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Judge/Calendar: Honorable Christopher Lanese

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

PROTECT ZANGLE COVE; COALITION TO )  
PROTECT PUGET SOUND HABITAT; and )  
WILD FISH CONSERVANCY, )  
  
Petitioners, )  
  
v. )  
  
WASHINGTON DEPARTMENT OF FISH )  
AND WILDLIFE; JOE STOHR, Acting )  
Director of the Washington Department of Fish )  
and Wildlife; and PACIFIC NORTHWEST )  
AQUACULTURE, LLC, )  
  
Respondents. )

No. 18-2-01972-34  
PETITIONERS' OPENING BRIEF

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1 **I. INTRODUCTION**

2 Washington’s commercial shellfish industry has rapidly expanded in recent years, and  
3 now occupies roughly 50,000 acres of the state’s tidelands. Industrial shellfish facilities are  
4 often concentrated in critical habitat areas, destroying thriving ecosystems that once featured a  
5 variety of aquatic plants, forage fish, and predators, and replacing them with intensive plantings  
6 of a single shellfish species. The techniques used by these facilities often involve significant  
7 construction projects, such as clearing and dredging tidelands; burying natural sediment in  
8 layers of gravel; installing structures such as rafts, floats, and buoys; driving stakes or rebar into  
9 the substrate to secure acres of plastic nets, bags or trays; and—in the case of geoduck  
10 facilities—sinking more than 20 tons of plastic pipe into each cultivated acre of beach.

11 Seventy-five years ago, the Washington Legislature enacted one of the state’s best tools  
12 for protecting its precious coastal waters—a statute that requires all projects undertaken in the  
13 state’s fresh or salt waters to gain prior approval to ensure the protection of fish life. *See* Chapter  
14 77.55 RCW (“Hydraulic Code”). The shellfish aquaculture industry is now a primary source of  
15 such “hydraulic projects,” threatening to cause exactly the sort of harm to aquatic habitats that  
16 the Hydraulic Code was designed to prevent. But the Washington Department of Fish and  
17 Wildlife (“WDFW”) has refused to enforce the Hydraulic Code against shellfish aquaculture  
18 facilities, categorically exempting the entire industry. Although WDFW insists this exemption  
19 is statutorily required, the Legislature has never passed such an exemption.

20 Petitioners Protect Zangle Cove, Coalition to Protect Puget Sound Habitat, and Wild  
21 Fish Conservancy ask the Court to find that WDFW’s rule exempting the commercial shellfish  
22 industry from the Hydraulic Code exceeds its statutory authority; declare that WDFW’s practice  
23 of providing this exemption is unlawful; and require that the shellfish facility planned for  
24 Zangle Cove obtain a permit under the Hydraulic Code before proceeding with construction.

25 **II. FACTUAL BACKGROUND**

26 **A. Washington’s Commercial Shellfish Aquaculture Industry**

27 Shellfish have been commercially cultivated in Washington for more than 150 years,

1 but in recent years, commercial aquaculture operations have become industrialized and  
2 expanded rapidly. According to the U.S. Fish and Wildlife Service, active and fallow  
3 commercial shellfish aquaculture facilities occupied about 50,000 shoreline acres in the state  
4 by October 2015. Ex. A at 4.<sup>1</sup> A significant part of this expansion results from the commercial  
5 cultivation of geoduck clams. Ex. C at 98. Commercial aquaculture facilities disrupt critical  
6 nurseries, feeding grounds, shelters, and migratory corridors for numerous aquatic species. Ex.  
7 B at 1-32-1-37, 1-47-1-49. For example, the U.S. Army Corps of Engineers indicates there is  
8 “substantial overlap” between shellfish aquaculture and spawning areas for forage fish,  
9 including Pacific herring, surf smelt and Pacific sand lance, and that 66% of active shellfish  
10 aquaculture acreage overlaps with eelgrass. Ex. C at 86, 94-95. WDFW has designated these  
11 spawning beds and concentrations of eelgrass as “saltwater habitats of special concern,” which  
12 trigger additional protections under the Hydraulic Code. WAC 220-660-320(1) & (3). In decline  
13 statewide, eelgrass provides invaluable fish habitat and is a prime indicator of ecosystem health.  
14 Ex. B at 1-38, 1-48-1-49; Ex. C at 86. Forage fish are a critical food source for several  
15 endangered species, including Chinook salmon,<sup>2</sup> steelhead, and marbled murrelet. Ex. C at 86.

16 Commercial shellfish operators typically first clear tidelands of native plants and  
17 animals, often using heavy machinery, and historically use insecticides such as carbaryl to kill  
18 burrowing shrimp, and herbicides such as glyphosate and imazapyr to kill *Spartina* and eelgrass.  
19 Ex. B at 3-18; Ex. C at 17; Ex. D at 81. Operators then use a variety of processes to plant,  
20 protect, and harvest their shellfish, most of which involving extensive alteration to the tidelands.

21 **Geoduck** operators typically insert six-inch diameter polyvinyl chloride (“PVC”) tubes,  
22 approximately nine inches long, into the beach, leaving a few inches of tube protruding above

23 \_\_\_\_\_  
24 <sup>1</sup> All exhibits are attached to the concurrently filed Declaration of Claire Loebs Davis. The facts in this section are  
25 provided for factual context only, and are based on documents in the record, as well as documents from state and  
federal agencies that are subject to judicial notice. *See* concurrently filed Request for Judicial Notice and Motion  
to Supplement the Record (“Motion to Supplement”).

26 <sup>2</sup> Chinook salmon are the preferred and almost exclusive prey for Puget Sound’s critically endangered Southern  
27 Resident Killer Whales, which are in danger of extinction, largely because Chinook salmon populations are at a  
fraction of historic levels. *See* Draft Report and Potential Recommendations, Southern Resident Orca Task Force,  
at 3 (2018), available at [https://www.governor.wa.gov/sites/default/files/SRKWDraftReport\\_09-24-18.pdf](https://www.governor.wa.gov/sites/default/files/SRKWDraftReport_09-24-18.pdf).



1 the surface. Ex. C at 30-31. Typically, approximately 42,000 PVC tube sections will be placed  
2 *per acre (id.)*, which equates to approximately 7 miles of PVC tubes weighing 23 tons. The  
3 operator plants 2 to 4 juvenile geoduck seeds into each tube, or up to 168,000 geoducks per  
4 acre, and covers them all in plastic netting to protect them from native wildlife. *Id.* at 30-32.  
5 About 5 to 7 years after planting, operators harvest the geoducks with pressured water that  
6 loosens them from the substrate—and in the process liquefies the beach to a depth of 2 to 3 feet.  
7 *Id.* at 33; Ex. A at 145.

8 **Oyster** operations often use rafts or floats as work platforms, anchored to the substrate.  
9 Ex. C at 15. Oyster seed and larvae may be: placed in plastic bags, trays or cages, or on vertical  
10 ropes or wires attached to heavy lines suspended by floats or buoys (*id.* at 16); attached to long  
11 plastic or nylon lines secured to metal stakes or PVC pipe driven into the tideland (*id.* at 19);  
12 put in plastic net bags placed directly on the tideland or attached to wood or metal racks driven  
13 into the substrate (*id.* at 22); or planted directly on the tideland, where they must be periodically  
14 harrowed to pull them out of the mud (*id.* at 17). Harvesting methods vary, but may include  
15 mechanical or ‘dredge’ harvesting. *Id.* at 17-18.

16 **Clams** may be planted directly on the tidelands, often after the substrate is covered with  
17 several layers of gravel. *Id.* at 24-25. Alternatively, clams can be grown in mesh bags anchored  
18 to the beach or trays stacked six or seven feet high in the intertidal zone, both of which are often  
19 secured by rebar driven into the substrate. *Id.* at 24, 29. The harvesting of clams may excavate  
20 the intertidal zone to a depth of 4 to 6 inches. *Id.* at 26. **Mussels** may be grown in racks or bags  
21 (*id.* at 14), but are often suspended from numerous rafts (*id.* at 11). Once mussel seed reaches  
22 a certain size, it is sluiced into plastic net tubes, weighted with concrete, and attached to a raft  
23 or longline. *Id.* at 12. Plastic nets are typically hung around the perimeter. *Id.* at 13-14.

