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No. 91325-1

SUPREME COURT OF THE STATE OF WASHINGTON

BRUCE M. BEATTY,

Petitioner,

v.

WASHINGTON STATE FISH AND WILDLIFE COMMISSION, *et al.*,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves a permit authorizing Petitioner Bruce Beatty to vacuum streambed materials through a suction dredge to mine gold. In approving this permit, the Washington Department of Fish and Wildlife (WDFW) included a timing window adopted by rule to protect fish species that spawn and incubate during the time Beatty sought to dredge. WDFW declined to grant Beatty's requested timing extension because he refused to tell the biologist where, along the 2.5-mile stream, he sought to dredge. Without that information, WDFW could not meaningfully evaluate and balance the risk of allowing dredging outside the work window.

Beatty's unwillingness to give WDFW the information it needed to evaluate the risk of his dredging operations does not raise an issue of substantial public interest warranting review under RAP 13.4(b)(4). His theories that he was singled out and that WDFW follows a "protect every egg" approach are unsupported by the record and have been rejected at every level of review. This Court has upheld WDFW's application of the general standard "protection of fish life." Several statutory and rule-based requirements further limit and guide WDFW's discretion. Here, WDFW simply needed to know where Beatty sought to dredge to evaluate the impacts of allowing a longer work window. Beatty's petition raises no issues of substantial interest and should be denied.

II. RESTATEMENT OF THE ISSUES

Should review be denied because the Petition does not involve an issue of substantial public interest under RAP 13.4(b)(4) that warrants Supreme Court review?

If review were accepted, the following issues would be presented:

1. Was WDFW's application of the default work window for suction dredging in Fortune Creek reasonable and consistent with RCW 77.55.021 and RCW 77.55.231 when Beatty refused to provide information justifying an exception?
2. Does WDFW's implementation of the protection of fish life standard satisfy the constitutional standard prohibiting vagueness?
3. Does Beatty bear the burden of proving the invalidity of the permit condition when the Administrative Procedure Act (RCW 34.05) places the burden on the party challenging the agency action?
4. Is state regulation of mining for protection of fish life consistent with federal law when the state regulation allows certain mining techniques year-round and places timing restrictions on other equipment with exceptions based on site-specific and project-specific details?

III. COUNTERSTATEMENT OF THE CASE

A. WDFW's Regulation of Mineral Prospecting

WDFW regulates construction and other work affecting state waters under RCW 77.55, the Hydraulic Code. WDFW does so by issuing Hydraulic Project Approval (HPA) permits, which can only be conditioned for the protection of fish life. Prospecting and mining for gold in Washington waters is regulated by WDFW under the Hydraulic Code. WDFW adopted rules to allow small-scale mineral prospecting and mining activities without the need for individual permits, as directed by RCW 77.55.091. These rules are known as the Gold and Fish Pamphlet and are codified at WAC 220-110-200 through WAC 220-110-206.

The Gold and Fish Pamphlet authorizes miners to use certain handheld tools year-round without restriction. WAC 220-110-201. It also authorizes miners to use motorized equipment, like suction dredges, during specific dates, known as work windows, established by rule for hundreds of streams throughout the state. WAC 220-110-202. Miners wishing to prospect or mine outside the work windows or use equipment not authorized by the rules may apply for an individual permit based on project-specific and site-specific information. RCW 77.55.021(2).

WDFW developed the work windows for each watercourse listed in WAC 220-110-206 by identifying the fish species that reside in the

watercourse, and calculating the incubation periods for each of those fish species from spawning to emergence. CP 349:4-10. The work windows reflect the times each year when fish are not likely to be spawning and eggs are not likely to be in the gravel.

