

1 EXPEDITE
2 No Hearing is set
3 Hearing is set:
4 Date: 11/9/18
5 Time: 9:00 AM
6 Judge/Calendar: Honorable Christopher Lanese

7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 PROTECT ZANGLE COVE; COALITION TO)
9 PROTECT PUGET SOUND HABITAT; and)
10 WILD FISH CONSERVANCY,)
11)
12)
13)
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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' OPPOSITION TO
PACIFIC NORTHWEST
AQUACULTURE, LLC'S MOTION FOR
JUDGMENT ON THE PLEADINGS

1 **I. INTRODUCTION**

2 Respondent Pacific Northwest Aquaculture, LLC's ("PNA") Motion for Judgment on
3 the Pleadings ("Motion for Judgment" or "JP Mot.") is a distraction and a waste of judicial
4 resources. A motion for judgment on the pleadings can serve the interests of judicial efficiency
5 if it is filed in a timely manner, by limiting the issues that must be explored during discovery
6 or considered at trial. That is not the case here. PNA waited to file its Motion for Judgment until
7 the eve of the final merits hearing in this case. Petitioners have already filed their Opening
8 Brief, while Respondents' Brief is due the same day the hearing for the Motion for Judgment
9 is noted. And the Court's ruling on the merits will necessarily resolve the substantive issues
10 raised by the claim against PNA, one way or another, regardless of whether that claim is
11 dismissed. There is thus no purpose to be served by the Court considering the issues raised in
12 the Motion for Judgment separately from the full arguments on the merits of the action. The
13 Court should deny the Motion for Judgment for this reason alone, strike the hearing set for
14 November 9, and consider the issues raised by PNA within the context of the upcoming hearing
15 on the merits.

16 At whatever point it is considered, PNA's request for dismissal should be denied. The
17 Motion for Judgment fundamentally distorts the nature of Petitioners' claim against PNA and
18 the law that applies to that claim. Petitioners do not bring a private action against PNA for
19 damages, or seek to usurp the role of the Washington Department of Fish and Wildlife
20 ("WDFW") by "privately enforce[ing] the Hydraulic Code against PNA." JP Mot. at 11. Rather,
21 Petitioners seek a declaratory judgment and related injunctive relief under the Uniform
22 Declaratory Judgment Act, chapter 7.24 RCW ("UDJA"). Under the UDJA, the Court is
23 authorized to "declare rights, status, and other legal relations," including the rights of persons
24 affected by "statute." RCW 7.24.010, .020. An action under the UDJA is not dependent upon
25 whether the statute in question creates a private right of action. Nevertheless, the citizen
26 enforcement powers included in chapter 77.55 RCW (the "Hydraulic Code") support
27 Petitioners' standing to bring a claim under the UDJA and seek injunctive relief against PNA.

1 **II. FACTS**¹

2 Zangle Cove is an undeveloped estuary in South Puget Sound ringed by single-family
3 residences on small waterfront lots. Petition for Judicial Review, Declaratory Judgment, and
4 Injunctive Relief (“Pet”) ¶¶ 14-15. It is home to numerous wildlife species, and the Squaxin
5 Tribe fishes for salmon that migrate through its waters. *Id.* ¶¶ 15, 18. It is critical habitat for
6 endangered Puget Sound Chinook salmon and steelhead. *Id.* ¶ 17. Both species are known to
7 be present in the area, along with a variety of other endangered species. *Id.* Patches of native
8 eelgrass (*Zostera marina*) have occurred in Zangle Cove, which is currently the site of an
9 eelgrass restoration project funded by the U.S. Department of Energy and the U.S.
10 Environmental Protection Agency. *Id.* ¶ 16. Eelgrass is a prime indicator of ecosystem health
11 and provides crucial habitat for several species. *Id.*