24 **B. Adverse Impacts of Commercial Shellfish Aquaculture**

25 Industrial shellfish aquaculture threatens aquatic ecosystems and fish in myriad ways.  
26 Ex. C at 83-89; Ex. E at 4-12, 4-14, 4-15, 4-17, 4-21. It replace native species with a  
27 monoculture that dominates the ecosystem, and consumes massive amounts of phytoplankton,

1 a critical source of food. Ex. C at 83-84; Ex. E at 4-12, 4-17, 4-21. The use of heavy equipment,  
2 installation of structures such as rafts, application of herbicides and pesticides, extensive  
3 reliance on plastic netting, bags and tubes, disturbance of the substrate, and release of sediments  
4 can dramatically alter ecosystems, degrade habitat and eliminate food sources for native  
5 species. Ex. B at 4-64-4-67; Ex. C at 83-89, 104-121; Ex. E at 4-12-4-15. Structures and gear  
6 frequently break free and float away during storms, and ropes and plastics shed nylon fibers  
7 and releases microplastics into the water. Ex. A at 125-129; Ex. C at 84, 88-89, 104, 107, 110,  
8 113, 115. The effects of these contaminants compound further up the food chain, threatening  
9 apex predators such as Southern Resident Killer Whales. Ex. A at 128-129; Ex. C at 83-89.

### 10 **C. Geoduck Facility in Zangle Cove**

11 Zangle Cove is a nearly pristine estuary located at the north end of Boston Harbor in  
12 Thurston County. Ex. F at 4. It is a critical habitat for endangered Puget Sound Chinook salmon  
13 and steelhead. *See* 50 C.F.R. § 226.212 (Mar. 25, 2016). Both species are known to be present  
14 in the area, along with a variety of other endangered species, including Southern Resident Killer  
15 Whales. Ex. F at 11. Pacific Northwest Aquaculture, LLC (“PNA”) is partnering with Taylor  
16 Shellfish Company, Inc. (“Taylor Shellfish”) to construct a commercial geoduck facility in  
17 Zangle Cove. *See* Taylor Shellfish’s Motion to Intervene at 2; Ex. F at 5. Its proposed planting,  
18 maintenance, and harvesting techniques are consistent with the common industry practices  
19 described above. *Id.* at 7-8. Specifically, on its 47,900-square foot intertidal plot, PNA plans to  
20 insert approximately 47,900 PVC-tube sections, or about one per square foot, and plant about  
21 152,000 geoducks. *Id.* at 5, 9 PNA began construction in early September—roughly five months  
22 after this action was filed—with the installation of roughly 1,800 to 2,000 PVC tubes covered  
23 by mesh netting. *See* Declaration of Patrick Townsend ¶12 & attached Exs. 1-4. PNA intends  
24 to continue the operation in perpetuity on a 5 to 6 year plant/harvest cycle. Ex. F at 6, 9.

## 25 **III. LEGAL BACKGROUND**

### 26 **A. Washington’s Hydraulic Code**

27 In 1943, the Washington Legislature passed the first version of the Hydraulic Code,

1 requiring a permit for every project that would “use, divert, obstruct or change” state waters.  
2 Ex. H at 1. The current version of the code defines “hydraulic project” as “the construction or  
3 performance of work that will use, divert, obstruct, or change the natural flow or bed of any of  
4 the salt or freshwaters of the state.” RCW 77.55.011(11). The purpose of the code is to “ensure  
5 that construction or performance of work is done in a manner that protects fish life.” WAC 220-  
6 660-010. Absent an exemption, all hydraulic projects must secure a Hydraulic Project Approval  
7 (“HPA”) permit from WDFW, designed to ensure the “adequacy of the means proposed for the  
8 protection of fish life.” RCW 77.55.021. Examples of projects that require an HPA permit are  
9 the installation of docks, piers, floats, buoys, boat ramps and launches; dredging and sand or  
10 gravel removal; most aquatic plant removal or control; and mineral prospecting.<sup>3</sup>

11 According to WDFW, HPA permits will be issued if the project adequately protects fish  
12 life, which means it must result in “no net loss” of fish. WAC 220-660-080(3)(c). An HPA  
13 permit may require mitigation measures (WAC 220-660-080), or be granted with restrictions,  
14 such as limiting activity to certain “timing windows” during the year to minimize the impact  
15 on fish (WAC 220-660-330); preventing the removal of plants and other habitat features (WAC  
16 220-660-290, -360(4)(b)-(c)); imposing limitations on the construction of docks, floats and  
17 buoys (WAC 220-660-380); and regulating the use of equipment, materials, and potential  
18 contaminants (WAC 220-660-360(7)&(8)). Additional restrictions may be imposed for  
19 “saltwater habitats of special concern,” including eelgrass beds and forage fish spawning areas,  
20 which “provide essential functions in the developmental life history of fish life.” WAC 220-  
21 660-320(2)(b) & (3). The Hydraulic Code does not exempt any people or industries, but does  
22 exempt specific activities, such as driving across a ford (RCW 77.55.031), removing derelict  
23 fishing gear (RCW 77.55.041) and pulling certain invasive plants (RCW 77.55.051).

## 24 **B. 1985 Aquatic Farming Act**

25 In 1985, the Legislature enacted the Aquatic Farming Act (the “Act”) to “encourage the

26 \_\_\_\_\_  
27 <sup>3</sup> See WDFW, *Hydraulic Project Approval (HPA) – For Projects in or Near Water*, available at  
[https://wdfw.wa.gov/licensing/hpa/hpa\\_tri-fold\\_final\\_9-1.pdf](https://wdfw.wa.gov/licensing/hpa/hpa_tri-fold_final_9-1.pdf).

1 development and expansion of aquaculture.” Ex. I at 1; Ex. J at §1 (now RCW 15.85.010). The  
2 Act directed that “aquaculture activities” should have the “same status as other agricultural  
3 activities” and that for legal purposes, “aquaculture should be considered a branch of the  
4 agricultural industry.” Ex. J at §1. Accordingly, the Act designated the Department of  
5 Agriculture as “the principal state agency” for providing industry support. *Id.* at §3 (now RCW  
6 15.85.030). The Act required the Department of Fisheries (a WDFW predecessor agency) to  
7 work with the Department of Agriculture in developing programs to control fish disease. *Id.* at  
8 §§8-10 (now RCW 77.115.010, .030; §9 was repealed in 2000). Meanwhile, it removed  
9 WDFW’s authority to regulate farmed fish under the same scheme used to regulate fishing. *Id.*  
10 at §§17-18, 20-25 (now RCW 77.12.047, .570, .590, .600 and RCW 77.65.010, .280, .490).

11 Nothing in the Act explicitly exempts commercial aquaculture from otherwise  
12 applicable environmental regulations, including the Hydraulic Code. *See generally* Ex. J. Nor  
13 does it appear that either the Department of Fisheries, or its successor, WDFW,  
14 contemporaneously understood the Act to implicitly create such an exemption. To the contrary,  
15 WDFW assumed it had the authority to regulate commercial aquaculture for many years after  
16 the Act. *See* Ex. P (WDFW notifying aquatic farmer in 2000 that HPA permit was required for  
17 repairs to existing net pen). Indeed, 14 years after the Act, WDFW organized an outside  
18 committee, including aquatic farmers, to help develop rules for aquaculture under the Hydraulic  
19 Code. Ex. L at 1. Only after six months of meetings did WDFW management decide to suspend  
20 the work of the committee to reconsider its “authority to adopt such rules.” Ex. M at 1.

### 21 **C. Application of Aquatic Farming Act to Exempt Aquaculture from HPA Permits**

22 In 2006, State Representative Patricia Lantz (D-Gig Harbor) asked Washington  
23 Attorney General Rob McKenna for his opinion on whether WDFW should be requiring  
24 commercial geoduck farmers to obtain HPA permits. Ex. K. Her inquiry focused on the import  
25 of two provisions of the Act: Section 8 (now codified as RCW 77.115.010) and Section 17(3)  
26 (now codified as RCW 77.12.047(3)). *Id.* at 3-5. Specifically, Rep. Lantz asked whether those  
27 provisions created an “implied exemption” to the Hydraulic Code for commercial geoduck

1 aquaculture. Ex. K at 3. She contended that they did not. *See generally id.* at 2-5.