Suction dredges, a common mining technique, float on the surface, are powered by gas engines, and can weigh up to 700 pounds. CP 104:11, 13-14, 15. They can significantly impact fish life when operated in small streams at times outside the work windows. CP 363-367.¹

Direct impacts can include eggs being sucked through the dredge nozzle, which results in 100 percent mortality soon after fertilization, CP 363:12-13, and fluctuating, but nonetheless significant, mortality rates during the incubation and development stages, CP 365:23-367:10. Indirect impacts can arise from entrainment during the excavation process, miners crushing redds (fish nests) while wading, artificial channel modification from excavation holes and sediment deposits, water quality modifications, temporary dams or water diversions, changes in food availability for fish, and disturbance from human activities. R-30 at 7-1 to 7-30.² Miners typically excavate areas several feet wide to find gold settled on bedrock below the gravel. CP 111:1-6; CP 359:17-360:10.

¹ See Figure 10 in WAC 220-110-020(95) for an illustration of a suction dredge.

² Exhibits A and R represent the Appellant and Respondent exhibits from the Administrative Record compiled by the Pollution Control Hearings Board.

B. Beatty Applied for an Individual Permit

Beatty applied for an individual permit to prospect and mine for placer materials in Fortune Creek, a high-elevation, cold-water stream in the Wenatchee National Forest. He sought to use suction dredges with six-inch, four-inch, and three-inch nozzles to vacuum streambed material, and a highbanker to separate valuable material from streambed material on the banks.³ He submitted a Google map with a hand-drawn arrow identifying Fortune Creek, and requested to suction dredge a total of 300 linear feet anywhere within the 2.5 mile stretch “[f]rom [the] mouth of Fortune Creek up stream in an eastward direction.” R-1 at 2, 9, 15.

He requested a five-year permit with an annual work window of May 1 through September 30, with four months for suction dredging and five months for highbanking. This was well beyond the August 1 through August 15 window established for Fortune Creek in the Gold and Fish Pamphlet for highbankers and suction dredges (with no larger than four-inch nozzles). WAC 220-110-206. WDFW biologist William Meyer requested clarification as to where he sought to work. Beatty responded:

I’m looking to prospect Fortune Creek including the North and South Forks. I have only been up about 1/3 of a mile

³ A highbanker is a stationary device used to separate gold from streambed materials outside the banks, using water supplied by hand or by pumping. The miner supplies streambed material to the highbanker by means other than suction dredging. WAC 220-110-020(50). See Figure 1 in WAC 220-110-020(50) for an illustration of a highbanker.

from the bridge. Don't know what the rest is like except that I do know that this area had been prospected and mined a lot by our forefathers. All this previous mining was placer mining in nature. I aim to prospect more for the source of the placer gold therefore necessitating use of a highbanker moreso rather than dredging.

R-4.

Meyer approved HPA No. 122729-1 with Beatty's requested work window for highbanking from May 1 through September 30. R-2. Because Meyer approved a large highbanker in a relatively small stream outside the work window, he limited the permit length to two years. He explained that "[he] would like to conduct a site visit to evaluate the impact to fish life from these mineral prospecting activities" and that "Fortune Creek does not have a lot of area for settling ponds to keep sediment laden water or spoils from entering the stream." R-6.

The HPA also authorized Beatty to use suction dredges with six-inch, four-inch, and three-inch nozzles, but only during the August 1 through August 15 work window. R-2. Meyer explained, "Fortune Creek has both spring and fall spawning fish species. Because both spring and fall spawning fish are present, fish eggs are in the gravel prior to and after the approved work windows. Therefore, we cannot approve suction dredging during these spring and fall periods." But he continued:

However, if you were to provide us with site-specific information where we can conduct a site assessment

regarding the impacts to fish life, we may be able to issue a permit to allow work with a suction dredge outside the standard work window.

R-6.