12 PNA has applied for and received a Shoreline Substantial Development Permit from the
13 Thurston County Shoreline Hearings Board to establish a 1.1-acre geoduck aquaculture
14 operation on tideland within Zangle Cove owned by ChangMook Sohn (“Sohn”), a member of
15 PNA. *Id.* ¶¶ 40, 45. This would be the first commercial geoduck operation in Zangle Cove and
16 the only current aquaculture operation in Zangle Cove. *Id.* ¶ 40. On behalf of PNA, Sohn applied
17 for a Hydraulic Project Approval (“HPA”) permit for the proposed geoduck operation in 2014.
18 *Id.* ¶ 46. WDFW deemed the application incomplete and no HPA permit was issued. *Id.* In
19 2015, WDFW promulgated WAC 220-660-040(2)(1), exempting commercial shellfish
20 operations from HPA permitting. *Id.*

21 PNA intends to partner with Intervenor Taylor Shellfish Farms, Inc. (“Taylor Shellfish”)
22 to construct and operate the geoduck facility. *Id.* ¶¶ 41-42; Motion to Intervene by Taylor
23 Shellfish (“Int. Mot.”) at 2. Taylor Shellfish will lease the tidelands belonging to Sohn for this
24 purpose, and will be responsible for the majority of geoduck planting and harvesting at the site.
25 Int. Mot. at 2. PNA and Taylor Shellfish plan to insert 47,900 sections of six-inch diameter

26 ¹A full discussion of the facts can be found in the Opening Brief at 1-8. The following is a summary of the facts
27 as they relate specifically to Zangle Cove. Because this is a response to a motion for judgment on the pleadings,
these facts are largely recounted as alleged in the Petition.

1 polyvinyl chloride (“PVC”) tubes into Zangle Cove’s tideland, plant three geoduck seeds in
2 each tube, and then cover the area with 16 nets measuring 50 feet by 50 feet each, which would
3 be staked to the ground with rebar pushed into the substrate every 10 feet. Pet. ¶¶ 42-43.

4 WDFW currently exempts commercial shellfish facilities from compliance with the
5 Hydraulic Code, through an exemption WDFW codified in 2015 through WAC 220-660-
6 040(2)(1). The Hydraulic Code requires that an HPA permit be issued before any person begins
7 “the construction or performance of work that will use, divert, obstruct, or change the natural
8 flow or bed of any of the salt or freshwaters of the state.” RCW 77.55.011(11). PNA’s proposed
9 activity would “use, divert, obstruct, or change” the saltwater beds in Zangle Cove, and thus
10 would require an HPA permit—if the Court rules that WDFW’s exemption of commercial
11 shellfish aquaculture facilities is unlawful. *See* RCW 77.55.011(11). Under those
12 circumstances, an HPA permit could only be issued to PNA if it demonstrates that its proposed
13 geoduck aquaculture operations would result in “no net loss” of fish life. *Id.* at ¶ 50 (citing
14 RCW 77.55.011(11), .021(1); WAC 220-660-080(3)(c)). A person engaging in a non-exempt
15 hydraulic project without an HPA permit may incur a civil penalty of up to \$100 per day and
16 be subject to criminal penalties. RCW 77.15.300, 77.55.291(1).

17 Petitioners are non-profit organizations dedicated to the preservation of Washington’s
18 aquatic creatures and their habitats. Pet. ¶¶ 4-6. They study and advocate for the ecological
19 health of Washington’s nearshore environments, including Zangle Cove. *Id.* Petitioners’
20 members and supporters enjoy and recreate in Washington’s nearshore waters and tidelands,
21 and some also own homes in Zangle Cove. *Id.* ¶¶ 7-8. Their interests and activities are highly
22 dependent on the presence of healthy fish populations. *Id.* The practices that PNA intends to
23 employ at its Zangle Cove facility could disrupt natural ecosystems and endanger fish
24 populations. *Id.* ¶¶ 28-39. On the other hand, if PNA were to acquire an HPA permit, WDFW
25 could impose conditions to prevent or mitigate some of these harmful effects. *Id.* ¶¶ 50-51.

26 The Petition was filed on April 12, 2018, seeking the following: a declaration that
27 WDFW’s policy and practice of exempting industrial shellfish aquaculture from HPA

1 permitting is unlawful (“Claim One”); invalidation of WAC 220-660-040(2)(1), the rule
2 codifying this exemption (“Claim Two”); and an injunction barring PNA from constructing a
3 geoduck aquaculture facility in Zangle Cove until it acquires an HPA permit (“Claim Three”).
4 Pet. ¶¶ 64-82.