2 Attorney General McKenna responded in a 2007 letter opinion. AR 949-52 (“AG  
3 Opinion”). The AG Opinion conceded geoduck operators would have to obtain HPA permits  
4 absent an exemption, and acknowledged aquaculture was not among the express exemptions in  
5 the Hydraulic Code. AR 951-52. Nevertheless, it read RCW 77.115.010(2) and 77.12.047(3) as  
6 providing implied exceptions, and opined that as a result, WDFW may not require HPA permits  
7 for aquaculture facilities. AR 951-52. However, the AG Opinion indicated WDFW *should*  
8 require an HPA permit for a “boat ramp, dock, or other construction work at an aquatic farm,”  
9 because that “regulates construction; it does not regulate aquaculture products.” AR 957 n.4.

10 By 2011, WDFW’s general practice seems to have been to exempt commercial  
11 aquaculture from HPA permitting. However, it remained confused about the extent of this  
12 exemption, and in particular did not understand the distinction raised in footnote 4 of the AG  
13 Opinion. *See* Ex. N at 1-2 (in a July 2011 email, WDFW regulatory coordinator Pat Chapman  
14 observes that the “logic of footnote #4 in the AG opinion escapes me,” but that if WDFW  
15 attempts to pull back on the broad aquaculture exemption, WDFW is “certain to get pushback  
16 from the aquaculture industry, just as we did when we proposed just such rules a number of  
17 years ago”).<sup>4</sup> Perhaps as a result of its confusion, WDFW did not “consistently exercise[]” any  
18 authority of aquaculture permits. Ex. O at 1 (2012 email from protection division manager for  
19 WDFW’s habitat program); *see* Ex. N at 1 (assistant director of WDFW’s habitat program  
20 noting “regular complaints about us being [in]consistent,” and indicating “the issue needs to be  
21 settled in the upcoming rulemaking”).

22 WDFW issued a preproposal statement of inquiry for possible rulemaking related to the  
23 Hydraulic Code on July 18, 2011 (AR 1), a notice of proposed rulemaking on July 2, 2014 (AR  
24 2), and final rules on July 1, 2015 (AR 173). Among the new rules was WAC 220-660-040(2)(1),  
25 which exempts “[i]nstallation or maintenance of tideland and floating private sector commercial  
26 \_\_\_\_\_

27 <sup>4</sup> Chapman is the same staff member who convened an outside committee to develop hydraulic rules for  
aquaculture in 1999, only to have the project halted in 2000 after six months. Ex. L-M, discussed *supra* part III.B.

1 fish and shellfish culture facilities” from HPA permitting, but requires an HPA for “accessory  
2 hydraulic structures, such as bulkheads or boat ramps.” WDFW provided no scientific or policy  
3 basis for the exception (*see* Concise Explanatory Statement, AR 345-460), and the change was  
4 not evaluated its Environmental Impact Statement (AR 461-948). Instead, WDFW included the  
5 AG Opinion in the rulemaking file (AR 949-58) and referenced RCW 7.12.047 as the basis for  
6 the exemption (AR 102, 103). In response to comments that questioned the exemption, WDFW  
7 responded that it was mandated by RCW 77.12.047(3).<sup>5</sup> AR 390; *see also* AR 964, 968, 986-  
8 87 (comments indicating AG Opinion was erroneous, and asking WDFW to have it revisited).

#### 9 **D. Procedural History of Current Dispute**

10 PNA submitted an HPA permit application (ID #2529) for its proposed geoduck  
11 operation on December 30, 2014. Ex. G. WAC 220-660-040(2)(l) became effective on July 1,  
12 2015. AR 173. WDFW closed PNA’s HPA application for inactivity on July 18, 2016.<sup>6</sup>  
13 Petitioners filed the instant petition on April 12, 2018. The Court granted Taylor Shellfish’s  
14 motion to intervention on June 20, 2018. On October 4, 2018, PNA moved for judgment on the  
15 pleadings on Petitioners’ claim seeking an injunction against PNA, noting a hearing for  
16 November 9, 2018. A final hearing on the petition is set for December 7, 2018.

#### 17 **IV. ARGUMENT**

18 All three counts in the petition revolve around one issue: Does WDFW have the  
19 authority to exempt commercial shellfish aquaculture from HPA permitting? The Hydraulic  
20 Code says no. In the absence of a statutory exemption, WDFW must require HPA permits for  
21 all hydraulic construction. RCW 77.55.011(11). And the Legislature has never passed any such  
22 statutory exemption. Nevertheless, WDFW cites to a vague statutory provision from the  
23

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24 <sup>5</sup> However, WDFW seemed to still be conflicted about what the law required even as it was developing the rule.  
25 In 2010, Coast Seafoods applied for an HPA to replace a floating dock. Ex. Q at 1-4. An internal draft of WDFW’s  
26 2011 response shows its struggle whether to say just that it “does not currently require an HPA for infrastructure  
27 projects associated with aquaculture,” or that it “*can* require an HPA for infrastructure projects associated with  
aquaculture [but] currently does not[.]” Ex. R at 1 (emphasis added).

<sup>6</sup> *See* WDFW’s Aquatic Protection Permitting System Permit application ID 2529, *available at*  
[https://www.govonlinesaas.com/WA/WDFW/Public/Client/WA\\_WDFW/Public/Pages/SubReviewList.aspx](https://www.govonlinesaas.com/WA/WDFW/Public/Client/WA_WDFW/Public/Pages/SubReviewList.aspx).

1 Aquatic Farming Act, RCW 77.12.047(3), claiming that this subsection not only allows, *but*  
2 *requires* it to exempt commercial aquaculture from HPA permitting. AR 390.

3 This is simply wrong. By its plain meaning, the Aquatic Farming Act has no impact on  
4 WDFW's authority and duties under the Hydraulic Code, either express or implied. But even if  
5 the Court finds that Act to be ambiguous, the consideration of its legislative history and the  
6 fundamental canons of statutory construction confirm that the Legislature did not intend to  
7 implicitly create such an exemption. As a result, WDFW exceeded its statutory authority by  
8 creating such an exemption in WAC 220-660-040(2)(1); WDFW's policy of exempting  
9 commercial aquaculture from HPA permit requirements is unlawful; and PNA should not be  
10 able to construct an aquaculture facility at Zangle Cove without a permit.

11 **A. HPA Permits are Required for Commercial Shellfish Aquaculture**

12 *1. Commercial Aquaculture is Clearly a "Project" Regulated by the Hydraulic Code*

13 In the absence of an exemption, the Hydraulic Code clearly applies to commercial  
14 shellfish aquaculture. The AG Opinion conceded that "inserting tubes and netting on the  
15 tidelands for geoduck aquaculture would be a hydraulic project [otherwise subject to an HPA  
16 permit]." AR 951; *see also* Ex. T at 19 (holding by Thurston County Hearing Examiner that  
17 geoduck operations involve "construction of a structure"). Indeed, it would be hard to dispute  
18 that most shellfish facilities at least "use" the beds of the state's salt waters. *See* RCW  
19 77.55.011(11). In addition, WDFW's own rules confirm the Hydraulic Code regulates many  
20 industry practices: for example, the removal of beneficial aquatic plants, sometimes with  
21 machinery, to clear aquaculture beds (WAC 220-660-290 (7)); the dredging frequently used to  
22 harvest shellfish (WAC 220-660-410); the use of docks, floats, and buoys to suspend shellfish  
23 (WAC 220-660-380); and the use of structures to house shellfish that alter the saltwater bottom,  
24 such as PVC pipes to grow geoducks (WAC 220-660-420). *See* discussion *supra* part III.A.

25 *2. The Plain Language of the Statutory Scheme Makes Clear Commercial Shellfish*  
26 *Aquaculture is not Exempt from the HPA Permit Requirement*

27 Petitioners contend that language of the statutes in question is clear, in which case the

1 Court need go no further in its analysis. “[I]f the statute’s meaning is plain on its face, then the  
2 court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of*  
3 *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). A statute is  
4 ambiguous if it can “reasonably be interpreted in two or more ways,” but not “simply because  
5 different interpretations are conceivable.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v.*  
6 *Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239-40, 59 P.3d 655 (2002).