Beatty opted not to provide WDFW with site-specific information, and instead appealed the permit to the Pollution Control Hearings Board (Board). The Board, the Kittitas County Superior Court, and Division III of the Court of Appeals all upheld the permit conditions, concluding WDFW reasonably applied the established work windows when Beatty requested an exception but refused to identify where he planned to dredge.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Discretionary review under RAP 13.4(b)(4) is only warranted “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” Beatty argues the Court should accept review because “the Department desperately needs guidance” as to how to interpret the Hydraulic Code. In support of this position, he contends he was a victim of discriminatory treatment and that a “lack of standards” made that possible. The Court should reject these arguments because they are unsupported by the record and because the statutes and rules provide sufficient parameters to limit WDFW’s discretion.

A. Beatty Was Not a Victim of Discriminatory Treatment

Beatty argues that WDFW refused to extend the work window in part because of a letter sent from a WDFW manager to Beatty in January 2008. This letter apologized for an interaction between WDFW biologist Perry Harvester and Beatty's wife during a workshop in the rulemaking process.⁴ But the record is clear that Harvester did not process or issue the permit, and became involved in this matter only after the appeal was filed. CP 171:15-172:2. The Board found Harvester's testimony on this point credible and found no other evidence to support Harvester having influenced the permit conditions. CP 60:15-61:7.

More importantly, "[t]he Board [did] not find any substantiation for Mr. Beatty's allegation that his permit was handled less favorably than others based on personal animosity." CP 61:5-7. The record reflects instead WDFW's efforts to work with Beatty to allow suction dredging outside the adopted work windows. As both the Board and the trial court concluded, the reason Beatty was denied a variance was his refusal to provide WDFW with specificity on his intended dredging operations.

⁴ Harvester denied any personal conflict with Beatty's wife and explained to the Board that he did "nothing other than asking Mrs. Beatty if she had a question, and she said she did not have a question regarding the rules, and so [he] asked her to sit down if she had no question regarding the rules." CP 204:16; CP 205:14-18.

B. WDFW's Application of Duly Adopted Work Windows Does Not Raise an Issue of Substantial Public Interest

The Court should reject Beatty's suggestion that WDFW follows "only the rule of biologists" and needs this Court's guidance to reign in a scheme of "utterly arbitrary power." Pet. at 1. The statutes and rules provide sufficient guidance to limit biologist discretion. Here, Beatty sought a substantial exception to the duly adopted work windows but refused to provide the information necessary to justify that request. No amount of additional guidance would have given WDFW the information it needed to evaluate Beatty's suction dredge operations and its potential impacts to the fish life that spawns in Fortune Creek. Thus, this permit condition, which Beatty could have remedied by simply identifying where he sought to dredge, does not raise an issue of substantial public interest.

1. WDFW's Authority Is Limited by Legal Standards

WDFW regulates hydraulic projects for the protection of fish life by evaluating likely impacts and including reasonable permit conditions to address them. RCW 77.55.021(1), (7)(a). This Court upheld WDFW's approach to regulating hydraulic projects in *State v. Crown Zellerbach Corporation*, 92 Wn.2d 894, 900-01, 602 P.2d 1172 (1979). Beatty asks this court to overrule that case. In *Crown Zellerbach*, the Court evaluated WDFW's framework of including technical provisions "tailored with the

intent to fit the particular project and fish resource needs,” and concluded it was not unlawful delegation. *Id.* at 898, 900. The Court held WDFW’s implementation of the “protection of fish life” standard was “adequate, particularly in light of our stated view that environmental factors are not readily subject to standardization or quantification.” *Id.* at 900.

The reasoning of *Crown Zellerbach* is well founded, and Beatty’s permit, for which he refused to help WDFW evaluate impacts of his proposed dredging outside the work window, provides no basis upon which this Court should consider overruling its settled principles. Since *Crown Zellerbach*, WDFW has adopted a myriad of technical provisions by rule in WAC 220-110, and additional statutory requirements have been added to limit WDFW’s discretion. Specifically, the statutes require permit conditions to “be reasonably related to the project” and not “attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.” RCW 77.55.231(1).

