

1 Hearing date: 11/09/2018  
2 Hearing time: 9:00 AM  
3 Judge/Calendar:  
4 Honorable Christopher Lanese  
5  
6

7 SUPERIOR COURT OF WASHINGTON  
8 FOR THURSTON COUNTY

9 PROTECT ZANGLE COVE, et al.,

10 Petitioners,

11 v.

12 WASHINGTON DEPARTMENT OF FISH  
13 AND WILDLIFE, et al.,

14 Respondents.  
15  
16

No. 18-2-01972-34

PACIFIC NORTHWEST  
AQUACULTURE, LLC'S  
MOTION FOR JUDGMENT ON  
THE PLEADINGS

17 **I. RELIEF REQUESTED**

18 Pacific Northwest Aquaculture, LLC ("PNA") moves the court for an order  
19 granting judgment on the pleadings in its favor with respect to the Third Claim for Relief  
20 ("Claim Three") in Petitioners' Petition for Judicial Review, Declaratory Judgment, and  
21 Injunctive Relief ("Petition") because Claim Three fails to state a claim upon which relief  
22 can be granted and PNA is entitled to judgment as a matter of law. Further, because PNA  
23 is only a respondent with respect to Claim Three, PNA should be dismissed as a party  
24 from this action.  
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**II. FACTS**

Petitioners bring Claim Three only against PNA. Petition p. 26. Claim Three alleges PNA’s commercial geoduck aquaculture farm (“Farm”) is a hydraulic project as defined by RCW 77.55.011(11) and hence requires a hydraulic project approval (“HPA”) permit from the Washington Department of Fish and Wildlife (“WDFW”). *Id.* The only relief Petitioners request in Claim Three is for PNA to “be enjoined from beginning operations at its Facility until it has received the required HPA permit from WDFW under chapter 77.55 RCW.” *Id.* Petitioners indicate they are bringing Claim Three pursuant to chapter 77.55 RCW (the “Hydraulic Code”). *Id.*

**III. ISSUE STATEMENT**

Is PNA entitled to judgment in its favor on Claim Three when the Hydraulic Code grants WDFW the exclusive authority to enforce the requirement to obtain an HPA permit for qualifying work and there is no express or implied private cause of action authorizing Petitioners to enforce compliance with that HPA permit requirement?

**IV. ARGUMENT AND AUTHORITY**

**A. Rule 12(c) is the Appropriate Mechanism for Evaluating Whether Petitioners are Entitled to Privately Enforce the Hydraulic Code.**

This motion is made pursuant to Washington State Superior Court Civil Rule (“CR”) 12(c). CR 12(c) authorizes any party to move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. “Motions under CR 12(b)(6) and 12(c) raise identical issues, whether a request for relief states a claim for which a court can grant relief.” *Didlake v. State*, 186 Wn. App. 417, 422, 345 P.3d 43 (2015). This motion is brought pursuant to CR 12(c) because the pleadings are closed. *Id.* at 421; CR 12(c).

1 A motion to dismiss for failure to state a claim is the proper vehicle for evaluating  
2 whether a statute authorizes a private enforcement action. *Protect the Peninsula's Future*  
3 *v. City of Port Angeles*, 175 Wn. App. 201, 208-14, 304 P.3d 914 (2013) (holding a  
4 lawsuit seeking to require compliance with RCW 69.41.060 fails to state a claim upon  
5 which relief can be granted, and must be dismissed under CR 12(b)(6), because the statute  
6 creates no private cause of action).

7 With regard to timing of this Motion, Thurston County Local Court Rule (“LCR”)  
8 5(d)(1)(D) states motions filed under CR 12(c) shall be filed and served as provided in CR  
9 56 and LCR 56. *See also* LCR 12(c). CR 56 requires motions to be filed and served not  
10 later than 28 calendar days before the hearing, and motions must be heard more than 14  
11 calendar days before the date set for trial unless leave of court is granted to allow  
12 otherwise. LCR 56 does not contain additional deadlines for bringing a CR 12(c) motion.  
13 This motion is timely under CR 12(c) because it is filed and served no later than 28 days  
14 before the hearing, and the motion hearing is set more than 14 days before trial.

15 **B. The Hydraulic Code Does Not Create a Private Cause of Action.**

16 **a. The Hydraulic Code Contains No Express Private Cause of Action.**

17 Claim Three alleges the Farm is a hydraulic project and requires an HPA permit  
18 under the Hydraulic Code.<sup>1</sup> Petition p. 26. Petitioners thus seek to privately enforce the  
19 Hydraulic Code in Claim Three.