7 A statute’s plain meaning must be ascertained “by construing that statute along with all  
8 related statutes as a unified whole and with an eye toward finding a harmonious statutory  
9 scheme.” *State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). Accordingly, an analysis  
10 of RCW 77.115.010(2) and RCW 77.12.047(3) must include not only those statutes in their  
11 entirety, but context of those statutes within the framework created by both the Aquatic Farming  
12 Act and the Hydraulic Code. *Campbell & Gwinn*, 146 Wn.2d at 10.

13 a. The Hydraulic Code is Not Ambiguous

14 This case could begin and end with a plain reading of the Hydraulic Code. As discussed  
15 above, commercial shellfish aquaculture is a “hydraulic project.” All hydraulic projects must  
16 have an HPA permit unless exempted. RCW 77.55.021. There is no exemption within the  
17 Hydraulic Code for commercial aquaculture. By a plain reading of the Hydraulic Code,  
18 therefore, commercial shellfish aquaculture facilities are required to obtain HPA permits.

19 b. The Aquatic Farming Act is not Ambiguous

20 A reasoned reading of the Aquatic Farming Act also does not indicate that commercial  
21 shellfish aquaculture is exempt from the Hydraulic Code. Nowhere in the Act is there any  
22 mention of such an exemption. *See generally* Ex. J. In fact, the only reference to the Hydraulic  
23 Code confirms that it is applicable to aquaculture facilities. According to section 19 of the Act,  
24 a “mechanical harvester license is required to operate a mechanical or hydraulic device for  
25 commercially harvesting clams...unless the requirements of RCW 75.20.100 are fulfilled for  
26 the proposed activity.” Ex. J §19 (RCW 75.20.100 was the permit provision of the Hydraulic  
27 Code, eventually recodified as RCW 77.55.021), If the Act exempted commercial aquaculture



1 from the Hydraulic Code, then it would no longer apply to commercial clam operations, so such  
2 facilities would be *unable* to fulfill the requirements of Section 19 by obtaining an HPA permit  
3 for hydraulic devices. If the Court were to imply such an exemption, therefore, the effect would  
4 be to render Section 19 meaningless. Such an effect is contrary to the basic principles of  
5 statutory interpretation, which require the Court to “harmonize” all provisions of a statute  
6 *Segura v. Cabrera*, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015).

7 In order to remove unnecessary and duplicative regulation, the Act consolidated  
8 licensing authority for aquaculture products, and removed WDFW’s authority to regulate  
9 aquaculture products under the licensing scheme for wild game and fish. The Act made these  
10 changes through a long list of *express* exemptions for commercial aquaculture, duly  
11 incorporated in each of the relevant chapters of the code. Ex. J at §§17-18, 20-25. For example,  
12 Section 18 removed aquaculture facilities from the licensing otherwise required for commercial  
13 fishing, and inserted a proviso that “[n]o license or permit is required for the production or  
14 harvesting of private sector cultured aquatic products.” *Id.* at §18(3) (now RCW 77.65.010(4)).  
15 Similarly, Section 20 expressly exempted aquatic farmers from requirements for wholesale fish  
16 dealer’s licenses (Ex. J §20(4), now RCW 77.65.280(2)(a)); Section 21 specifically removed  
17 aquatic products from the definition of “game fish” (Ex. J §21(2), now RCW 77.08.280(2));  
18 Sections 22, 23, and 24 expressly exempted aquaculture facilities from the licenses required for  
19 game farms (Ex. J §22-24, now RCW 77.12.570, .590 and .600); and Section 25 expressly  
20 exempted aquatic farmers from obtaining fishing licenses (Ex. J §25(3), now RCW 77.65.490).

21 The Act provided for no such express exemption removing aquaculture from the  
22 authority of the Hydraulic Code. If the Legislature wanted to provide such an exemption, it  
23 clearly knew how. Because an exemption from the HPA permit requirement is not included in  
24 the Act’s lengthy list of statutory exemptions, the plain meaning of the statute is that there *is no*  
25 *such exemption*. See *In re Custody of S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986).

26 *3. The Aquatic Farming Act Does Not Create an Implied Exemption*

27 The AG Opinion reads an implied exemption into two provisions of the Aquatic

1 Farming Act that neither mention the Hydraulic Code nor provide for such an exemption.  
2 Especially within the full context of the Act, such a reading is not a reasonable interpretation,  
3 and thus does not render the Act ambiguous. *See Fraternal Order*, 148 Wn.2d at 239.

4 a. RCW 77.115.010 Does Not Exempt Shellfish Aquaculture from HPA Permitting

5 Section 8 of the Act, codified at RCW 77.115.010, authorizes a joint “disease inspection  
6 and control” program between the Department of Agriculture and the Department of Fisheries  
7 to “protect the aquaculture industry and wildstock fisheries[.]” Ex. J at §8(1); RCW  
8 77.115.010(1). The section considers the impact of potential disease only—no mention is made  
9 of aquaculture’s other potential harmful effects to wild fish that the Hydraulic Code might  
10 prevent, such as the destruction of habitat, removal of food sources, and release of pollutants.

11 Section 8 further provides:

12 “The **director of fisheries** shall adopt rules implementing this section. However,  
13 such rules shall have the prior approval of the director of agriculture and shall  
14 provide therein that the director of agriculture has provided such approval. The  
15 director of agriculture or the director’s designee shall attend the rule-making  
16 hearings conducted under chapter 34.04 RCW and shall assist in conducting  
17 those hearings. The authorities granted the department of fisheries by these rules  
and by [current RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210,  
77.115.030, and 77.115.040] **constitute the only authorities of the  
department of fisheries to regulate private sector cultured aquatic products  
and aquatic farmers as defined in section 2 of this act.**”

18 Ex. J at §8(2) (now RCW 77.115.010(2)) (emphasis added). The AG Opinion posited that to  
19 give meaning to the Legislature’s use of the term “only” in this subsection, it had to find that  
20 “only” reflected “a legislative intent to limit WDFW authority to regulate private sector cultured  
21 aquatic products.” AR 952. The AG Opinion then makes the further leap that such an intent  
22 must be read to imply a limit on WDFW’s authority to enforce the Hydraulic Code against  
23 commercial aquaculture. *Id.* This leap is unjustified for several reasons.

24 As an initial matter, the AG Opinion did not even consider the context of the Hydraulic  
25 Code as it existed at the time of the Aquatic Farming Act. *See* Ex. U (RCW 75.20.100 (1983)).  
26 At that time, the Department of Fisheries did not have sole authority over the Hydraulic Code.  
27 Rather, HPA applications were directed toward “the department having jurisdiction of the site,”

1 and the applicable departments were to “mutually agree on which one department shall  
2 administer the provisions of this section.” *Id.* Prior to a 1983 amendment, HPA applications  
3 were to be approved by both the “director of fisheries and the director of game.” Ex. V §75.  
4 The 1983 legislative history indicates the intent of the new language was to change approval  
5 procedures so the “workload is divided between the Fisheries and Game Departments.” Ex. W  
6 at 94 (Final Legislative Report on S.H.B. 278). Although the two departments were later  
7 consolidated into WDFW (*see* Ex. X §30)), in 1985 the Departments of Fisheries and Game  
8 were still separate. But Section 8 of the Act implicated *only the authority of the Department of*  
9 *Fisheries*. Ex. J at §8(2). It is not a reasonable to assume the Legislature meant to create an  
10 implied exemption from the requirements of the Hydraulic Code by limiting the authority of  
11 *only one of the two departments that had jurisdiction to enforce that code*. Indeed, such an  
12 interpretation would lead to the absurd result that while the *Department of Fisheries* would not  
13 have authority to enforce the Hydraulic Code against commercial aquaculture, the *Department*  
14 *of Game* would. In determining the meaning of a statute, courts should “avoid a reading that  
15 produces absurd results because we presume that the legislature did not intend absurd results.”  
16 *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 464, 219 P.3d 686 (2009).