5 PNA filed its Answer and Affirmative Defenses to the Petition on May 2, 2018. WDFW
6 filed the agency record on May 29, 2018. On June 6, 2018, the same counsel that represents
7 PNA filed the Motion to Intervene on behalf of Taylor Shellfish. The Court granted this Motion
8 on June 20, 2018. On August 13, 2018, the Court entered the Case Schedule Order, setting a
9 hearing date of December 7, 2018, with Petitioners’ Opening Brief due October 23, 2018, and
10 Respondents’ Brief due November 9, 2018. PNA filed its Motion for Judgment, solely with
11 respect to Claim Three, on October 4, 2018, noting a hearing for November 9, 2018.

12 **III. ARGUMENT**

13 The Motion for Judgment is not only untimely, but also raises an issue that is largely
14 academic. If Petitioners prevail in their claims against WDFW, commercial shellfish
15 aquaculture facilities in Washington, including PNA’s facility in Zangle Cove, will be required
16 to secure HPA permits before proceeding with any hydraulic projects. Specifically, if
17 Petitioners are successful in their action for a declaratory judgment under the UDJA, it would
18 be perfectly appropriate for the Court to issue an order enjoining the construction of the Zangle
19 Cove facility, until either PNA or its business partner, Taylor Shellfish, have obtained an HPA
20 permit. Now that Taylor Shellfish has intervened as a respondent, the Court could issue such
21 an order regardless of whether PNA is dismissed from the action. Thus, the resolution of Claim
22 Three will necessarily hinge upon the Court’s rulings on Claims One and Two. Since the
23 briefing for the merits hearing has already begun, the Court should consider all three claims
24 together at the final hearing in the interests of judicial efficiency.

25 Regardless of when the Court considers these arguments, however, PNA articulates no
26 reason to dismiss Claim Three, because its entire Motion for Judgment is based on a
27 fundamental misunderstanding of Petitioners’ claims. Petitioners Third Claim is not dependent

1 upon the existence of a private right of action for damages under the Hydraulic Code, but is a
2 proper request for the Court to exercise its statutory authority to grant declaratory and injunctive
3 relief. *See* RCW 7.24.010; RCW 7.40.020. PNA was properly joined as a party in an action for
4 such relief.

5 **A. PNA’s Motion is a Waste of Judicial Resources**

6 The purpose of a motion for judgment on the pleadings under CR 12(c) is the same as a
7 CR 12(b)(6) motion to dismiss: to determine if a plaintiff can prove any set of facts that would
8 justify relief. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). Such
9 motions should be presented early to provide all involved, including the Court, an opportunity
10 to avoid the time and expense associated with gathering and considering evidence supporting
11 allegations that, even if true, lack a legal remedy. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
12 558, 127 S. Ct. 1955 (2007) (“the basic deficiency should . . . be exposed at the point of
13 minimum expenditure of time and money by the parties and the court.”) (internal quotation
14 marks and citation omitted). A party may not move for a judgment on the pleadings so late in
15 the litigation that it would delay trial. CR 12(c).

16 The pleadings closed in this matter on May 2, 2018. PNA filed its Motion for Judgment
17 almost six months after service of the Petition, more than five months after it filed its answer,
18 four months after WDFW filed the record in this case, and just two weeks before the beginning
19 of briefing on the merits for the final hearing. The hearing on the Motion for Judgment is noted
20 for November 9. However, Petitioners’ Opening Brief was already submitted on October 23,
21 and Respondents’ briefs are due November 9—so unless final hearing is delayed to allow for
22 new briefing, the timing of the motion does not allow either party to limit or adjust its briefing
23 dependent upon the Court’s ruling on the Motion for Judgment. *See* CR 12(c) (motion for
24 judgment on the pleadings must be made “within such time as not to delay the trial”).

