-49. The Cost-Benefit Analysis also examines the HPA laws in the context of the baseline created by other environmental laws. AR 469-85.

Attempting to draw artificial boundaries around HPA authority, the Counties also claim that WDFW cannot use HPA permits to address impacts to fish from water quality, temperature, sound, or light. Opening Brief at 28-31. This reasoning would apply regardless of whether the construction project is above or below the ordinary high water line, and does not create a jurisdictional limit based on the location of the water line. Once a hydraulic project triggers WDFW's authority, then protection of fish life is the standard applied to review of the project's impacts,[6] and WDFW may use any reasonable means to accomplish this goal, as long as the conditions are proportional to the impacts of the project. RCW 77.55.231. All of the impacts the Counties identify must be addressed to protect fish life, regardless of the project's location. Poor water quality and high

[6] RCW 77.55.021(7)(a).

temperatures can kill fish, pressure waves from underwater sounds can also kill, and the lack of light can hinder the growth of aquatic plants needed by fish and increase predation. AR 352-53, 627-33.

The Counties' overly literal interpretation is inconsistent with the hydraulic code in its entirety. The impacts that WDFW is attempting to avoid or mitigate in the HPA rules either will occur or are reasonably certain to occur. WDFW's rules do not arbitrarily reach above the ordinary high water line to control activities that will have only theoretical or highly speculative consequences.[7] Removing vegetation from a riverbank *will* change the flow and bed of the watercourse through flooding and erosion. AR 347, 349, 628, 663-67. Placing a concrete bulkhead at the water's edge *will* affect the flow or bed of the adjacent lake or marine waterbody. *See* AR at 626-632, 657; CP 121 (AGO 2016 No. 6). Yet under the Counties' interpretation, WDFW would be powerless to regulate these activities.

The Counties' interpretation is not consistent with the context or the goals of the legislation and would seriously limit WDFW's ability to protect fish life for projects both above and below the ordinary high water line. This Court should reject such absurd results.

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[7] If it were to do so, the permittee, or any third party, could appeal this overreach. RCW 43.21B.110(1)(*l*); RCW 77.55.021(8); WAC 220-660-460, -470.

4. The Counties' Reliance on Hypotheticals Does Not Equate to Jurisdictional Limits in the Statutes

The Counties presume that WDFW's HPA authority ends at the ordinary high water line. Opening Brief at 1, 9, 34. The Counties then interpret the statutes in RCW 77.55 according to this mistaken assumption.

The Counties argue that compliance with the application elements listed in RCW 77.55.021(2), including plans for work below the ordinary high water line, would be impossible if the project was entirely above the ordinary high water line and cite this straw man as evidence that WDFW has no jurisdiction above the ordinary high water line. Opening Brief at 1, 20-23. This argument fails.

Very few hydraulic projects take place entirely above the ordinary high water line[8] and even in those rare cases, the statutory language has to be interpreted reasonably to avoid absurd or strained outcomes. *See Thurston Cty. v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004) (court should adopt the interpretation which best advances the legislative purpose and avoids unlikely, absurd, or strained consequences).

The Counties' interpretation ignores the ordinary meaning of the language at issue. *See Lake*, 169 Wn.2d at 526 (when discerning a statute's

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[8] *See* AR 493 (breakdown of HPA permits by type of project).

plain meaning, the court considers the ordinary meaning of the language at issue). To be complete, an application must include complete plans for the work within the ordinary high water line. RCW 77.55.021(2)(b); WAC 220-660-050(9)(c)(iii)(C). For the extremely unusual project that is entirely above the water line, but affects the bed or flow of water, a complete application will not include any plans for work within the water line.

The word "must" in the statute's description of a complete application is an example of a specific statute superseding a general statute. *See Kustura v. Dep't of Labor & Indus.,* 169 Wn.2d 81, 88, 233 P.3d 853 (2010). The definition statute (RCW 77.55.011) generally describes hydraulic projects, while the permit statute (RCW 77.55.021) describes the application process. If they cannot be harmonized, the specific statute should prevail. *Hallauer v. Spectrum Properties, Inc.,* 143 Wn.2d 126, 146, 18 P.3d 540 (2001).

Similarly, the Counties' overly literal interpretation of the definition of hydraulic project creates an impossible regulatory standard and leads to absurd results. The Counties argue that the "potential" for a project to affect water is insufficient for regulatory authority. To support this cramped interpretation, the Counties identify two rules which use the word "potential": (1) WAC 220-660-190, which states that an HPA permit is required for bridge maintenance projects when parts might fall into the

water; and (2) WAC 220-660-330(3)(i), which states that WDFW must consider the characteristics of habitat potentially affected by the project when it specifies authorized work times. Opening Brief at 13-15.

The Counties' concern, that the 2014 rules expand WDFW's jurisdiction, is not supported by the plain language of the rules. WAC 220-660-190 is the recodification of former WAC 220-110-070. AR 575. The prior rule stated:

> An HPA is required for construction or structural work associated with any bridge structure waterward of or across the ordinary high water line of state waters. An HPA is also required for bridge painting and other maintenance where there is potential for wastage of paint, sandblasting material, sediments, or bridge parts into the water, or where the work, including equipment operation, occurs waterward of the ordinary high water line. Exemptions/5-year permits will be considered if an applicant submits a plan to adhere to practices that meet or exceed the provisions otherwise required by the department.

WAC 220-110-070 (originally adopted in 1983, amended in 1994) (emphasis added). Despite using the word "potential," in the 30 years of the rule's existence, it was never subject to a rule challenge or to a decision from the Pollution Control Hearings Board, or its predecessor, the Hydraulics Appeals Board.[9] ER 201.

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[9] In 2014, Yakima County appealed the denial of an HPA permit for work on Sisk Road Bridge, but the appeal was dismissed following settlement. PCHB No. 14-132. The issues raised in the petition were whether the project was maintenance or new construction under WAC 220-110-030(14) and whether the technical provisions in WAC 220-110-070(1)(a)-(g) were applicable to maintenance projects.

The challenged rule states:

> 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. An HPA 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. An HPA is not required for utility crossings attached to bridge structures.

WAC 220-660-190 (emphasis added).