17 The far more reasonable interpretation is that limitation of authority in Section 8(2) of  
18 the Act was confined to the “rules implementing this section,” all of which relate to disease  
19 control for aquatic products. RCW 77.115.010(1). Indeed, it would make no sense to bury an  
20 exemption to a hydraulic construction requirement within a statute that the AG Opinion  
21 concedes addresses the agency’s “disease inspection powers.” AR 951. This is especially true  
22 when the Court considers, as it must, the full context of the Act, the rest of which carefully  
23 places each of its exemptions and qualifications within the statute that contains the regulation  
24 in question. *See, generally*, Ex. J at §§16-25 (currently codified as RCW 77.12.047, .570, .590,  
25 .600 and RCW 77.65.010, .280, .490). Given the structure of the Act, it is unreasonable to  
26 conclude that the Legislature meant to sneak a broad exemption to an environmental protection  
27 regulation into a statute explicitly related to disease control of fish.

1           Moreover, the limitation on the Department of Fisheries explicitly applies only to the  
2 regulation of “aquatic products” and “aquatic farmers,” as defined in Section 2:

- 3           • “aquatic products” are “**marine . . . plants and animals** that are propagated, farmed, or  
4 cultivated on aquatic farms under the supervision and management of a private sector  
5 aquatic farmer,” including various species of sea plants, shellfish, and fin fish.
- 6           • an “aquatic farmer” is a “**private sector person** who commercially farms and manages  
7 the cultivating of private sector cultured aquatic products[.]”

8 Ex. J §2 (RCW 15.85.020) (emphasis added). The Act also defines ““aquaculture” as “**the**  
9 **process of growing, farming, or cultivating** private sector cultured aquatic products[.]” *Id.*  
10 (emphasis added). It is significant that the restriction of authority in Section 8(2) applies *only*  
11 to “aquatic products” (plants and animals) and “aquatic farmers” (people), and not to  
12 “aquaculture” (*the process of growing aquatic products*). By its plain terms, the Hydraulic Code  
13 regulates *only* a particular process, i.e. “the construction or performance of work,” and *not*  
14 plants, animals, or people. RCW 77.55.011(11). As a result, the restriction of authority in  
15 Section 8(2) of the Act is clearly not intended to apply to the Hydraulic Code.

16           The AG Opinion recognizes that this provision could not literally mean that all “aquatic  
17 farmers” were outside the bounds of the jurisdiction of the Department of Fisheries, regardless  
18 of their activities, and tries to reconcile this language by concluding that the Legislature only  
19 meant to limit regulations that applied to both “aquatic farmers” *and* their “aquatic products.”  
20 AR 952. This is reasonable. What is *not* reasonable is the AG Opinion’s subsequent conclusion  
21 that the use of the Hydraulic Code to regulate geoduck planting and harvesting would be a  
22 regulation of “aquatic products.” AR 952. The Hydraulic Code has nothing to say about  
23 “aquatic products.” It would not regulate the type of shellfish used on an aquatic farm, or how  
24 that shellfish is transported, labelled, or sold. Rather, it would regulate only the *process* by  
25 which the shellfish was cultivated, such as the insertion of PVC tubes into tidal beds for  
26 geoducks, the use of floating rafts for oysters, or the excavation of tidal beds for clams.

27           The distinction that the AG’s Opinion tries to make in footnote 4 is therefore  
nonsensical. AR 957 n.4 (indicating that a HPA permit would be required for “the construction  
of a boat ramp, dock or other construction work at an aquatic farm . . . because the permit

1 regulates construction; it does not regulate aquaculture products.”). Because the *entire*  
2 Hydraulic Code *is about the regulation of construction* and other *processes* in hydraulic zones,  
3 *not the regulation of products*, there is no principled distinction allowing WDFW to require an  
4 HPA permit for a float used at a clam farm, but not for the insertion of rebar into the tidal  
5 substrate to secure clam trays at the same farm. *See id.* By its own reasoning, therefore, the AG  
6 Opinion concedes that the limitations of Section 9(2) do not apply to the Hydraulic Code.

7 b. RCW 77.12.047(3) Does Not Exempt Shellfish Aquaculture from HPA Permitting

8 The plain meaning of Section 17 of the Act, codified at RCW 77.12.047, also does not  
9 support an implied HPA permit exemption. RCW 77.12.047 outlines a subset of the authority  
10 of the Fish and Wildlife Commission’s authority to “adopt, amend, [and] repeal rules,” related  
11 to the regulation of fishing and the classification of fish. The Act adds the following language:  
12 “this section does not apply to private sector cultured aquatic products.” Ex. J §17(3); RCW  
13 77.12.047(3). Although WDFW did not cite to this section in support of the exemption in WAC  
14 220-660-040(2)(1), the AG Opinion asserted that “if an HPA permit were used to regulate  
15 geoduck planting and harvesting, it would sidestep this express limit on the use of WDFW rules,  
16 confounding express legislative intent.” AR 952. This conclusion is incorrect.

17 First, like the restriction RCW 77.115.010, this provision exempts only “aquatic  
18 products” from regulation, not “aquaculture,” *the processes* that would be regulated under the  
19 Hydraulic Code. But even more fundamentally, this proviso explicitly applies only to the  
20 rulemaking authority articulated in “this section,” i.e., RCW 77.12.047, which describes only a  
21 small subset the Commission’s authority. *See* RCW 77.04.055 (generally describing the  
22 Commission’s duties, and referencing RCW 77.12.047 in one of seven subsections). RCW Title  
23 77 provides the full sweep of WDFW’s duties and authority, including WDFW’s responsibility  
24 to issue HPA permits under RCW 77.55.021. By its plain language, RCW 77.12.047(3)  
25 unambiguously applies only to the Commission’s rulemaking authority over the topics  
26 articulated in that section. To use this exception to imply a broad exemption to responsibilities  
27 granted in a different section of the code goes far beyond the language of the Act.

1 c. The Aquatic Farming Act as a Whole is Incompatible with an HPA Exception

2 Finally, the statements of purpose within the Aquatic Farming Act are incompatible  
3 with an implied exemption removing an entire industry from a key state environmental  
4 regulation. It is appropriate for a court to consider such statements when determining the plain  
5 meaning of a statute. *Campbell & Gwinn*, 146 Wn.2d at 11. Indeed, if “statutory language is  
6 susceptible of two constructions—one of which will promote the purpose of the statute and the  
7 second of which will defeat it—courts will adopt the former.” *State v. Wiggins*, 114 Wn. App.  
8 478, 482, 57 P.3d 1199 (2002) (internal citation omitted).

9 The Aquatic Farming Act recognized the developing aquaculture industry, and indicated  
10 its purpose was to give aquaculture “the same status as other agricultural activities, programs,  
11 and development within the state” and that aquaculture should be “considered a branch of the  
12 agricultural industry of the state for purposes of any laws that apply to. . . the agriculture  
13 industry.” Ex. J §1 (codified at RCW 15.85.010). But the agriculture industry is not exempt  
14 from the Hydraulic Code. To the contrary, 14% of all of the HPA permits issued between 2008  
15 and 2012 were for agricultural. AR 166. Indeed, the HPA code contains longstanding provisions  
16 unique to agriculture.<sup>7</sup> As a result, implying an exemption from HPA requirements for shellfish  
17 aquaculture would defeat the stated purpose of the Act to treat aquaculture similarly to  
18 agriculture and subject it to the same laws. To the contrary, such an exemption elevates  
19 aquaculture to a unique status as the *only state industry* that is exempt from the environmental  
20 protection requirements embodied in the Hydraulic Code.<sup>8</sup> The statements of purpose within  
21 the Aquatic Farming Act indicate this was clearly not what the Legislature intended.

22 4. *There is No Indication the Legislature Intended to Exempt Shellfish Aquaculture*

23 The Court’s fundamental purpose in construing a statute is to ascertain and carry out the

24 \_\_\_\_\_  
25 <sup>7</sup> For example, in 1986, the Legislature added provisions relating to the diversion of water for agricultural irrigation  
26 and stock watering purposes. Ex. AA §1-2 (Laws of 1986, ch. 173 (now at RCW 77.55.281(9)-(11))). In 1988, the  
27 Legislature added provisions relating to stream bank stabilization projects to protect farmland. Ex. S § 1 (Laws of  
1988, ch. 272 (now at RCW 77.55.281 (9)-(11))).

<sup>8</sup> Forest practices are exempt, but *only* if “fish protection standards” are incorporated into “forest practice rules.”  
RCW 77.55.361(1). No comparable proviso exists for industrial aquaculture.