20 Unlike their second claim for relief, Petitioners do not contend Claim Three is  
21 reviewable under the Administrative Procedure Act, chapter 34.05 RCW. Petition pp. 25-  
22 26. Rather, in the sub-heading for Claim Three, Petitioners indicate the claim is grounded  
23 in the Hydraulic Code. Petition p. 26.

24 \_\_\_\_\_  
25 <sup>1</sup> Petitioners do not specifically identify the section of the Hydraulic Code that is allegedly violated in Claim  
Three. Based on other paragraphs in the Petition, it appears to be RCW 77.55.021. *E.g.* Petition pp. 1-2.

1 The Hydraulic Code contains no express cause of action authorizing private  
2 individuals to require others to comply with its provisions, including RCW 77.55.021.  
3 RCW 77.55.021(8) authorizes appeals relating to the issuance, denial, conditioning, or  
4 modification of an HPA permit, but it does not authorize private citizens to bring an action  
5 to require an individual to obtain an HPA permit before initiating or completing activities  
6 that allegedly require such a permit. *See also* WAC 220-660-460, -470 (establishing  
7 procedures for informal and formal appeals relating to the issuance, denial, provisioning,  
8 or modification of an HPA). Instead, only WDFW is authorized to enforce an individual's  
9 failure to obtain a required HPA permit. RCW 77.55.291 (authorizing WDFW to levy  
10 civil penalties for violating any provisions of RCW 77.55.021).

11 **b. The Hydraulic Code Contains No Implied Private Cause of Action.**

12 Washington courts have stated that private enforcement of a statute is not possible  
13 absent a citizen suit provision. *E.g. Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161  
14 P.3d 1000 (2012) (“Private enforcement of the [Consumer Protection Act] was not  
15 possible until 1971, when the legislature created the private right of action to encourage  
16 it.”) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d  
17 778, 719 P.2d 531 (1986)). In limited cases, however, courts have held a private cause of  
18 action may be implied.

19 Where the Legislature enacts a statute that grants rights to an identifiable  
20 class, there is an assumption that those rights are enforceable. *See Bennett*  
21 *v. Hardy*, 113 Wn.2d 912, 919–20, 784 P.2d 1258 (1990). In *Bennett*, 113  
22 Wn.2d at 920–21, 784 P.2d 1258, we held that in determining whether a  
23 cause of action exists, the court must consider: (1) whether the plaintiffs  
are within the class of persons for whose benefit the statute was enacted;  
(2) whether legislative intent, explicitly or implicitly, supports creating or  
denying a remedy; and (3) whether implying a remedy is consistent with  
the underlying purpose of the legislation.

24 *Wash. State Coal. for the Homeless v. Dep't of Soc. and Health Servs.*, 133 Wn.2d 894,  
25 912-13, 949 P.2d 1291 (1997).

1 The three-factor *Bennett* test is borrowed from a test developed by federal courts<sup>2</sup>  
2 and has been used in cases where, as here, the plaintiff requests injunctive relief to require  
3 compliance with a statute. *Wash. State Coal. for the Homeless*, 133 Wn.2d at 913; *Braam*  
4 *ex rel. Braam v. State*, 150 Wn.2d 689, 712, 81 P.3d 851 (2003).

5 As demonstrated in the sections that follow, consideration of the *Bennett* factors  
6 does not support a finding that the Legislature intended to create a private cause of action  
7 in the Hydraulic Code.

8 **i. The Hydraulic Code Was Not Enacted to Benefit Petitioners.**

9 The first factor asks whether the legislature intended to confer statutory rights  
10 upon the plaintiff—not simply whether the plaintiff would benefit from the statute.  
11 *California v. Sierra Club*, 451 U.S. 287, 294 (1981). There is no intent to create a private  
12 right of action where a statute proscribes certain activities but “does not unmistakably  
13 focus on any particular class of beneficiaries whose welfare” the statute is intended to  
14 further. *Id.* There are no special beneficiaries when legislation establishes a general  
15 regulatory program that is administered by an agency and benefits the public at large. *Id.*  
16 at 294-298 (holding the federal Rivers and Harbors Act does not contain an implied  
17 private cause of action). *See also Hickie v. Whitney Farms, Inc.*, 107 Wn. App. 934, 29  
18 P.3d 50 (2001) (the Solid Waste Management Act, chapter 70.95 RCW, creates no private  
19 cause of action when its purpose is to prevent land, air, and water pollution, and the duty  
20 imposed by the statute is to the public, not specific individuals).