For projects involving water crossing structures (bridges, culverts, fords, and conduits), it is self-explanatory that if, during the course of the construction project over the water, materials fall into the water, the materials can affect the bed or flow. WAC 220-660-190. Under the plain language of both the prior and challenged rule, if those activities are conducted in a way that materials do not have the potential to fall into the water, WDFW does not regulate them.[10]

HPA permits must be obtained *before the start* of work or construction. RCW 77.55.021(1). The purpose of the hydraulic code is to impose best management practices (via the rule's technical provisions) to

[10] Therefore, if this Court invalidates the challenged rules, as the Counties request, bridge projects with the potential to affect the state waters below will still be required to obtain an HPA permit under the prior rules. Chelan County's HPA permits, attached to its Statement of Prejudice, were issued under the prior rules, on January 6, 2015 (CP 47) and October 10, 2014. CP 53 (citing WAC 220-110). The challenged rules did not take effect until July 1, 2015. AR 173.

avoid or minimize the potential impacts. The Legislature did not write the hydraulic code as a strict enforcement law, but prospectively requires an application from any person or government agency who will construct or perform work that will affect the bed or flow of state waters. *See* RCW 77.55.291 (limited civil enforcement authority), 77.15.300 (criminal authority). This decision, to require an application prior to construction, rather than requiring WDFW to monitor and enforce construction work, was entirely within the Legislature's prerogative.

In addition, the Counties' interpretation would lead to absurd results. Under the Counties' theory, sandblasting a bridge would not require a HPA permit despite the obvious risk that paint and other materials would fall into the water. If, halfway through the project, sandblasted material or even a large bridge part fell into the water, would the contractor then be required to obtain a permit because it can now say with certainty that the project will affect the flow or bed of state waters? Such a result would be contrary to the statutory scheme, and it is absurd to think the Legislature would have intended it.

The Counties' focus on WAC 220-660-330(3)(i) is equally misplaced, as this rule identifies authorized work times for saltwater areas with sensitive fish life. The rule does not establish whether a particular project requires an HPA permit, but instead authorizes WDFW to consider

potentially affected habitat when determining whether a saltwater work time is required. A project below the ordinary high water line in salt water, and in juvenile salmon, surf smelt, or herring habitat, requires a work window to reduce the risk of impacts to fish life at sensitive life stages. WAC 220-660-330(1). The condition only applies to work waterward of the ordinary high water line. WAC 220-660-330(3). Although one subsection of the rule does use the word "potential," all the rule does is require WDFW to consider the "characteristics of habitats potentially affected by the project." WAC 220-660-330(3)(i). The use of the word "potential" did not expand WDFW's jurisdictional authority.

The Counties' final hypothetical example is an allegation that WDFW will regulate beyond its jurisdiction, including upland impermeable surfaces (i.e., parking lots), climate change, and stormwater projects. Opening Brief at 15-16. The Counties ignore relevant limits in the statutes in their attempt to create a parade of horribles, as well as WDFW's acknowledgment of these limits. *See, e.g.* AR 375, 625-26. These statutory provisions must be read in their entirety and not piecemeal. *Gwinn*, 146 Wn.2d at 11. The plain language of the HPA statutes in RCW 77.55 do not include regulation of climate change or parking lots. The Counties' claim that WDFW's regulatory interpretation will allow the conditioning of

stormwater projects is prevented by RCW 77.55.161. *See also* WAC 220-660-260(3), 220-660-430(3).

WDFW's rules were within its statutory authority, and the Superior Court's order should be upheld. CP 147.

C. Even if the Statutes Are Ambiguous, WDFW's Interpretation Requires Deference

Should this Court conclude that the statutes are ambiguous, it may give WDFW's interpretation of its statutes "great weight, provided it does not conflict with the statute." *Port of Seattle v. Pollution Control Hearings Board,* 151 Wn.2d 568, 587, 90 P.3d 659 (2004) (citation omitted). A statute is ambiguous if it can have "more than one reasonable meaning." *Gwinn,* 146 Wn.2d at 12. If this Court decides that the statutes have more than one reasonable meaning, then aids to statutory construction can be used. *Id.* "Where there are two reasonable interpretations of statutory language, the interpretation which better advances the overall legislative purpose should be adopted." *Weyerhaeuser Co. v. Dep't of Ecology,* 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

This Court should defer to WDFW's expertise that some projects above the ordinary high water line can affect the bed or flow of state waters. AR 705. WDFW's technical expertise regarding impacts, an Attorney General Opinion, case law, and the Legislature's acquiescence all support

deference to WDFW's long-standing interpretation of its statutory authority.

1. Upland Activities Can Affect the Bed or Flow of State Waters

While this Court does not defer to an agency's interpretation when the rule is unambiguous, or when it relates to the scope of its own authority, it does defer on factual matters, particularly those that are complex, technical, and close to the heart of the agency's expertise. *Ass'n of Washington Spirits v. Liquor Control Board,* 182 Wn.2d 342, 355, 340 P.3d 849 (2015) (no deference for unambiguous statute); *Impoundment of Chevrolet Truck,* 148 Wn.2d 145, 157, 60 P.3d 53 (2002) (no deference to agency's scope of its own authority); *Cornelius v. Dep't of Ecology,* 182 Wn.2d 574, 585, 344 P.3d 199 (2015).

The purpose of the HPA statutes is to protect fish life. RCW 77.55.021(1); *Beatty,* 185 Wn. App. at 457 ¶86. The Programmatic Environmental Impact Statement (PEIS) and the Concise Explanatory Statement explain when WDFW may regulate upland projects to protect fish. AR 376, 535. Although Counties allege the PEIS shows WDFW's intent to exceed its statutory authority, that overstates the intent of the document and misstates its analysis. AR 625.

An environmental impact statement analyzes the probable, significant, adverse, environmental impact of the proposed project (here, the revised rules). RCW 43.21C.031, WAC 197-11-400. It is not a description of the rules' technical provisions, but an analysis of the likely environmental impacts of the rules. AR 625. The Counties' reliance on the PEIS to prove that WDFW changed the intent of the statutes is misplaced.