2. Rule-Based Work Windows Establish a Presumptive Baseline of Protection

The Gold and Fish Pamphlet rules governing mining establish conditions based on the type of equipment the miner desires to use and the particular watercourses in which the miner desires to work. WAC 220-110-200 through WAC 220-110-206. Miners can engage in a

variety of prospecting and mining activities without applying for an individual permit, so long as the work complies with the Pamphlet rules and occurs during the established work windows.

These presumptive work windows represent the general times when suction dredging may occur without damage to fish spawning activity, and are tailored for the fish species found in each of hundreds of watercourses in Washington. They provide “a baseline measure of protection without any need for further regulatory control.” *Beatty v. Wash. Dep’t of Fish and Wildlife*, __ Wn. App. __, 341 P.3d 291, 303 (2015). When miners request exceptions to the Gold and Fish Pamphlet, WAC 220-110-200(2), WDFW relies on the default windows for work timing unless exceptions are justified by site-specific or project-specific circumstances. WDFW considers the nature of the project and its likely impact on the fish and habitat where the work will take place.

Here, Beatty sought exceptions to the equipment type and work window authorized by rule for Fortune Creek. He requested to suction dredge for four months with the only limitation that he would “follow the provisions in the Gold and Fish Pamphlet.” R-1 at 8. The WDFW biologist explained that Fortune Creek has both spring and fall spawning fish species and that he could not approve suction dredging at the times when fish eggs were likely to be in the gravel, without site-specific

information to conduct a site assessment regarding impacts to fish life.

R-6. Beatty refused to provide any additional information. The Board correctly summarized the regulatory scheme as follows:

An applicant cannot expect to obtain approval of an HPA relaxing a previously adopted regulation protecting fish without providing any grounds or substantiation for the deviation. Mr. Beatty has argued that it is WDFW's responsibility to calculate risk of harm and investigate the specifics of the proposed activity. The Board disagrees and concludes that the applicant is responsible for providing the information necessary to fully evaluate the impact of extending a duly adopted work window. Mr. Beatty failed to meet that burden.

CP 70:16-21. In light of Beatty's unwillingness to provide any more detail than his desire to dredge throughout the 2.5-mile stretch of stream, WDFW correctly applied the default work windows established in rule to protect fish populations spawning when Beatty seeks to dredge. Nothing about this regulatory scheme raises an issue of substantial public interest.

3. WDFW Does Not Apply a Hyper-Strict "Protect Every Egg" Approach

Beatty asks this Court to accept review to reign in an interpretation of the Hydraulic Code that seeks "total preservation." But WDFW does not interpret the Hydraulic Code as requiring "total preservation" and protection of "every egg." Rather, the statute contemplates that hydraulic projects will be permitted, and by their nature, they will have some impact

on fish life. The statute requires that they be conditioned reasonably to protect fish life.

For mineral prospecting, as discussed above, WDFW adopted work windows as the primary means of limiting impacts on fish populations. Even with respect to the non-motorized mining activities allowed year-round, WDFW acknowledges, “there is some risk associated with those activities alone.” CP 347:10-15. “The intent of the [Gold and Fish] pamphlet was to provide as much opportunity as the resource agencies could provide without adversely impacting or significantly impacting fish life.” CP 353:15-18. The work windows do not amount to “total preservation”:

[T]he idea was to protect most of the fish most of the time over most of the conditions that we have observed. So the intent was not to protect every fish. We knew that.

CP 178:13-16; *see also Beatty*, 341 P.3d at 303 (“The establishment of a work window contemplates some harm to fish eggs and fish life that develop outside of the specified dates.”).