25 PNA’s Motion for Judgment to dismiss Count Three also comes roughly three months
26 after PNA’s counsel moved for intervention on behalf of Taylor Shellfish—in part due to Taylor
27 Shellfish’s interest in the claim against PNA in Count Three. *See* Int. Mot. at 5; Reply in Support

1 of Int. Mot. at 2, 4 & 6. Counsel thus used the existence of Claim Three to help support the
2 intervention of Taylor Shellfish, and delayed the Motion for Judgment until after that motion
3 had been granted. But the contention that Taylor Shellfish must be allowed *into* the case, while
4 its business partner PNA must be allowed *out*, is pointless gamesmanship. As Taylor Shellfish
5 concedes, “Petitioners’ relief would newly require Taylor Shellfish to obtain an HPA permit
6 not only for the PNA farm, but for other farms that Taylor Shellfish intends to operate in the
7 future.” Int. Mot. at 5. The voluntary intervention of Taylor Shellfish as a party permits the
8 Court under chapter 7.40 RCW to order such injunctive relief against Taylor Shellfish as may
9 be just, equitable, and necessary—including an injunction to halt construction on the Zangle
10 Cove project until a permit has been obtained.

11 Tthe impact of dismissing Claim Three, as PNA urges, would thus be negligible. If
12 Respondents and Intervenor defeat Claims One and Two, the Court will have no basis to enjoin
13 PNA, and Claim Three would be moot. Conversely, if Petitioners are successful on Claims One
14 and Two, Taylor Shellfish could be enjoined from constructing the Zangle Cove facility even
15 in the absence of PNA, and PNA could face potential civil and criminal sanctions for engaging
16 in a hydraulic project without a permit. *See* RCW 77.15.300, 77.55.021(1), 77.55.291.

17 As a result, entertaining PNA’s Motion for Judgment at this late date would be a waste
18 of judicial resources. The parties will have already briefed the challenged claim by the time the
19 hearing on this motion is noted, and there would be little to no practical effect even if the Court
20 granted the Motion for Judgment in advance of the final merits hearing. For the sake of judicial
21 economy, therefore, Petitioners urge the Court to strike the hearing on November 9 and consider
22 PNA’s arguments as part of the final merits hearing on December 7.

23 **B. Petitioners’ Claim Three Properly Seeks an Injunction against PNA**

24 Motions to dismiss should be granted “sparingly and with care.” *Tenore v. AT&T*
25 *Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998) (internal citation and quotation
26 marks omitted). Under Washington’s notice pleading standards, a complaint need only contain
27 “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and

1 (2) a demand for judgment for the relief to which he deems himself entitled.” CR 8(a). ““A
2 pleading is insufficient when it does not give the opposing party fair notice of what the claim
3 is and the ground upon which it rests.” *Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98
4 P.3d 827 (2004) (internal citation omitted). A complaint should not be dismissed unless there
5 is ““no state of facts which plaintiff could prove, consistent with the complaint, [that] would
6 entitle the plaintiff to relief on the claim.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d
7 96, 101, 233 P.3d 861 (2010) (internal citation omitted).

8 **1. The Petition Properly Seeks Declaratory and Injunctive Relief under the UDJA**

9 The Petition seeks a declaration from the Court under the UDJA regarding the rights of
10 Petitioners under the Hydraulic Code, and asks the Court to enjoin PNA from violating those
11 rights pursuant to its authority in chapter 7.40 RCW. *See* Pet. ¶ 1 (describing nature of action);
12 ¶ 2 (asserting the Court’s “jurisdiction under RCW 34.05.570(2) (judicial review of agency
13 rules), chapter 7.24 RCW (declaratory relief), and chapter 7.40 RCW (injunctive relief)”; ¶¶
14 64-73 (outlining first claim for declaratory relief under UDJA); ¶¶ 78-82 (incorporating by
15 reference earlier claim for declaratory relief, and seeking injunction against PNA).

16 As discussed in the Opening Brief at 23-25, Petitioners have a basis for bringing a claim
17 under the UDJA. The UDJA authorizes the Court to “declare rights, status, and other legal
18 relations.” RCW 7.24.010. This extends to the rights of persons affected by “statute, municipal
19 ordinance, contract or franchise.” RCW 7.24.020. The UDJA is a “remedial statute,” which is
20 to be “liberally construed and administered.” *Wash. State Coal. for the Homeless v. Dept. of*
21 *Social and Health Servs*, 133 Wn.2d 894, 916, 949 P.2d 1291 (1997). Before a court can take
22 action under the UDJA, it must be presented either with an issue of major public importance or
23 a justiciable controversy. *See Lewis Cty. v. State*, 178 Wn. App. 431, 435, 315 P.3d 550 (2013)
24 (internal citation omitted).