What the PEIS shows is that construction activities near state waters can adversely affect the bed or flow of waters that fish depend on. These impacts include disturbance of banks or shorelines, riparian vegetation modifications, alteration of stream morphology, sediment delivery into the water, and alteration of the aquatic light regime. AR 609-14, 625-59. These impacts trigger WDFW's obligation to require an HPA permit for construction projects that will affect the bed or flow of state waters.

Due to the broad variety of hydraulic projects regulated by WDFW, which can range from construction of a hydroelectric dam to maintenance of a residential dock, there are numerous ways that fish can be impacted by a hydraulic project's effect on the bed or flow of state waters. For example, piers, floats, and ramps shade fish habitat, which reduces the survival of the aquatic plants beneath on the bed, although the structure is located above the water. WAC 220-660-380(2), AR 347, 379, 627, 632. Disturbance of banks or shorelines can cause direct impacts to both bed and flow, altering

the natural processes that form fish habitat. WAC 220-660-130 (freshwater), -370 (saltwater); AR 348, 628. Sedimentation added to the flow of water bodies can smother juvenile fish and eggs and expose them to toxic chemicals. AR 350, 353, 628-30, 633; *see* WAC 220-660-100(2).

If the Counties' interpretation prevails, WDFW will not be able to protect fish life from any of the above effects if they originate above the ordinary high water line, even when there is a clear impact to the bed or flow of state waters. This is not what the Legislature intended when it directed WDFW to "ensure the proper protection of fish life." RCW 77.55.231(1).

2. A 2016 Attorney General Opinion Supports WDFW's Interpretation

A formal Attorney General Opinion (AGO) is a powerful aid to construction of a statute. Although not controlling, attorney general opinions are entitled to great weight. *Thurston Cty.*, 151 Wn.2d at 177; *Citizens All. for Prop. Rights Legal Fund v. San Juan County,* 184 Wn.2d 428, 440, 359 P.3d 753 (2015).

The Director of WDFW asked the Washington Attorney General for an opinion on the following question: "Does RCW 77.55 limit the regulatory authority of the Washington Department of Fish and Wildlife (WDFW) under the Hydraulic Project Approval (HPA) process to activities

at or below the ordinary high water line?" CP 121 (Op. Att'y Gen. 6 (2016), at 1). In 2016, the Attorney General's Office issued a formal opinion which concluded that "RCW 77.55's plain language does not limit WDFW's HPA authority solely to activities at or below the ordinary high water line. Because the statute is unambiguous, other means of statutory construction are unnecessary." CP 125 (Op. Att'y Gen. 6, at 6).

The AGO first considered the interpretation of WDFW, as the agency charged with implementing the statutes. CP 126. The AGO noted that for decades, WDFW "construed its authority over hydraulic projects as extending to work above the ordinary high water line." *Id.* The AGO also reviewed the pertinent legislative history and concluded that the "legislative history of RCW 77.55 shows consistency of language throughout the 73 years since its first enactment. The legislature did not alter or modify the language at any point in a manner that would signal an intention different from the plain meaning of the current version." CP 125-28 (Op. Att'y Gen. 6, at 6-8). The AGO concluded that "under plain meaning analysis or other means of statutory construction, RCW 77.55 does not limit WDFW's authority to activities at or below the ordinary high water line." CP 128 (Op. Att'y Gen. 6, at 8).

3. The *Northwest Steelhead* Case and the Legislature's Acquiescence to the Decision Support WDFW's Interpretation

Washington appellate cases can aid in statutory interpretation. The only Washington decision pertaining to this question of HPA authority is *NW Steelhead and Salmon Council of Trout Unlimited v. Dept. of Fisheries,* 78 Wn. App. 778, 896 P.2d 1292 (1995). In that case, WDFW issued an HPA permit for a bridge, but deferred to the City of Seattle to regulate a proposed home construction project on an adjacent wetland. An issue in the case was whether WDFW "erred as a matter of law in deferring . . . to the City . . . ." *Id.* at 786. In ruling on this issue, the court stated WDFW "has jurisdiction over wetlands adjacent to state waters that affect the natural flow of such waters." *Id.* at 787.

The court concluded that WDFW did not err in refusing to exercise its concurrent jurisdiction. *Id.* at 788. There would be no concurrent jurisdiction unless both WDFW and the City had authority over the adjacent wetland. Therefore, the Washington Court of Appeals recognized that WDFW has HPA authority over wetlands adjacent to state waters, which are, by definition, above the ordinary high water line. WAC 220-660-030(156) (definition of wetland cites RCW 90.58.030). This decision is the only appellate authority that considers the scope of WDFW's jurisdiction above the ordinary high water line, and may be considered by this Court as

persuasive authority. *See Protect the Peninsula's Future v. City of Port Angeles,* 175 Wn. App. 201, 215 ¶33, 304 P.3d 914 (2013) ("Dicta is not binding authority.") (citation omitted).

In the ensuing 22 years since the *Northwest Steelhead* decision, despite 35 amendments to the statutes, the Legislature has not modified WDFW's statutory authority relative to the ordinary high water line. AR 555-62. Courts presume "that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *City of Federal Way v. Koenig,* 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (legislature declined to amend statute in the 23 years since the court decision); *see also Buchanan v. Int'l Brotherhood of Teamsters,* 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (after judiciary construed statute, Legislature acquiesced by meeting for 22 sessions without revisiting statute). This Court should acknowledge the Legislature's acquiescence in the Court of Appeal's recognition that WDFW has authority to regulate adjacent wetlands in its HPA permits.

D. Although the Counties Waived Their Constitutional Challenge, the Rule is Not Void for Vagueness Because Certainty is Not Required in a Rule

The Counties' Statement of Grounds for Direct Review states that they do not assert their unconstitutionally void for vagueness challenge.

Statement at 1, fn 2. Despite this assertion, the Counties argue vagueness in their Opening Brief at 16-18, but omit reference to the challenged rule in their discussion of the doctrine. This Court should not address an issue that the Counties stated they were declining to pursue.