WDFW has also made clear it would have considered extending the work window if Beatty provided additional information about his proposed work from which impacts could be assessed. When individuals seek exceptions to the default work windows, WDFW needs site-specific information because it would have been virtually impossible to envision

all of the variety of locations and circumstances in a single pamphlet. CP 354:20-23; CP 355:22-24 (“[Y]ou have to know something about the site to be able to evaluate what the potential risks or impacts might be to a specific location within the stream.”). Thus, Beatty’s contention that WDFW needs reigning in because it is applying the Hydraulic Code in a hyper-strict manner aimed at “total preservation” should be rejected.

Beatty’s argument that WDFW seeks to “protect every egg” should likewise be rejected. It comes from a WDFW biologist’s answer to a compound question that first asked whether it was WDFW’s position that “because there are so many things going on, we cannot have quantitative evaluation of risk.” He responded: “Yes. There’s a lot of variety out there.” CP 390:15-20. WDFW specifically responded to the “protect every egg” theory as follows: “I think if all we were doing was killing a few eggs, I would agree with you that it is not a significant impact to protecting fish life, if it was just a few eggs.” But he also noted: “If it’s the last fish that’s spawning in that system, maybe a few eggs makes a difference.” CP 258:20-259:4. At each level of review, Beatty’s theory that WDFW seeks to protect every egg has been rejected. Accordingly, it does not raise an issue of substantial public interest.

C. Beatty's Remaining Arguments Do Not Merit Review

Beatty also requests the Court accept review on the grounds that a heightened standard of review should apply for hydraulic permitting decisions, that his permit conditions were unduly restrictive, that agencies are misusing the "cumulative impacts" analysis, and that WDFW's "hole-by-hole" review is irrational and unconstitutional. These arguments lack merit and should be rejected as bases for the Court's review under RAP 13.4(b)(4).

1. Beatty Bears the Burden of Proving the Invalidity of the Board's Decision

Beatty asks the Court to change the law and shift the burden of proof in a judicial review to WDFW. The standard of review is governed by the Administrative Procedure Act, which provides that on judicial review, "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). Beatty's reliance on *Pentagram Corporation v. City of Seattle*, 28 Wn. App. 219, 622 P.2d 892 (1981), is misplaced. That case, which did not involve the Administrative Procedure Act, held that a city council decision lacking findings of fact and conclusions of law was not entitled to the presumption of reasonableness and, in that circumstance, the city's decision was arbitrary and capricious. Here, the Pollution Control Hearing Board's

Order constituted the final agency decision and included findings of fact and conclusions of law. Beatty is mistaken in contending there were no specific findings to justify the imposition of the duly enacted work windows.

2. Beatty's Permit Conditions Were Reasonable and Do Not Raise an Issue of Substantial Public Interest

Beatty's permit conditions were reasonable and consistent with WDFW's regulatory scheme for mineral prospecting. He argues, "the undisputed evidence showed that all risk could be eliminated by simply restricting operations in pocket gravels." Pet. at 17. But as discussed above, WDFW's regulatory scheme for mineral prospecting is based on following duly adopted work windows and authorizing exceptions when justified by site or project specific circumstances. The WDFW biologist described the process on cross-examination as follows:

Q But the way you determine whether the conditions are out of proportion with the impact is essentially whether you're subjectively comfortable with it?
[Buchal]

A No. It's based on a site assessment, on what the risks are and what is observed at that specific location. And so an assessment is based on a variety of things that a biologist goes to look at to take into account of the various risks based on what is proposed and how it's done and either conditions, denies or approves the permit based on that information.

CP 405:5-15. This regulatory scheme requires applicants to inform WDFW biologists about the nature and location of their proposed projects. Beatty's application did not.

3. Beatty's Discussion of Cumulative Impacts Is Misplaced

Beatty contends that review is warranted because regulators are "denying permits because of the 'cumulative impact' of assuming they might grant more permits in the future." Pet. at 19. WDFW did not deny Beatty's permit. WDFW declined to authorize an extended work window. It did so not because of concerns about impacts from future permits, but because Beatty did not provide sufficient information about his project for WDFW to make a meaningful assessment of the impacts to spawning fish. This reasoning is evident throughout the record. The Court should not accept review based on a theory that did not apply to his permit, and significantly, one that did not form the basis for the Board's order.