1 Legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10. If a statute's plain meaning is  
2 clear, then the court must give effect to that plain meaning and the inquiry goes no further.  
3 Petitioners contend that the Hydraulic Code unambiguously establishes the responsibility of  
4 WDFW to regulate commercial shellfish aquaculture activities, and that the Aquatic Farming  
5 Act clearly does not support WDFW's grant of an exception. However, if the Court finds that  
6 the provisions of the Act are ambiguous, it must look to other tools of statutory construction to  
7 attempt to ascertain legislative intent. *See Alfredo Cerrillo v. Esparza*, 158 Wn.2d 194, 201 142  
8 P.3d 155 (2006). When the intent of the Legislature is examined through the use of these tools,  
9 there is similarly no indication that the Aquatic Farming Act was intended to exempt  
10 commercial shellfish aquaculture facilities from compliance with the Hydraulic Code.

11 First, the legislative history of the Act shows no intent to pass such an exemption.  
12 Legislative history serves a key role in divining intent, and courts will examine it when  
13 provisions of an act appear to conflict. *Bigsby*, 189 Wn.2d at 216. Yet what is most notable  
14 about the legislative history of the Aquatic Farming Act is what is *not* there. The Hydraulic  
15 Code is the primary state tool for protecting the integrity of its aquatic ecosystems. The statutory  
16 exemptions to the Code's requirements are narrow, and aimed either at (1) beneficial practices  
17 that the state wants to encourage;<sup>9</sup> (2) actions that pose little risk to the aquatic environment;<sup>10</sup>  
18 or (3) instances where another statutory provision or environmental plan covers the purpose  
19 that would be served by an HPA permit.<sup>11</sup> There are no exemptions that apply either to entire  
20 industries or to large-scale practices with a significant potential to affect fish life. Passing such  
21 an exemption would thus be a significant legislative step that would be expected to elicit

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22 <sup>9</sup> See RCW 77.55.041 (exempting removal of derelict fishing gear); RCW 77.55.051 (exempting removal of  
23 invasive plants by hand); and RCW 77.55.061 (exempting certain remedial actions of hazardous substances).

24 <sup>10</sup> See RCW 77.55.031 (exempting the act of driving across an established ford); RCW 77.55.091 (exempting small  
25 scale prospecting or mining if done in accordance with established rules).

26 <sup>11</sup> See RCW 77.55.101 (any legal requirement under the Hydraulic Code shall be superseded by an environmental  
27 excellence program agreement); RCW 77.55.111 (WDFW shall comply with an existing habitat incentives  
agreement when evaluating a request for an HPA permit); RCW 77.55.201 (a landscape management plan  
approved by WDFW and DNR shall serve as an HPA permit); RCW 77.55.361 (the Hydraulic Code does not apply  
to a forest practices hydraulic project, so long as adequate fish protection standards are incorporated in the forest  
practice rules).

1 significant legislative discussion, deliberation and attention.

2 Yet neither the Senate nor the House reports contain any mention of such an exemption.

3 *See generally*, Exs. Y, Z. This is despite the fact that both reports detail the Act's other  
4 exemptions. *See* Ex. Z at 1-4 (Senate Bill Report on Senate Bill 3067); Ex. Y at 1-4 (House Bill  
5 Report on Engrossed Bill). For example, the House Bill Report indicates that the Act provides:

6 EXEMPTION FROM FISHERIES AND GAME PROGRAMS. [Commercial]  
7 aquatic products are expressly exempted from: the general authority of the  
8 Director of Fisheries to adopt rules implementing the food fish and shellfish  
9 statutes; and from certain licensure and permit requirements established under  
10 those statutes. No license or permit is required under those statutes for the  
11 production or harvesting of [commercial] aquatic products nor for the delivery,  
processing, or wholesaling of such products when adequately identified under  
rules of the Department of Agriculture. A mechanical harvester license is not  
required for harvesting claims from a clam farm if the requirements of the  
Hydraulic Project Approval statute are fulfilled.

12 [Commercial] aquatic products are not game fish for the purposes of the game  
13 and game fish statutes and game farm licenses are not required for their  
14 production. [Commercial] aquatic products adequately identified under rules of  
the Department of Agriculture are exempted from game code requirements that  
certain wildlife be tagged or labeled. . .

15 OTHER. Repealed are statutes authorizing the issuance of aquaculture permits  
by the Department of Fisheries and requiring oyster or clam farm licenses.

16 Ex. Y at 3. The report thus calls out the Act's exemption from "food fish and shellfish statutes"  
17 (*see* Ex. J §§8, 17, 18, 20), change in vehicle license requirements (*see id.* §16), exemption  
18 from requirements related to game fish and game farms (*see id.* §§21-25), and repeal of statutes  
19 requiring oyster or clam farm licenses (*see id.* §18). But there is no mention of any exemptions  
20 to environmental regulations, much less to the Hydraulic Code. Indeed, the Act's legislative  
21 history contains only one reference to the HPA regime, clarifying that either an HPA permit or  
22 a mechanical harvester license is required to harvest clams from a farm. Ex. Y at 3. As discussed  
23 *supra* part IV.A.2.b., this provision of the Act presumes the applicability of the Hydraulic Code.

24 It is simply implausible that the Legislature would have enacted such a significant  
25 rollback of state environmental protections without (1) any explicit provision in the Act  
26 providing for such an exemption; (2) any mention in the Act of the Hydraulic Code (other than  
27 one reference to its continued use); (3) any discussion in the legislative background of the need



1 for such an exemption; or (4) any discussion in the House or Senate reports of the existence of  
2 such an exemption. The fact that the legislative history does not mention such a significant  
3 exemption is compelling evidence that the Legislature never meant it to exist.

4 Second, the canons of statutory interpretation provide that when a legislature  
5 specifically lists exemptions from certain provisions, it is presumed that omissions from this  
6 list are intentional. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133-34, 814 P.2d 629 (1991); *see*  
7 *also In re Custody of S.B.R.*, 43 Wn. App. at 625 (“A basic rule of statutory construction is that  
8 express exceptions in a statute exclude all other exceptions.”). This principle applies to both the  
9 Hydraulic Code and the Aquatic Farming Act. Although the Hydraulic Code lists several  
10 exemptions to the HPA permit requirement, an exemption for the commercial aquaculture  
11 industry is not among them. *See* RCW 77.55.031-.091. Similarly, the Aquatic Farming Act lists  
12 a number of specific exemptions and statutory repeals that change regulations applicable to the  
13 commercial aquaculture industry, but makes no mention of one to the Hydraulic Code. If the  
14 Legislature wanted to create an exemption to the HPA permit requirement, it clearly knew how  
15 to do so. The fact that such an exemption is not listed in either the Hydraulic Code or the Aquatic  
16 Farming Act is conclusive evidence that it was never intended.

17 Third, the rules of statutory construction provide that when there is an apparent conflict  
18 between two statutes, the “latest enacted provision prevails when it is more specific than its  
19 predecessor.” *State v. J.P.*, 149 Wn.2d 444, 452, 69 P.3d 318 (2003) (internal quotation and  
20 citation omitted); *see also State v San Juan Cty.*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984)  
21 (the rule is that “as between two conflicting parts of a statute, that part latest in order of position  
22 will prevail, where the first part is not more clear and explicit than the last part”).

23 The Aquatic Farming Act was passed in 1985. Ex. J. The Hydraulic Code was enacted  
24 in its barest form in 1943. Ex. H. Based on these dates, the AG Opinion concludes that the  
25 Aquatic Farming Act was a later enactment. However, the Hydraulic Code has been  
26 fundamentally altered in subsequent amendments, including several amendments after the  
27

1 Aquatic Farming Act that added exemptions.<sup>12</sup> Also significant to this action are changes to the  
2 Hydraulic Code in 2005 to improve the “efficiency and predictability of the hydraulic project  
3 approval program.” Ex. GG at 1. Although the AG Opinion dismissed this legislation as simply  
4 a recodification of the Hydraulic Code (AR 951), the bill also consolidated exemptions that had  
5 previously scattered in provisions both within and *outside* the Hydraulic Code. *See* RCW  
6 77.55.100(9) (2004) (driving across a ford); RCW 77.55.150 (2004) (removal of weeds); RCW  
7 77.12.865(3) (2004) (removal of derelict fishing gear). As a result of the 2005 changes, these  
8 exemptions were placed in *consecutive, stand-alone* provisions *within* the Hydraulic Code.  
9 RCW 77.55.031, .041, .051.; *see* Ex. HH §§301-303 (Laws of 2005, ch. 146).