To successfully challenge the rules as unconstitutionally vague, the Counties must prove that the rules are unconstitutional beyond a reasonable doubt. *Longview Fibre Co. v. Dep't of Ecology,* 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998) (citation omitted). Because the Counties are bringing a facial challenge, they must prove there is no set of circumstances under which the rules would be constitutional. *Reno v. Flores,* 507 U.S. 292, 301, 113 S.Ct. 1439, 123 L. Ed. 2d 1 (1993). The Counties' general allegation, that WDFW's failure to recognize the limit of the ordinary high water line on its permitting authority "presents a vagueness problem," does not meet that burden. Opening Brief at 16.

A rule is only unconstitutionally vague "if persons of common intelligence must necessarily guess at its meaning and disagree as to its application." *Washington Cedar & Supply Co. v. Dep't of Labor & Indus.,* 137 Wn. App. 592, 604 ¶27, 154 P.3d 287 (2007) (citation omitted); *see also Longview Fibre,* 89 Wn. App. at 633. A rule is not unconstitutionally vague when there are "some possible areas of disagreement," "merely because one cannot predict exactly when his or her conduct would be

classified as prohibited," "simply because some of its terms are vague or undefined," or "simply because it could have been drafted with greater precision." *See Regan v. Dep't of Licensing,* 130 Wn. App. 39, 51 ¶¶28-30, 121 P.3d 731 (2005) (citations omitted). "The regulation does not ... have to provide complete certainty." *Wash. Cedar,* 137 Wn. App. at 604 ¶27, citing *Inland Foundry Co., Inc. v. Dep't of Labor and Industries,* 106 Wn. App. 333, 339-40, 24 P.3d 424 (2001).

The Counties cite a Washington and Idaho case[11] to support their assertion that a rule is void for vagueness when the agency exercises its discretion to implement the rule. Opening Brief at 16-17. The Counties disregard Washington precedent that upholds the constitutionality of rules, even when they do not predict with complete certainty the prohibited conduct. *Washington Cedar,* 137 Wn. App. at 604; *Keene v. Board of Accountancy,* 77 Wn. App. 849, 854-55, 894 P.2d 582 (1995). "A statute or regulation ... does not have to satisfy impossible standards of specificity." *Longview Fibre Co.,* 89 Wn. App. at 633 (citation omitted).

The plain language of RCW 77.55, as well as the context of the statute, sets clear limits on WDFW's permitting authority. WDFW requires

[11] Persuasive authority from out-of-state courts is only needed when Washington authority is silent on a particular claim. *See Grange Ins. Ass'n v. Roberts,* 179 Wn. App. 739, 764 ¶ 39, 320 P.3d 77 (2013). There is ample Washington precedent interpreting void-for-vagueness constitutional challenges, and thus no need for this Court to consider an Idaho decision.

an HPA application when the proposed construction or work will affect the bed or flow of a state water. While this is often a site-specific determination, based on the project proposed and the water body at the site, WDFW's exercise of discretion is not void for vagueness. There are too many possible combinations of project types with potential effects on state waters for a statute or rule to describe every scenario and eliminate the need for some exercise of agency discretion. A rule is "not void simply because it [did] not list every possible prohibited behavior." *Regan,* 130 Wn. App. at 52 ¶32, citing *Keene,* 77 Wn. App. at 855. Even without an objective standard, "common knowledge and understanding of other [members of the profession to which the rule applies] provided adequate specificity." *Id.*, citing *Keene*, 77 Wn. App. at 856.

A rule may have vague or undefined terms and still be constitutional. *Longview Fibre Co.,* 89 Wn. App. at 633, citing *Keene,* 77 Wn. App. at 855; *see also Regan,* 130 Wn. App. at 50-52 (statute not vague for failing to specify conduct that constituted "sale or issuance of bail bonds"; court does not consider facial challenges to statutes unless they involve First Amendment rights) (citing *Weden v. San Juan County,* 135 Wn.2d 678, 708, 958 P.2d 273 (1998)); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 814, 828 P.2d 549 (1992) ("Simply because the words of a statute are not defined in the statute does not make the statute ambiguous. If that were

true, the majority of statutes would suffer from ambiguity."); *Chester v. Deep Roots Alderwood, LLC,* 193 Wn. App. 147, 152 ¶9, 371 P.3d 113 (2016) (citation omitted) (the principles of statutory interpretation apply equally to rules).

In *Longview Fibre,* the Court of Appeals upheld Ecology's challenged air pollution control rule, despite the fact that the standard was "good air pollution control practice." 89 Wn. App. at 634. The court reasoned that because the pollution sources and control techniques varied widely, Ecology's general standard, followed by the agency's determination for the project, provided adequate notice to the regulated entity. *Id.* at 634-35. WDFW's rules should be held to the same standard applied to Ecology's rules. Construction projects vary widely, and applicants are on notice that if their project will affect the bed or flow of state waters, an HPA application is required. WDFW respectfully requests that this Court uphold the Superior Court's dismissal of Counties' void for vagueness challenge. CP 147.

E. The APA Provides for Limited Relief in a Rule Challenge

The APA limits the relief available in a rule challenge. RCW 34.05.574(1), (2). The court may affirm the agency decision, set the decision aside, or remand to the agency for further consideration. *Id.*; *Rios v. Dep't of Labor & Indus.,* 145 Wn.2d 483, 508, 39 P.3d 961 (2002).

The Counties ask this Court to declare the entire Chapter of WAC 220-660 invalid. Opening Brief at 32-33. Invalidation of the hydraulic code rules is an exceptional remedy that is not warranted here, particularly where doing so would prevent WDFW from protecting fish from construction projects that affect the bed or flow of state waters. Even if this Court accepts the Counties' arguments, the rules can be applied consistent with their position. If the rules are enforced in a way that exceeds WDFW's statutory authority, the Counties may exercise their right to challenge the application of the rules in individual HPA permits.[12] RCW 43.21B.110(1)(*l*); RCW 77.55.021(8); WAC 220-660-460, -470. Alternatively, this Court should invalidate only the portions of the specific rules which exceed WDFW's statutory authority.