25 A controversy is justiciable when (1) there is an “actual, present, and existing dispute”;
26 (2) between parties “having genuine and opposing interests;” (3) that are “direct and
27 substantial;” and (4) a “judicial determination of which will be final and conclusive.” *Wash.*

1 *State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 284, 4 P.3d
2 808 (2000) (internal quotations and citation omitted). The standing requirements for claim
3 under the UDJA substantially “overlap the requirements for justiciability.” *Am. Legion Post*
4 *#149 v. Wash, State Dep’t of Health*, 164 Wn.2d 570, 593, 192 P.3d 306 (2008). In order to
5 establish standing under the UDJA, a party must be in the “zone of interests to be protected or
6 regulated by the statute in question” and must have “suffered an injury in fact.” *Id.* at 593-94
7 (internal citation and quotation marks omitted).

8 Petitioners have met all requirements for standing and justiciability under the UDJA.
9 First, Petitioners have standing. Their interests in abundant fish life are within the “zone of
10 interests” regulated by the Hydraulic Code, because the purpose of the Hydraulic Code is “the
11 protection of fish life.” RCW 77.55.021; *see Lands Council v. Wash. State Parks & Recreation*
12 *Comm’n*, 176 Wn. App. 787, 802, 309 P.3d 734 (2013) (environmental organization met
13 standing requirement under State Environmental Policy Act when alleging an action would
14 harm its members by jeopardizing wildlife, because the environment is a core interest protected
15 by SEPA). Petitioners have also suffered an injury in fact. WDFW’s failure to require HPA
16 permits for commercial shellfish aquaculture facilities has injured Petitioners and their
17 members by decreasing their ability to enjoy activities in Washington’s coastal waters that
18 depend upon an abundance of fish life and causing them distress over the loss of fish life and
19 the resultant harm to the environment. Pet. ¶¶ 4-9; Declaration of Patrick Townsend² ¶¶ 2-10;
20 Declaration of Laura Hendricks ¶¶ 2-10; Declaration of Dr. Nick Gayeski ¶¶ 5-10; and
21 Declaration of Bill McMillan ¶¶ 2-1. Such injuries are sufficient to establish standing. *Chelan*
22 *Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 271, 413 P.3d 549 (2018) (finding an
23 organization met standing requirements when its members were deprived of the ability to enjoy
24 recreational opportunities).

25 Second, the claim also meets the standards of justiciability. Petitioners ask the Court to
26 invalidate WDFW’s policy exempting commercial shellfish aquaculture from HPA

27 ² All declarations were filed in support of Petitioners’ Opening Brief.

1 requirements. Respondents seek to preserve that policy. This is an “actual, present, and existing
2 dispute,” and the parties’ interests are “opposing,” and “direct and substantial.” *See Wash. State*
3 *Republican Party*, 141 Wn.2d at 284. Absent relief from the Court, the commercial aquaculture
4 industry will continue to harm fish populations, thereby harming Petitioners’ interests. Finally,
5 a judicial determination from the Court that WDFW’s policies and practices are unlawful will
6 force the agency to revise those policies and practices to ensure that commercial aquaculture is
7 subject to HPA permitting.³

8 PNA is misguided in asserting it is necessary for the statute under interpretation—in
9 this case, the Hydraulic Code—to include a separate private right of action in order to bring a
10 claim under the UDJA. The UDJA includes its own right of action for equitable relief,
11 permitting parties who meet the above standards to petition for clarification of their rights under
12 another statute. RCW 7.24.020. In order to bring a cause of action under the UDJA, therefore,
13 the statute being interpreted need not contain a separate private right of action. *Id.*; *see Five*
14 *Corners Family Farmers v. Washington*, 173 Wn.2d 296, 300-01, 268 P.3d 892 (2011),