10 In addition to having several iterations that were subsequent to the Aquatic Farming  
11 Act, the Hydraulic Code is also more specific as to the only issue of concern here—the  
12 exemptions to the HPA permit requirement. The AG Opinion dismisses the Hydraulic Code as  
13 “substantially broader” than RCW 77.115.010(2), because it applies to “all work and  
14 construction in salt and fresh waters.” AR 951. This conclusion is based on a meaningless  
15 comparison. The question is not whether the entire Hydraulic Code is broader in its application  
16 and import than a single provision of the Aquatic Farming Act. Of course it is. Rather, the  
17 question is whether the later statutory provision that appears to conflict with an earlier provision  
18 is “more clearly worded [and] more specific.” *San Juan Cty.*, 102 Wn.2d at 320. The potential  
19 conflict is over a potential exemption to the Hydraulic Code. Section 8 of the Aquatic Farming  
20 Act (RCW 77.115.010(2)) is related to fish diseases and does not mention the Hydraulic Code,  
21 much less provide any “clear” or “specific” exemptions to its requirements. *See id.* On the other  
22 hand, the Hydraulic Code as passed in 2005 clearly and specifically lists the exemptions to its  
23 requirements, including those that were previously contained in other chapters of the RCWs.

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24  
25 <sup>12</sup> In 1986, the Legislature passed an exemption for driving across fords (*see* Ex. AA §1 (Laws of 1986, ch. 173  
26 (now RCW 77.55.031)); in 1994, it exempted certain hazardous contamination remediation activities (*see* Ex. BB  
27 §15 (Laws of 1994, ch. 257 (now RCW 77.55.061)); in 1995, it exempted the removal of invasive weeds using  
certain methods (*see* Ex. CC §4 (Laws of 1995, ch. 255 (now RCW 77.55.051)); and in 2002, it exempted “the  
removal of derelict fishing gear” and emergency housing for sexually violent predators (*see* Exs. DD §4 (Laws of  
2002, ch. 20 (now RCW 77.55.041) and FF §14 (Laws of 2002, ch. 68 (now RCW 77.55.071))).

1 As a result, even if the Court were inclined to agree that the AG Opinion’s reading of the  
2 Aquatic Farming Act is reasonable (it is not), the rules of statutory construction dictate that it  
3 should nevertheless defer to the more recent enactment of the Hydraulic Code.

4 5. *Any Doubt Should be Resolved against Creating an Exemption*

5 If the Court is unable to conclusively determine whether the Aquatic Farming Act  
6 created an exemption to the Hydraulic Code, at least two canons of statutory construction  
7 counsel that any doubt should be resolved against creating an implied exemption. First, it is  
8 the “duty of the court to reconcile apparently conflicting statutes and to give effect to each of  
9 them, if this can be achieved without distortion of the language used.” *State v. Fagalde*, 85  
10 Wn.2d 730, 739 P.2d 86 (1975). In this case, the interpretation urged by the AG Opinion creates  
11 a conflict between the Aquatic Farming Act, which it opines creates an exemption to the  
12 Hydraulic Code, and the Hydraulic Code itself, which contains no such exemption. But the  
13 Court can give full effect to the provisions of RCW 77.115.010(2) by interpreting it to only  
14 limit WDFW’s authority to regulate *aquatic products*, while also maintaining the integrity of  
15 the Hydraulic Code to regulate *hydraulic construction*. RCW 77.55.021(1). Even if it finds that  
16 the two interpretations of the Aquatic Farming Act are equally reasonable, it is “the duty” of  
17 the Court to choose this interpretation, because it would give effect to both statutes in question.

18 Second, as the AG Opinion conceded, any doubts about the meaning of a statutory  
19 proviso should be resolved in favor of giving effect to the general statutory terms to which the  
20 proviso does not explicitly apply. AR 951; *State v. Turpin*, 94 Wn.2d 820, 825, 620 P.2d 990  
21 (1980) (because provisos “operate as limitations upon or exceptions to the general terms of the  
22 statute to which they are appended. . . [they] should generally be strictly construed with any  
23 doubt to be resolved in favor of the general provisions, rather than the exceptions”). Here, the  
24 strict construction of the language of RCW 77.115.110(2) is that it applies to “aquatic products”  
25 and “aquatic farmers,” and *not* to aquatic “construction,” which is the activity regulated by the  
26 Hydraulic Code. Thus construed, RCW 77.115.110(2) does not create any exemption to the  
27 requirement that aquaculture facilities obtain an HPA permit for hydraulic construction.

1 **B. WAC 220-660-040(2)(1) Exceeds WDFW’s Statutory Authority and is Invalid**

2 A plaintiff has standing to obtain judicial review of an agency action if (1) the agency  
3 action has prejudiced the plaintiff; (2) plaintiff’s asserted interests are among those that the  
4 agency was required to consider when it engaged in the challenged action; and (3) a judgment  
5 in plaintiff’s favor would substantially redress the prejudice caused by the agency action. RCW  
6 34.05.530. WDFW’s failure to require HPA permits for commercial shellfish aquaculture  
7 facilities has prejudiced Petitioners and their members by decreasing their ability to participate  
8 in and enjoy activities in Washington’s coastal waters that depend upon an abundance of fish  
9 life and causing them distress over the loss of fish life and the resultant harm to the environment.  
10 See Townsend Decl. at ¶¶ 2-10; Declaration of Laura Hendricks at ¶¶ 2-10; Declaration of Dr.  
11 Nick Gayeski at ¶¶ 5-10; and Declaration of Bill McMillan at ¶¶ 2-11. Such injuries are  
12 sufficient to establish standing. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d  
13 249, 271, 413 P.3d 549 (2018) (finding an organization met standing requirements when its  
14 members were deprived of the ability to enjoy recreational opportunities). Second, Petitioners’  
15 interests in abundant fish life are among those the agency was required to consider in  
16 promulgating WAC 220-660-040(2)(1), because the purpose of the Hydraulic Code is “the  
17 protection of fish life.” RCW 77.55.021; see *Lands Council v. Wash. State Parks & Recreation*  
18 *Comm’n*, 176 Wn. App. 787, 802, 309 P.3d 734 (2013) (environmental organization met  
19 standing requirement under State Environmental Policy Act when alleging an action would  
20 jeopardize wildlife, because environment core interest protected by SEPA). Finally, a judgment  
21 in Petitioners’ favor would redress their injuries because the application of the Hydraulic Code  
22 to commercial shellfish aquaculture would mitigate the harm those facilities cause to fish life.

23 WDFW’s promulgation of WAC 220-660-040(2)(1) exceeded its statutory authority.  
24 The Court must invalidate a rule that “exceeds the agency’s statutory authority.” RCW  
25 34.05.570(2)(c); *Foster v. Washington Dep’t of Ecology*, 184 Wn.2d 465, 471, 362 P.3d 959  
26 (2015). Unless there is a specific statutory exemption, the Hydraulic Code requires that every  
27 person obtain an HPA permit from WDFW before beginning work on a hydraulic project. RCW

1 77.55.021. The Hydraulic Code gives WDFW no authority to exempt an entire industry from  
2 its requirements, and, as discussed *supra* part IV.A.2., 3., there is no statutory exemption for  
3 commercial aquaculture facilities. WAC 220-660-040(2)(1) should thus be declared invalid.

4 **C. It is Unlawful for WDFW to Exempt Commercial Shellfish Aquaculture**

5 Under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, the Court is  
6 authorized to “declare rights, status, and other legal relations.” RCW 7.24.010.<sup>13</sup> This extends  
7 to the rights of persons affected by “statute, municipal ordinance, contract or franchise.” RCW  
8 7.24.020. To do so, the Court must be presented either with an issue of major public importance  
9 or a justiciable controversy. *See Lewis Cty. v. State*, 178 Wn. App. 431, 435, 315 P.3d 550  
10 (2013) (internal citation omitted). Petitioners present both.