IV. CONCLUSION

The Counties and WDFW agree on the legal principles that apply to this Court's review of WDFW's 2014 rules. The parties disagree on the outcome of the application of those principles. The Legislature's objective in the Hydraulic Code is to regulate projects that affect the bed or flow of

[12] The rules do not change the Counties' options to apply for an oral or expedited permit if a bridge requires emergency repairs, or to obtain a five-year maintenance permit. RCW 77.55.021(12), (14), (15), (16); 77.55.221; WAC 220-660-050(3)(ii), (3)(iv), (4), (5), (6), (7), (9)(b), (9)(c), (14)(b). Approximately 393 of 2,500 HPA permits (16%) will be issued annually to government agencies for bridge work under WAC 220-660-190. AR 166, 169.

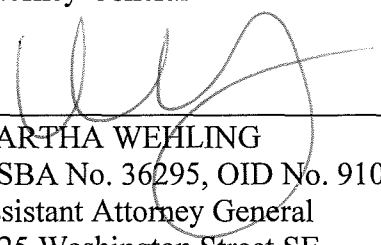
state waters in order to protect fish life. WDFW achieves this objective by considering each project's effects on state waters, regardless of the location of the project above or below the water line. WDFW has implied authority to regulate upland projects, in those narrow and discrete circumstances where the construction project will affect the bed or flow of state waters. WDFW's rules achieve this purpose and are reasonable interpretations of its governing statutes.

The plain language of the HPA statutes does not limit HPA authority to the ordinary high water line. Even if this Court finds these statutes ambiguous, an examination of the other aids to statutory construction will yield the same conclusion. The Counties seek to invalidate an entire chapter and all of its protections for fish life because one rule, WAC 220-660-190, might require an HPA permit for future bridge projects. The Counties' interpretation frustrates the legislative purpose, ignores the plain language of the laws, and is based on hyper-technical arguments that lead to absurd and strained consequences.

The Superior Court did not err in concluding that the rules were within WDFW's delegation of authority, and WDFW respectfully requests that this Court affirm the Superior Court's dismissal of the Counties' rule challenge.

RESPECTFULLY SUBMITTED this 7th day of February, 2018.

ROBERT W. FERGUSON
Attorney General



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DEPARTMENT OF FISH AND WILDLIFE—PERMIT—WATER—RIVER—TIDELANDS—Regulatory Authority Under The Hydraulic Project Approval Process Related To Activities Above The Ordinary High Water Line

The regulatory authority of the Department of Fish and Wildlife to require hydraulic project approval is not limited to activities conducted at or below the ordinary high water line. It includes authority over work "that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." Fixing a precise limit to the Department's authority above the ordinary high water line is impossible in the abstract; whether a particular project is subject to hydraulic project approval will depend on the facts in the given situation.

June 3, 2016

James Unsworth, Ph.D.
Director, Department of Fish and Wildlife
600 Capitol Way N
Olympia, WA 98501-1091

Cite As:
AGO 2016 No. 6

Dear Dr. Unsworth:

By letter previously acknowledged, you requested our opinion on two questions we paraphrase as follows:

1. Does RCW 77.55 limit the regulatory authority of the Washington Department of Fish and Wildlife (WDFW) under the Hydraulic Project Approval (HPA) process to activities conducted at or below the ordinary high water line?

2. If the answer to the first question is no, then what conditions must be present to justify WDFW's exercise of HPA authority on activities conducted above the ordinary high water line?

BRIEF ANSWERS

No. RCW 77.55's plain language does not limit WDFW's HPA authority solely to activities at or below the ordinary high water line.

With some statutory exceptions, WDFW is justified in exercising HPA authority on any activity that meets RCW 77.55.011(11)'s definition of a "hydraulic project," regardless of

[original page 2]

whether the activity is above or below ordinary high water lines. The activity must be construction or performance of work that *affects* state waters below the ordinary high water line by using, diverting, obstructing, or changing the *natural flow* or *bed* of the state water. This authority clearly extends to hydraulic projects landward of the ordinary high water line, though exactly how far beyond the ordinary high water line the authority extends will depend on the facts of any given circumstance.

BACKGROUND

Your questions concern RCW 77.55, which sets forth WDFW's regulatory authority over "hydraulic projects," a term that refers to certain construction and work affecting state waters. RCW 77.55.021(1) states:

> Except as provided in RCW 77.55.031, 77.55.051, 77.55.041, and 77.55.361, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

The specified statutory exceptions are driving across an established ford (RCW 77.55.031); removing or controlling certain invasive plants (RCW 77.55.051); removing derelict fish, crab, and shellfish gear (RCW 77.55.041); and permitting under the forest practices act (RCW 77.55.361).

RCW 77.55.011 defines three terms used in RCW 77.55.021(1):

- "Department" is WDFW. RCW 77.55.011(5).
- "Permit" is "a hydraulic project approval permit issued under [RCW 77.55]." RCW 77.55.011(18). Such permits are commonly referred to as "HPA permits."
- "'Hydraulic project' means 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).

RCW 77.55 does not define "hydraulic" as a term independent of "project." Nor does it define "flow," natural or otherwise. RCW 77.55.011, however, does define two terms used in the meaning of "hydraulic projec":

[original page 3]

- "'Waters of the state'[1] 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).
- "'Bed' means the land below the ordinary high water lines of state waters" excluding all artificial watercourses but for those located where a natural watercourse previously existed. RCW 77.55.011(1).

RCW 77.55.011 further defines "ordinary high water line," used in both the definitions of "state waters" and "bed":

- An "ordinary high water line" is "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. Provided, that in any area where the ordinary high water line cannot be found, the ordinary high water line adjoining saltwater is the line of mean higher high water and the ordinary high water line adjoining freshwater is the elevation of the mean annual flood." RCW 77.55.011(16).

The statute also describes a process for obtaining WDFW's approval before starting a hydraulic project. Specifically, RCW 77.55.021(2) requires proponents of a hydraulic project to submit an application. Among other things, the application must include "[g]eneral plans for the overall project," "[c]omplete 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," and "[c]omplete plans and specifications for the proper protection of fish life[.]" RCW 77.55.021(2)(a)-(c).