4. WDFW's Approach Is Rational and Constitutional

Beatty finally argues the regulatory scheme is preempted by the 1872 Mining Act, Sess. 2, ch. 152, 17 Stat. 91-96, and thus unconstitutional under the Supremacy Clause. The regulatory scheme does not ban mining; it simply requires that mining permits be guided by informed decision making. WDFW biologist Meyer requested more specificity prior to issuing the permit. He later offered to again consider

the requested exception if Beatty would simply provide information on where Beatty intended to mine. This occurred prior to Beatty filing an appeal. It is evident WDFW made efforts to approve the extended work window, but could not do so without more information about the proposed dredging.

Beatty references other permits allowing suction dredging in the Cle Elum River as evidence that site specificity does not matter. There was no testimony relating to these other permits because they were added to the record after the hearing. Whether detailed site information is needed depends on the specific aquatic system. High-elevation streams like Fortune Creek have fish populations that are small in number and size, with smaller redds that may be located in small, scattered areas where gravel exists. CP 436:6-16; CP 438:7-441:25.

For work outside the work windows, WDFW attempts to identify suitable areas for mining by evaluating the site-specific considerations once the miner indicates the locations to be disturbed. CP 354:10-355:25; CP 469:7-11. Biologists consider the size of the waterbody, the location of work on that waterbody, the degree of planned disturbance, the type of fish present, and the spawning seasons. CP 356:3-10; *see also* WAC 220-110-010 (“Each application shall be reviewed on an individual basis.”) and WAC 220-110-040 (“Certain technical provisions shall be required

depending upon the individual proposal and site specific characteristics.”). Implementing the “protection of fish life” standard in this way provides an appropriate benchmark and level of flexibility to take into account site-specific and project-specific conditions, but only works with cooperation from the miner. CP 470:12-471:23.⁵

This approach is consistent with the 1872 Mining Act and does not frustrate the purpose of “reward[ing] and encourag[ing] the discovery of economically valuable minerals located on public lands.” *South Dakota Mining Ass’n v. Lawrence Cnty.*, 155 F.3d 1005, 1010 (8th Cir. 1998). WDFW’s approach carefully balances the federal mining law’s purposes of encouraging exploration and extraction of valuable minerals with the environmental interest in protecting fish life and habitat. It is also consistent with the U.S. Supreme Court’s conclusion that states are not preempted from imposing reasonable regulation of mining in national forests. *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 593, 107 S. Ct. 1419 (1987).

The fact that WDFW imposed the default timing window for motorized suction dredging, when Beatty requested blanket approval to dredge 300 linear feet anywhere “from mouth to headwaters” in a stream measuring 2.5 miles, does not mean that WDFW frustrated the purpose of

⁵ Meyer has, on prior applications by Beatty, deviated from the Gold and Fish Pamphlet default work windows. CP 471:7-20.

the federal laws. Beatty remains free to use a variety of techniques during the timing windows, including highbanking during the extended window. He may also provide more details to justify an exception. As the superior court noted, "had he been willing to meet with the department . . . it is very likely the department would have granted the petitioner permission to mine exactly where he wanted to mine." CP 777.

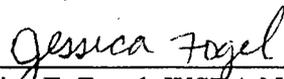
V. CONCLUSION

Beatty's petition raises no issues of substantial public interest. He was not singled out for discriminatory treatment; he simply failed to give site-specific information justifying his request to significantly expand the work window. WDFW implements the Hydraulic Code under statutory and rule-based limitations. No additional guidance would have warranted deviating from the work windows absent the information that only Beatty could provide. Accordingly, the Court should deny his petition for review.

RESPECTFULLY SUBMITTED this 17th day of March, 2015.

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DATED this 17th day of March, 2015, at Olympia, Washington.



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