21 The Hydraulic Code was not enacted to confer rights upon any class of  
22 beneficiaries, including Petitioners. Instead, the Hydraulic Code establishes a general

23 <sup>2</sup> The federal test has a fourth factor—whether the cause of action is one traditionally relegated to state  
24 law—that is inapplicable outside of the federal statutory context. *Bennett*, 113 Wn.2d at 920-21 n.3. Since  
25 developing the four-factor test, federal courts have shifted their focus to determining whether Congress  
intended to create a private cause of action. *Kramer v. Sec’y of Defense*, 39 F. Supp. 2d 54, 57-58 (D.D.C.  
1999).

1 regulatory program requiring HPA permits for certain activities and consistently states  
2 that it is designed exclusively to benefit fish life, not a specific class of people. RCW  
3 77.55.021 states an HPA permit shall be secured “for the protection of fish life.”  
4 “Protection of fish life is the only ground upon which approval of a permit may be denied  
5 or conditioned. Approval of a permit may not be unreasonably withheld or unreasonably  
6 conditioned.” RCW 77.55.021(7). If WDFW denies an HPA permit, it “shall provide the  
7 applicant a written statement of the specific reasons why and how the proposed project  
8 would adversely affect fish life.” RCW 77.55.021(8). WDFW may only modify an HPA  
9 permit when it can show “that changed conditions warrant the modification in order to  
10 protect fish life,” and a permittee can only obtain a modification if “such a modification  
11 will not impair fish life.” RCW 77.55.021(10), (11). *See also* RCW 77.55.231 (stating  
12 HPA permit conditions must be reasonably related to the project and ensure it “provides  
13 proper protection for fish life”); RCW 77.55.241 (“the construction of hydraulic projects  
14 may require mitigation for the protection of fish life”). WDFW’s Hydraulic Code Rules  
15 similarly state that the HPA permit program is exclusively designed to protect fish life.  
16 WAC 220-660-010 (“The purpose of the HPA is to ensure that construction or  
17 performance of work is done in a manner that protects fish life.”). “In deciding to grant or  
18 deny an HPA application, [WDFW’s] sole concern is to protect fish life.” *Nw. Steelhead  
19 and Salmon Council of Trout Unlimited v. Dep’t of Fisheries*, 78 Wn. App. 778, 787, 896  
20 P.2d 1292 (1995).

21 The Hydraulic Code, like the regulatory programs at issue in *Sierra Club*, 451 U.S.  
22 287 and *Hickle*, 107 Wn. App. 934, is not designed to specially benefit any people,  
23 including Petitioners. The Hydraulic Code contrasts sharply with other statutes that have  
24 been found to specially benefit plaintiffs and support an implied cause of action. *E.g.*  
25 *Bennett*, 113 Wn.2d at 919-21 (holding RCW 49.44.090, which prohibits certain

1 discriminatory employment actions against people between the ages of 40 and 70, created  
2 a specific right on the part of employees within this age range); *Wash. State Coal. for the*  
3 *Homeless*, 133 Wn.2d at 912-13 (holding RCW 74.13.031(1), which requires the  
4 Department of Social and Health Services to provide services to homeless children,  
5 provides special benefits for homeless children and their families); *Kim v. Lakeside Adult*  
6 *Family Home*, 185 Wn.2d 532, 374 P.3d 121 (2016) (holding vulnerable adults who are  
7 the victims of abuse or neglect are within the class of people who the Legislature intended  
8 to specially benefit in enacting a mandatory reporting statute, RCW 74.34.035).

9 Thus, the first factor of the *Bennett* test weighs against finding an implied private  
10 cause of action.

11 **ii. Legislative Intent Does Not Support a Private Cause of Action.**

12 Even when a statute is enacted to specially benefit a class of people, an implied  
13 private cause of action will not be found absent legislative intent to create such an action.  
14 *Braam ex rel. Braam*, 150 Wn.2d at 712. *See also Suter v. Artist M.*, 503 U.S. 347, 363  
15 (1992) (legislative intent to create a private cause of action is the most important inquiry,  
16 and the burden is on the plaintiff to demonstrate such intent). Courts begin, and may end,  
17 the inquiry of legislative intent to create a private cause of action based on the text and  
18 structure of the statute. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). *See also*  
19 *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 533 (1989) (“neither  
20 the language nor the structure of the [Civil Service Reform] Act shows any congressional  
21 intent to provide a private cause of action to enforce federal employees unions’ duty of  
22 fair representation”).