Finally, RCW 77.55.021(1) describes the purpose of WDFW's review of an application as the evaluation of "the adequacy of the means proposed for the protection of fish life." RCW 77.55.021(7)(a) further provides that "[p]rotection of fish life is the only ground upon which approval of a permit may be denied or conditioned." Under RCW 77.55.231(1), any conditions imposed by WDFW on an HPA permit "must be reasonably related to the project."

With this statutory background in mind, we turn to the analysis of the activities subject to an HPA permit.

[original page 4]

ANALYSIS

1.Does RCW 77.55 limit the regulatory authority of the Washington Department of Fish and Wildlife (WDFW) under the Hydraulic Project Approval (HPA) process to activities conducted at or below the ordinary high water line?

RCW 77.55.021(1) establishes WDFW's HPA permitting authority. The statute imposes the obligation to obtain an HPA permit on persons or government agencies wanting to undertake a hydraulic project. Thus, the definition of "hydraulic project," as

RCW 77.55 uses that term, is key to determining the extent of WDFW's HPA authority. If a statute defines a term, that definition is the basis of interpreting the statute. *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). If a term is undefined, we look to its plain meaning. *Id.* If a statute's meaning is unambiguous, statutory construction ends with the plain-meaning analysis. *See Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435-36, 359 P.3d 753 (2015). If, however, a statute retains more than one reasonable meaning, other matters such as legislative history are considered. *Id.*

RCW 77.55.011(11) defines a "hydraulic project" as "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." Nothing in the plain language of this definition requires that the work take place below the ordinary high water line to qualify as a hydraulic project. Under the basic rules of grammar, the main object in the definition—construction or performance of work—is modified *not* by its location *in* state waters, but by *its effect* on state waters. Moreover, some types of work done above the ordinary high water line clearly can divert, obstruct, or change the "natural flow or bed" of state waters. For example, bulldozing a steep bank directly above a river could change the river bed and divert, obstruct, or change the river flow if the work is undertaken without proper protections and significant waste material falls into the river. Similarly, placement of structures in a floodway above the ordinary high water line can redirect flood flows causing catastrophic change to fish habitat in river beds. To give a final example, a structure above the ordinary high water line can change tidal beds (destroying forage fish habitat) by diverting wave action at extreme high tide, causing scour erosion and blocking the sloughing of sands that nourish beaches.

Despite this plain language, commenters have offered three main arguments as to why they believe that HPA authority ends at the ordinary high water line. We explain in turn why we reject each one.

First, some have argued that WDFW's HPA authority is limited to work performed below the ordinary high water line because the statute defines "bed" as "the land below the ordinary high water lines of state waters." RCW 77.55.011(1). But the statute does not define hydraulic projects as work performed *on* the bed of state waters, but rather as "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). As noted previously, work above the ordinary high water line can

[original page 5]

obstruct or change the bed of state waters. And in any case, the statute also covers "work that will use, divert, obstruct, or change the natural *flow*" of state waters. RCW 77.55.011 (11) (emphasis added).

Second, some have argued that the first three verbs in the definition of "hydraulic project"— "use, divert, [and] obstruct"— make sense only if the regulated activity itself is taking place *in* the water. As we note above, however, upland activities can divert or obstruct the flow and beds of water bodies. In any event, we cannot ignore the final verb—"change"—just because it is arguably broader than the other three. While courts attempt to give meaning to every word in a statute (*McGinnis v. State*, 152 Wn.2d 639,

645, 99 P.3d 1240 (2004)), there is no rule of statutory construction that every word in a statute must be relevant to *every* application of the statute.

Third, some have argued that a project must take place below the ordinary high water line to be a "hydraulic project," because the dictionary meaning of "hydraulic" is "of or relating to water." *Webster's Third New International Dictionary* 1107 (2002). This reasoning is mistaken because RCW 77.55.011(11) provides a statutory definition of a "hydraulic project." Therefore, we rely on the statutory definition. *Hoffman*, 154 Wn.2d at 741. In the context of this statute, "hydraulic project" is a term of art, the meaning of which would be lost if we simply characterized a project as a hydraulic project because it is in or uses the water.

The statutory context as a whole confirms our plain language interpretation. *See, e.g.*, *Diaz v. State*, 175 Wn.2d 457, 466, 285 P.3d 873 (2012) (Statutes relating to the same subject are interpreted in light of each other, "considering all statutes on the same subject, taking into account all that the legislature has said on the subject, and attempting to create a unified whole." (citing *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001))). Several provisions in RCW 77.55 refer to the ordinary high water line in ways that would be unnecessary if WDFW had no authority beyond that point. *See, e.g.*, *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004) ("The legislature is presumed not to include unnecessary language when it enacts legislation."). For example, RCW 77.55.161(3)(c) prohibits WDFW from requiring changes to storm water outfalls above the ordinary high water line, which would be unnecessary if WDFW had no authority above the ordinary high water line. Similarly, RCW 77.55.321(1) allows WDFW to charge an application fee only where the project is located at or below the ordinary high water line, a limitation that would be unnecessary if WDFW had no authority to issue permits for projects above the ordinary high water line.

Finally, RCW 77.55 references projects that could occur, at least in part, above the line of ordinary high water and are subject to an HPA permit. For example, "stream bank stabilization" is subject to permits under RCW 77.55.021(9)-(15). RCW 77.55.011(23) defines "stream bank stabilization" as projects that include "bank resloping," "planting of woody vegetation," and "bank protection," which would necessarily include the area above the ordinary high water line. Other examples are dikes in RCW 77.55.131, bulkheads in RCW 77.55.141, and shoreline armoring, riparian habitat, and boat ramps in connection with marinas under RCW 77.55.151.

[original page 6]

For these reasons, we conclude that RCW 77.55's plain language does not limit WDFW's HPA authority solely to activities at or below the ordinary high water line. Because the statute is unambiguous, other means of statutory construction are unnecessary. Nonetheless, because some commenters have raised alternative—albeit incorrect—interpretations of the statute and its legislative history, we address means of statutory construction necessary only if a statute is ambiguous.