15 PNA is a proper party in an action under the UDJA because it has an “interest which
16 would be affected by the [Court’s] declaration.” RCW 7.24.110. As such, PNA is also subject
17 to the Court’s injunctive authority, and the Court may enjoin PNA as necessary to enforce a
18 declaration of rights under the UDJA. RCW 7.24.080; RCW 7.40.120. For example, in *Five*
19 *Corners*, a coalition of neighbors and environmental groups brought suit under the UDJA
20 against both the Department of Ecology and a private cattle feedlot, seeking a declaration of
21 the applicability of an exemption from groundwater permitting requirements, and an injunction
22 against the private party to stop using groundwater until it had acquired a permit. 173 Wn.2d
23 296 at 300-01. Although the court ultimately ruled against petitioners on the substantive issue
24 of statutory interpretation, it found that petitioners had standing to seek this relief under the

25 ³ Moreover, this is an issue of major public importance—an alternative grounds for granting review of a UDJA.
26 *See Snohomish Cty. v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994). Protection of fish life in Washington
27 is of substantial public importance, as is evidenced by the Hydraulic Code. The public’s interest would be served
by enforcing the state’s laws designed to protect fish life—without a carve out for an entire industry that has a
substantial impact on aquatic ecosystems.

1 UDJA. *Id.* at 305-06; *see also, e.g., S. Tacoma Way, LLC v. State*, 146 Wn. App. 639, 651, 191
2 P.3d 938 (2008), *rev'd on other grounds*, 169 Wash. 2d 118, 233 P.3d 871 (2010) (ruling in
3 favor of South Tacoma in a UDJA case brought against the state Department of Transportation
4 and a private party to stop the state's sale of property for failure to give adequate notice, and
5 ruling that the sale was *ultra vires* and thus void).

6 Furthermore, Petitioners meet the standard for injunctive relief, which requires them to
7 establish (1) "a clear legal or equitable right," (2) a "well-grounded fear of immediate invasion
8 of that right," and (3) that "the acts complained" of "will result in actual and substantial injury."
9 *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). In addition, the
10 standard requires the Court to examine these requirements in light of the "relative interests of
11 the parties" and "the interests of the public." *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d
12 785, 792, 638 P.2d 1213 (1982).

13 First, Petitioners have a clear legal and equitable right. In particular, Petitioner Protect
14 Zangle Cove and its members have taken great enjoyment from observing a variety of fish in
15 and around Zangle Cove, as well as other aquatic creatures and wildlife that depend on those
16 fish. Pet. ¶ 4; Townsend Dec. ¶¶ 3-4. Second, Petitioners have a well-grounded fear of the
17 invasion of that right: in fact, construction on the PNA facility has already begun, without the
18 protection for fish that would be provided by an HPA permit. Townsend Decl. ¶ 12. Third, if
19 construction is allowed to proceed without HPA permit limitations, Petitioners' interests in a
20 healthy ecosystem and abundant fish life in Zangle Cove will be substantially injured. The
21 geoducks PNA seeks to plant will be harvestable in six to seven years, and PNA intends to
22 continue to replant in perpetuity. Pet. ¶ 42. The damage to the Zangle Cove ecosystem by this
23 continued construction could be irreversible. Finally, the relative interests of the parties and the
24 public interest both weigh in favor of an injunction. An injunction will not prevent PNA from
25 constructing an aquaculture facility at Zangle Cove, but will merely require that in doing so, it
26 comply with the same provisions required by any other entity in Washington seeking to develop a
27 hydraulic project. Requiring such compliance will not do irreparable harm to PNA's interests. On

1 the other hand, the public has a substantial interest in seeing the fair, consistent, and equitable
2 enforcement of its laws designed to protect fish life. Allowing hydraulic projects to proceed without
3 that protection will cause lasting harm to the waterways that the state manages in the public trust.
4 *See Chelan*, 190 Wn.2d at 259-60 (describing the public trust doctrine).

5 **2. Petitioners Do Not Assert a Private Right of Action under the Hydraulic Code**

6 Although the *basis* for the declaratory and injunctive relief sought is that WDFW's
7 exemption for commercial shellfish aquaculture is unlawful under the Hydraulic Code (Chapter
8 77.55 RCW), the Petition at no point indicates that it is pursuing a private right of action against
9 PNA based on that Hydraulic Code. PNA is thus misguided in asserting that Petitioners' Claim
10 Three rests on such an implied private right of action.