23 The text and structure of the Hydraulic Code undermine any claim that the  
24 Legislature intended that the Code’s prohibition against performing certain work without  
25 an HPA permit may be privately enforced by Petitioners. As discussed above, the

1 Hydraulic Code establishes distinct roles for private citizens who may be affected by  
2 activities that require HPA permits and WDFW. RCW 77.55.021(8) authorizes any  
3 private citizen with standing to appeal the issuance, denial, conditioning, or modification  
4 of an HPA permit to the Pollution Control Hearings Board (“PCHB”). The statute also  
5 authorizes informal appeals of these same permit decisions, and decisions on informal  
6 appeals are further appealable to the PCHB. *Id. See also* WAC 220-660-460, -470.

7 The Legislature specifically and exclusively granted WDFW, not private  
8 individuals, authority to enforce the Hydraulic Code requirement to obtain an HPA  
9 permit. RCW 77.55.291 authorizes WDFW to “levy civil penalties of up to one hundred  
10 dollars per day for violation of any provisions of RCW 77.55.021” and it establishes  
11 detailed procedures for imposing, appealing, and securing payment of civil penalties to  
12 enforce the HPA permit requirement. The Legislature also provided that unlawfully  
13 undertaking hydraulic project activities—defined as failing to have an HPA permit for  
14 required work or violating any requirements or conditions of an HPA permit—is  
15 penalizable as a gross misdemeanor. RCW 77.15.300.

16 “[I]t is an elemental canon of statutory construction that where a statute expressly  
17 provides a particular remedy or remedies, a court must be chary of reading others into it.”  
18 *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). Where an act  
19 contains express provisions to enforce a statutory requirement and does not include a  
20 private cause of action, “it is highly improbable that the legislature ‘absentmindedly forgot  
21 to mention an intended private action.’” *Id.* at 20 (quoting *Cannon v. Univ. of Chicago*,  
22 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). *See also Middlesex County Sewerage*  
23 *Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 15 (1981) (“In the absence of strong  
24 indicia of a contrary congressional intent, we are compelled to conclude that Congress  
25 provided precisely the remedies it considered appropriate.”).

1 Courts have held that the language or structure of a statute may indicate legislative  
2 intent to create a private cause of action. For example, in *Transamerica*, 444 U.S. at 18,  
3 the Supreme Court held the statutory language of section 215 of the Investment Advisers  
4 Act of 1940 indicated legislative intent to create a private cause of action. The Court  
5 reasoned that because the statutory language declared certain contracts void, “§ 215 by its  
6 terms necessarily contemplates that the issue of voidness under its criteria may be litigated  
7 somewhere.” *Id.* RCW 77.55.021, in contrast, contains no language that indicates or  
8 necessarily contemplates private citizens can enforce RCW 77.55.021. The statute  
9 expressly authorizes private citizens with standing to appeal certain permit decisions, and  
10 RCW 77.55.291 exclusively authorizes WDFW to enforce the requirements to obtain an  
11 HPA permit and comply with its terms and conditions.

12 Because legislative intent does not support extending a private cause of action to  
13 Petitioners, the second factor in the *Bennett* test decisively weighs against finding a  
14 private cause of action.

15 **iii. Implying a Cause of Action Is Not Consistent with the Purpose of**  
16 **the Hydraulic Code.**

17 Consideration of the first two factors discussed above is dispositive. If a statute is  
18 not intended to benefit a specific class of people but rather the public at large, is enforced  
19 through a general regulatory scheme administered by an agency, and there is no evidence  
20 that the legislature intended to provide a private remedy, “it is unnecessary to inquire  
21 further to determine whether the purpose of the statute would be advanced by the judicial  
22 implication of a private action . . . .” *Sierra Club*, 451 U.S. at 298 (citing *Touche Ross &*  
23 *Co. v. Redington*, 442 U.S. 560, 574-76 (1979)). “The ultimate question is one of  
24 congressional intent, not one of whether this Court thinks it can improve upon the  
25 statutory scheme that Congress enacted into law.” *Touche Ross*, 442 U.S. at 578. *See also*

1 *Transamerica*, 444 U.S. at 23-24 (the dispositive question is whether Congress intended  
2 to create a private cause of action); *Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433,  
3 445-46, 938 P.2d 819, 822 (1997) (no private cause of action will be implied if the second  
4 *Bennett* factor is not met, even if the first and third factors are met).