Where a statute is ambiguous, courts defer to reasonable interpretations offered by the agency charged with implementing the statute. *See, e.g.*, *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015) ("[W]e give the agency's interpretation of the law great weight where the statute is within the agency's special expertise."). For

decades, WDFW has construed its authority over hydraulic projects as extending to work above the ordinary high water line. For example, in *In re Denial of an Hydraulic Project Approval to Young*,[2] a 1997 administrative case concerning a replacement bulkhead built inland from an existing bulkhead, the administrative law judge concluded "[c]learly a project which is located within the ordinary high water mark would fall within the jurisdiction of the department. This is not the exclusive criteria, however, to determine whether an HPA is required." Initial Order at 8. "[T]he pivotal question is . . . whether the construction of the bulkhead did use, divert, obstruct or change the natural flow or bed of the lake." *Id.* WDFW's director formally adopted the conclusions as his own. Modifying Order at 1; *see also* Letter from Gary Locke, Governor, State of Washington, to Ivan Urnovitz & Vernon Young, Northwest Mining Ass'n (Sept. 6, 2000) (attached).

WDFW's prior decisions also underscore the potentially absurd result that could ensue if HPA authority ended abruptly at the ordinary high water mark. We should avoid a reading of a statute resulting in absurd or strained consequences subverting legislative intent. *See Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 14-15, 248 P.3d 504 (2011). That the legislature intended the HPA review to protect fish life is clear from RCW 77.55.231, which identifies the purpose of the review as evaluation of whether the means to protect fish life are adequate. Further, RCW 77.55.021(7)(a) limits the reasons for denial or conditioning an HPA permit to protection of fish life. If the facts of a case show that a project above the ordinary high water line impacts fish life—as in the case of *In re Denial of an Hydraulic Project Approval to Young*—WDFW would be unable to protect fish life merely because the project is just above the ordinary high water mark. *See* Initial Order at 3 (the WDFW biologist agrees the high water mark is waterward of the existing bulkhead), 5, 10 (a concrete bulkhead has a detrimental effect on fish life though above the ordinary high water line). This would be an absurd consequence subverting legislative intent. Thus, the better reading is that HPA review is not limited to projects solely below the ordinary high water line.

We look finally at RCW 77.55's legislative history to determine legislative intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 527, 243 P.3d 1283 (2010). We find nothing in

[original page 7]

the legislative history of RCW 77.55 to reach a conclusion different from that we reached through plain meaning analysis.

The state first enacted a statutory obligation for hydraulic project approval in 1943. Laws of 1943, ch. 40. The requirement for a permit applied to a person, firm, corporation, or government agency desiring to

> construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds[.]

Laws of 1943, ch. 40, § 1.

In 1949, the legislature retained the 1943 act when enacting a comprehensive fisheries code. Laws of 1949, ch. 112. With a few exceptions, the substance of this

provision remained unchanged from 1943 to 1983. Laws of 1949, ch. 112, § 48. One exception was a change in 1967 whereby "any form of hydraulic project or other *project*" (Laws of 1955, ch. 12, 75.20.100 (emphasis added)) became "any form of hydraulic project or other *work*" (Laws of 1967, ch. 48, § 1 (emphasis added)). Another change in 1975 added the definition for "bed" as meaning "that portion of a river or stream and the shorelands within the ordinary high water lines." Laws of 1975, 1st Ex. Sess., ch. 29, § 1.

In 1983, the legislature overhauled the fisheries code, including the provisions concerning hydraulic project approval. Laws of 1983, 1st Ex. Sess., ch. 46. The provision currently codified as RCW 77.55.021(1) received only the addition of "salt or fresh" to describe the "waters of the state." Laws of 1983, 1st Ex. Sess., ch. 46, § 75.

In 1986, the legislature made additional changes. Laws of 1986, ch. 173. With the changes, the obligation to obtain a permit applied to any person or government agency desiring to

> construct any form of hydraulic project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state[.]

Laws of 1986, ch. 173, § 1.

An attachment to your request letter noted that the legislature entertained two bills in the 1990s that would have statutorily limited WDFW's hydraulic project approval to work at or below the ordinary high water line. The first was Senate Bill 5085 in 1993, which the legislature did not pass. The second was Senate Bill 5632 in 1995, which did pass (as E2SSB 5632) but without the provision that would have limited WDFW's hydraulic project approval to work at or below the ordinary high water line. The courts "are loathe to ascribe any meaning to the Legislature's failure to pass a bill into law." *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694

[original page 8]

(1996). Therefore, we do not believe the fact that the provisions did not pass is informative about the extent of WDFW's HPA authority. We nonetheless note that the passage of the 1995 bill without the express language indicates that the legislature considered changing, but did not, the longstanding statutory language.

The next significant reenactment occurred in 2005. Laws of 2005, ch. 146. The legislation repealed the prior version of the provision currently codified as RCW 77.55.021 (1), replacing it with the current version. Laws of 2005, ch. 146, § 201. The new definition of "hydraulic project" was the same as currently codified at RCW 77.55.011(11), described above. Laws of 2005, ch. 146, § 101. The new definitions section provided by the 2005 legislation also added definitions for "waters of the state," "state waters," "bed," and "ordinary high water line."

The legislative historegardless of whether identified as a "hydraulic project or . . . other work" or a "hydraulic project" under the new statutory definition, the obligation to obtain an HPA permit has been for any work affecting the flow or bed of state waters

regardless of the activity's locatiy of RCW 77.55 shows consistency of language throughout the 73 years since its first enactment. The legislature did not alter or modify the language at any point in a manner that would signal an intention different from the plain meaning of the current version. Ron relative to the ordinary high water line. Whether under plain meaning analysis or other means of statutory construction, RCW 77.55 does not limit WDFW's authority to activities at or below the ordinary high water line. We turn now to your second question.

2.If the answer to the first question is no, then what conditions must be present to justify WDFW's exercise of HPA authority on activities conducted above the ordinary high water line?

For WDFW's HPA authority to extend to any activity, regardless of whether it is above or below the ordinary high water line, the following conditions must be present:

- The activity must be *construction or performance of work*; and
- The activity must either:

(1) Use, divert, obstruct, or change the *natural flow* of the state water or

(2) Use, divert, obstruct, or change the *bed* of the state water.