11 A controversy is justiciable when (1) there is an “actual, present, and existing dispute”;  
12 (2) between parties “having genuine and opposing interests;” (3) that are “direct and  
13 substantial;” and (4) a “judicial determination of which will be final and conclusive.”  
14 *Washington State Republican Party v. Washington State Pub. Disclosure Comm’n*, 141 Wn.2d  
15 245, 284, 4 P.3d 808 (2000) (internal quotations and citation omitted). All requirements are met  
16 here. Petitioners ask the Court to invalidate WDFW’s policy of exempting commercial shellfish  
17 aquaculture from HPA requirements. Respondents seek to preserve that policy. This is an  
18 actual, present, and existing dispute, and the parties’ interests are opposed, direct and  
19 substantial. Absent relief from the Court, the commercial aquaculture industry will continue to  
20 harm fish populations, thereby harming Petitioners’ interests. Finally, a judicial determination  
21 from the Court that WDFW’s policies and practices are unlawful will force the agency to revise  
22 those policies and practices to ensure that commercial aquaculture is subject to HPA permitting.

23 Moreover, this is an issue of major public importance. *See Snohomish Cty. v. Anderson*,  
24 124 Wn.2d 834, 841, 881 P.2d 240 (1994). Protection of fish life in Washington is of substantial

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26 <sup>13</sup> The standing requirements for a Declaratory Judgment Act claim substantially “overlap the requirements for  
27 justiciability.” *Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 593, 192 P.3d 306  
(2008). A party must be in the “zone of interests to be protected or regulated by the statute in question” and must  
have “suffered an injury in fact.” *Id.* at 593-94. As discussed *supra* part IV.C., Petitioners meet both requirements.

1 public importance, as is evidenced by the Hydraulic Code. The public’s interest would be served  
2 by enforcing the state’s laws designed to protect fish life—without a carve out for an entire  
3 industry that has a substantial impact on aquatic ecosystems.

4 The Hydraulic Code provides that any person engaged in hydraulic projects must  
5 acquire an HPA permit *before* commencing work. RCW 77.55.021. WDFW’s policy and  
6 practice is to exempt commercial shellfish aquaculture facilities from this requirement, so long  
7 as their activities are “directly associated” with planting and harvesting aquaculture products.  
8 Ex. N at 2. As established *supra* part III.A., this is contrary to law. Accordingly, Petitioners  
9 seek a declaration that WDFW’s policies and practices of exempting commercial shellfish  
10 aquaculture from the HPA regime are unlawful and, therefore, *ultra vires*.

11 **D. PNA Should be Enjoined from Construction without an HPA Permit**

12 Petitioners seek a declaration pursuant to the Uniform Declaratory Judgments Act,  
13 chapter 7.24 RCW, that PNA is a person required to obtain an HPA permit. *See* RCW  
14 77.55.021. Petitioners further ask the Court to enjoin PNA, pursuant to chapter 7.40 RCW, from  
15 constructing a commercial geoduck facility in Zangle Cove without a permit.<sup>14</sup>

16 Petitioners meet the standard for injunctive relief, which requires them to establish (1)  
17 “a clear legal or equitable right,” (2) a “well-grounded fear of immediate invasion of that right,”  
18 and (3) that “the acts complained” of “will result in actual and substantial injury.” *Kucera v.*  
19 *State, Dep’t of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). The Court must examine  
20 these requirements in light of the “relative interests of the parties” and “the interests of the  
21 public.” *Tyler Pipe Indus. v. Dep’t of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

22 First, Petitioners have a clear legal and equitable right. Petitioner Protect Zangle Cove  
23 and its members have taken great enjoyment from observing a variety of fish in and around  
24 Zangle Cove, as well as other aquatic creatures and wildlife that depend on those fish.

25 <sup>14</sup> This claim also presents a justiciable controversy. *Washington State Republican Party*, 141 Wn.2d at 284. There  
26 is an actual, present, and existing dispute” between PNA, which seeks to construct a commercial shellfish  
27 aquaculture facility at Zangle Cove (*see* Exs. F, S) and Petitioners, who oppose the construction without an HPA  
permit. PNA and Petitioners have “genuine and opposing interests” that are “direct and substantial.” Finally, a  
judicial determination of whether PNA is required to obtain an HPA permit would be “final and conclusive.”

1 Townsend Decl. ¶¶ 3-4. The HPA code was established to protect fish and, therefore, establishes  
2 an implied private right of action for Petitioners in this matter. *See Wright v. Lyft, Inc.*, 189  
3 Wn.2d 718, 727, 406 P.3d 1149 (2017) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784  
4 P.2d 1258 (1990)) (courts may imply a right of action even if statute lacks an express one so  
5 long as consistent with legislative intent). Second, Petitioners have a well-grounded fear of the  
6 invasion of that right: Construction on the PNA facility has begun without the protection for  
7 fish provided by an HPA permit. Townsend Decl. ¶12. Third, if construction is allowed to  
8 proceed without HPA permit limitations, Petitioners' interests in a healthy ecosystem and  
9 abundant fish life in Zangle Cove will be substantially injured. The geoducks PNA seeks to  
10 plant will be harvestable in six to seven years, and PNA intends to continue to replant in  
11 perpetuity. Ex. F at 5-6. If construction is allowed to proceed, therefore, the damage to the  
12 Zangle Cove ecosystem could be irreversible. Finally, the relative interests of the parties and  
13 the public interest both weigh in favor of an injunction. An injunction will not prevent PNA  
14 from constructing an aquaculture facility at Zangle Cove, but will merely require that in doing so,  
15 it comply with the same provisions required by any other entity in Washington seeking to develop  
16 a hydraulic project. Requiring such compliance will not do irreparable harm to PNA's interests. On  
17 the other hand, the public has a substantial interest in seeing the fair, consistent, and equitable  
18 enforcement of its laws designed to protect fish life. Allowing hydraulic projects to proceed without  
19 that protection will cause lasting harm to the waterways that the state manages in the public trust.  
20 *See Chelan*, 190 Wn.2d at 259-60 (describing the public trust doctrine).

## 21 **V. CONCLUSION**

22 Petitioners ask the Court to (1) find that WAC 220-660-040(2)(l) exceeds WDFW's  
23 statutory authority and is thus unlawful; (2) declare that WDFW's policy and practice of  
24 exempting commercial shellfish aquaculture from the requirements of the Hydraulic Code is  
25 unlawful; and (3) enjoin continued construction at PNA's Zangle Cove facility until such time  
26 as it obtains an HPA permit, and direct PNA to restore the tidelands to their prior condition by  
27 removing equipment installed in the last several weeks.

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DATED: October 23, 2018  
LANE POWELL PC

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under  
3 the laws of the State of Washington, that on the 23rd day of October, 2018, the document  
4 attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF  
5 system and served upon the attorney and parties listed below pursuant to the electronic service  
6 agreement:

7

<p>8 <i>Bob Ferguson, Attorney General</i> Attn: Division of Fish, Wildlife and Parks 1125 Washington Street SE Olympia, WA 98501</p> <p>9 <a href="mailto:NoelleC@atg.wa.gov">NoelleC@atg.wa.gov</a> 10 <a href="mailto:MichaelY@atg.wa.gov">MichaelY@atg.wa.gov</a> 11 <a href="mailto:JeanneR@atg.wa.gov">JeanneR@atg.wa.gov</a> 12 <a href="mailto:DomiS@atg.wa.gov">DomiS@atg.wa.gov</a> 13 <a href="mailto:fwdef@atg.wa.gov">fwdef@atg.wa.gov</a></p>	<p><input type="checkbox"/> by <b>Thurston County ECF</b> <input checked="" type="checkbox"/> by <b>Electronic Mail per Agreement</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b></p>
<p>14 <i>Plauche &amp; Carr LLP</i> 811 First Avenue, Suite 630 Seattle, WA 98104</p> <p>15 <a href="mailto:Jesse@plauchecarr.com">Jesse@plauchecarr.com</a> 16 <a href="mailto:Billy@plauchecarr.com">Billy@plauchecarr.com</a> 17 <a href="mailto:Sarah@plauchecarr.com">Sarah@plauchecarr.com</a></p>	<p><input type="checkbox"/> by <b>Thurston County ECF</b> <input checked="" type="checkbox"/> by <b>Electronic Mail per Agreement</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class Mail</b> <input type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b></p>

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19 Executed on the 23rd day of October, 2018, at Seattle, Washington.

20  
21 *s/Patti Lane*  
Patti Lane, Legal Assistant