5 Even if the third factor were to be considered, however, it would not support  
6 implying a private cause of action. The purpose of RCW 77.55.021 is to ensure that  
7 construction or performance of work that requires an HPA permit is done in a manner that  
8 protects fish life. RCW 77.55.021. *See also* WAC 220-660-010. WDFW has expertise in  
9 evaluating projects that may require an HPA permit and identifying appropriate measures  
10 to protect fish life, and the Hydraulic Code appropriately relies on WDFW's expertise to  
11 achieve that objective. RCW 77.55.021; RCW 77.55.291. WDFW has a broad range of  
12 powers at its disposal to implement the purpose of the statute, including providing  
13 technical assistance, performing site visits, issuing notices of correction, imposing civil  
14 penalties, and relying on criminal penalties. RCW 77.55.291; RCW 77.15.300; WAC 220-  
15 660-480.

16 The Legislature's decision to entrust WDFW alone with enforcement of the statute  
17 and to give citizens only a limited role (appealing certain WDFW decisions on HPA  
18 permit applications) ensures WDFW's expertise is always applied in the first instance and  
19 that WDFW can utilize the enforcement tools it deems most suitable. Allowing citizens to  
20 bring enforcement actions based on their own determination of when a permit is required,  
21 thereby circumventing WDFW's ability to use its expertise and discretion, could lead to  
22 inefficiencies and divert agency resources in frustration of the legislative purpose of  
23 protecting fish life. *See Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 901-902 (2d  
24 Cir. 1981) (implying a private right of action to enforce the Federal Hazardous Substances  
25 Act and Consumer Product Safety Act could diminish the capacity of the Consumer

1 Product Safety Commission to enforce the acts in a coordinated manner); *Caceres Agency,*  
2 *Inc. v. Trans World Airways, Inc.*, 594 F.2d 932, 934 (2d Cir. 1979) (implying a private  
3 cause of action may inappropriately transfer regulatory interpretation and discretion from  
4 the agency to courts, resulting in inefficient and inconsistent outcomes); *Braam ex rel.*  
5 *Braam*, 150 Wn.2d at 712 (implying a private cause of action to enforce statutes designed  
6 to benefit foster children is inconsistent with the broad power vested in the Department of  
7 Social and Health Services to administer the statutes).

8 Because implying a cause of action authorizing Petitioners to privately enforce  
9 RCW 77.55.021 would be inconsistent with the purpose of the Hydraulic Code, the third  
10 factor in the *Bennett* test weighs against finding a private cause of action.

#### 11 IV. CONCLUSION

12 The Hydraulic Code does not expressly authorize a private cause of action to  
13 enforce its provisions. Nor can such an action be implied; indeed, all three factors in the  
14 *Bennett* test for finding a private cause of action weigh against such a conclusion. PNA  
15 therefore respectfully requests that the court issue an order granting PNA judgment on the  
16 pleadings with respect to Claim Three, which attempts to privately enforce the Hydraulic  
17 Code against PNA, and dismissing PNA from this action.

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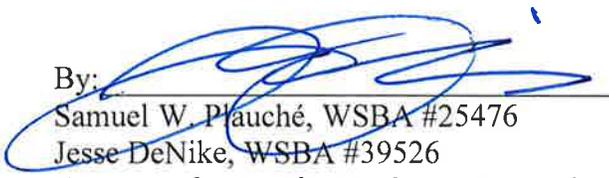
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DATED this 4<sup>th</sup> day of October, 2018.

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1 **CERTIFICATE OF SERVICE**

2 I certify that I caused a copy of the foregoing document to be served on all parties  
3 or their counsel of record on October 4, 2018, as follows:  
4

5 Claire Loeb Davis, WSBA# 39812 6 Richard A. Lintermans, WSBA# 51313 7 Lane Powell PC 8 1420 Fifth Avenue, Suite 4200 9 Seattle, WA 98111 10 <i>Attorneys for Petitioners</i>	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> By Federal Express, Priority Mail <input checked="" type="checkbox"/> By E-mail
11 Michael Mackaman Young, WSBA# 35562 12 Noelle Lea Chung, WSBA# 51377 13 Attorney General's Office 14 1125 Washington Street SE 15 Olympia, WA 98504 16 <i>Attorneys for Washington Department of Fish 17 and Wildlife</i>	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> By Federal Express, Priority Mail <input checked="" type="checkbox"/> By E-mail

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

20 EXECUTED at Seattle, Washington on October 4, 2018.

21 

22 Sarah Fauntleroy, Legal Assistant