RCW 77.55.011(11) (definition of "hydraulic project").[3]

[original page 9]

Some commenters claim that the lack of a boundary to HPA authority leads to an absurd result. In their view, if WDFW's HPA authority is not limited to the ordinary high water line, there is no limit to the extent of WDFW's authority because all work within a floodplain or watershed affecting runoff has the potential (theoretically) to "change" the natural flow. We see two flaws in this concern.

First, WDFW has not historically interpreted its authority so broadly, instead requiring permits only for activities that meet the definition of "hydraulic project" and are in or near state waters. *See, e.g.*, http://wdfw.wa.gov/licensing/hpa (last visited May 31, 2016) (HPA website) ("Since 1943, anyone planning certain construction projects or activities in or near state waters has been required to obtain . . . an HPA."); Unsworth Opinion Request Letter at 1 (explaining that "WDFW has required project proponents to apply for an HPA for . . . those projects that will be located landward of the [ordinary high water line] and immediately adjacent to waters of the state").

Second, a project is less likely to meet the statutory criteria of a "hydraulic project" the farther it is from a water body. This is so for at least three reasons:

(1) Impacts generally diminish over distance, so a project is less likely to "use, divert, obstruct, or change the natural flow or bed of" a water body the farther the project is from the water. RCW 77.55.011(11).

(2) For the same reason, a project far from the water is also less likely to affect fish life, which is the concern motivating HPA review; protection of fish

life is the sole basis on which WDFW can condition or deny a permit. *See* RCW 77.55.231, .021(7)(a).

(3) The statutory examples of work above the ordinary high water line that WDFW explicitly regulates are generally very near a water body. *See, e.g.*, RCW 77.55.021(9)-(15) ("stream bank stabilization"); RCW 77.55.131 (dikes); RCW 77.55.141 (bulkheads); RCW 77.55.151 (marinas and boat ramps); *see also, e.g.*, *In re Bankruptcy Petition of Wieber*, 182 Wn.2d 919, 926, 347 P.3d 41 (2015) (looking to a statutory scheme as a whole in order to determine the reach of a statute).

Thus, it would be very difficult for WDFW to assert authority over a project far removed from state waters.

Such limits to WDFW's authority, however, give no basis to draw an arbitrary line beyond which WDFW lacks authority. 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. The question of whether a particular project can change the bed or flow to the extent of affecting fish life involves technical expertise. A court accords an agency's interpretation of law great weight

[original page 10]

where the statute is within the agency's special expertise. *Cornelius*, 182 Wn.2d at 585. WDFW has such expertise: it is the agency charged with enforcement of an HPA permit; its review is limited to protection of fish life; and the conditions WDFW imposes on the permit must be reasonably related to the project. RCW 77.55.021(1), .021(7)(a), .231. Accordingly, we believe that courts would be somewhat deferential to WDFW's conclusions as to whether a particular project or type of project meets the statutory standard for requiring an HPA permit. We note that WDFW has provided notice in WAC 220-660 about certain work that is subject to an HPA requirement.[4]

In summary, we conclude that WDFW's HPA authority is not limited to activities at or below the ordinary high water line. WDFW is justified in exercising HPA authority on any activity that complies with the statutory definition of a "hydraulic project," regardless of whether the activity is above or below ordinary high water lines. While drawing a fixed upland boundary to WDFW's HPA authority is impossible, that authority clearly diminishes the farther a project is from the water.

We trust that the foregoing will be useful to you.

ROBERT W. FERGUSON

Attorney General

JANIS SNOEY

Assistant Attorney General

wros

attachments

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[1] Though the definition of hydraulic project uses "salt or freshwaters of the state" instead of "waters of the state," the reference to "salt and freshwaters" in the definition of "waters of the state" indicates its applicability to the term used in the definition of hydraulic project.

[2] In re Denial of an Hydraulic Project Approval to Young, No. AH-97-106 (Wash. Dep't of Fish and Wildlife Apr. 30, 1997) (Initial Order) (attached). Also attached as part of this document is the September 11, 1997, Decision Modifying Initial Order (Modifying Order).

[3] RCW 77.55.021(1) exempts four activities that meet the definition of a hydraulic project from the necessity of obtaining an HPA permit. Generally, each of the four activities—driving across an established ford; removing or controlling certain invasive plants; removing derelict fish, crab, and shellfish gear; and permitting under the forest practices act—must comply with certain separate statutory requirements in order to qualify for the exemption. See RCW 77.55.021(1), .031, .051, .041, .361.

[4] Whether deference to WDFW's expertise is appropriate in any particular case would depend on the circumstances. Deference to WDFW's interpretation of this statute would be particularly strong where it acts by rule to address particular categories of work. See, e.g., WAC 220-660-190 (addressing water crossing structures), -270 (utility crossings in freshwater). Adopted rules are presumed valid (RCW 34.05.570(1)) and, in this context, those rules both provide notice to the regulated public that the project requires an HPA permit and memorialize the agency's technical expertise in applying the HPA statute to the particular subject.

NO. 95029-6

SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE COUNTY, PIERCE COUNTY, DOUGLAS COUNTY, LEWIS COUNTY, and KITSAP KITSAP, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, Respondent.	DECLARATION OF SERVICE

I, Hang Nguyen-Le, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.

2. On March 9, 2018, I caused to be served a true and correct copy of the Corrected Response to Appellant's Opening Brief via electronic filing:

John Bjorkman
Gabrielle Thompson
James Lynch
K&L Gates, LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

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

DATED this 9th day of March, 2018, at Olympia, Washington.

/s/ HANG NGUYEN-LE
Hang Nguyen-Le, Legal Assistant

FISH, WILDLIFE, & PARKS DIVISION - ATTORNEY GENERAL'S OFFICE

March 09, 2018 - 9:29 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95029-6
Appellate Court Case Title:	Spokane County, et al v. State of Washington Department of Fish and Wildlife
Superior Court Case Number:	16-2-04334-5

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Comments:

Respondent is filing a Corrected Response to Appellant's Opening Brief to include 3 missing pages (i., ii., iii.) - Pages i. and ii. are the Table of Contents, and page iii. is the first page of the Table of Authorities. These pages were accidently not included in the initial filing on February 7, 2018. The substance of the brief remains unchanged.

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