11 Nevertheless, such a right of action may be implied from the structure of the Hydraulic
12 Code—further emphasizing the fact that Petitioners have established a clear and equitable legal
13 right under the UDJA. To determine if a statutory regime implies a private right of action,
14 Washington Courts normally apply the test articulated in *Bennett v. Hardy*, 113 Wn.2d 912,
15 920, 784 P.2d 1258 (1990); *see Wright v. Lyft, Inc.*, 189 Wn.2d 718, 727, 406 P.3d 1149 (2017)
16 (citing *Bennett*, courts may imply a right of action even if the statute lacks an express one, if
17 consistent with legislative intent). Under this test, the courts will recognize an implied private
18 right of action if: (1) a plaintiff or petitioner is within the class for whose benefit the statute was
19 enacted; (2) legislative intent, explicitly or implicitly, supports such a remedy; and (3) implying
20 a remedy is consistent with the legislative purpose of the statute. *Kim v. Lakeside Adult Family*
21 *Home*, 185 Wn.2d 532, 542, 374 P.3d 121 (2016). If Petitioners needed grounds for their action
22 apart from the UDJA, this standard would be met by an action against PNA for injunctive relief
23 to stop construction until the WDFW fulfills its statutory responsibilities to enforce the
24 provisions of the Hydraulic Code.

25 First, Petitioners are within the class for whose benefit the statute was enacted. The
26 hydraulic regime was promulgated in 1943 to ensure that any “hydraulic project” provides for
27 “the proper protection of fish life.” Laws of 1943, ch. 40, § 1 (originally codified as Rem.Sup.

1 1949, § 5734-1). Petitioners conduct “field research on wild fish populations,” “recreate and
2 boat” in Washington’s nearshore waters, “enjoy hiking, fishing” in the waters of the Puget
3 Sound, and “derive scientific, educational, recreational, health, conservation, spiritual, and
4 aesthetic benefits from . . . wild native fish species in those waters, and the existence of natural,
5 wild, and healthy ecosystem.” Pet. ¶¶ 4-8. Therefore, they have “aesthetic, recreational,
6 scientific, education and procedural interests” in healthy nearshore fish populations. *Id.* ¶ 9.
7 These interests are not common to all Washingtonians, but are unique to persons who study,
8 enjoy, or recreate in Washington’s waters and require healthy and plentiful fish for those
9 activities.

10 Second, legislative intent supports the remedy Petitioners seek. The legislature created
11 a private right of action for “a person with standing” to appeal the “issuance, denial,
12 conditioning, or modification of a permit.” RCW 77.55.021(8)(a) (cross referencing the
13 standing provision in RCW 43.21B.230(1) for appeals to the pollution control hearings board);
14 *see* WAC 220-660-460, -470 (rules governing such appeals); JP Mot. at 4. As noted above,
15 Petitioners have standing, and private citizens with similar interests routinely appeal the
16 issuance of HPA permits. *See, e.g.* Request for Informal Appeal, sent by Sound Action on
17 September 18, 2013, to the WDFW HPA Appeals Coordinator, available at:
18 <http://www.soundaction.org/appeal.pdf> (appeal by an environmental protection nonprofit of the
19 issuance of several HPA permits). There is no meaningful distinction, in terms of harms to a
20 party with such standing, between the right to appeal a permit issued with inadequate
21 conditions, and the right to challenge the failure to obtain an HPA permit in the first place.
22 Although the right to appeal within the Hydraulic Code is the right to an administrative appeal,
23 it is clear that the Legislature intended for private citizens to be able to play a role in enforcing
24 the HPA permit requirement.

25 “Where the Legislature enacts a statute that grants rights to an identifiable class, there
26 is an assumption that those rights are enforceable.” *Wash. State Coal. for the Homeless*, 133
27 Wn.2d at 912. The Legislature surely did not intend to allow citizens to enforce the details of

1 Hydraulic Code by challenging specific provisions of HPA permits that had been granted, but
2 not intend for private citizens to be able to bring an action for declaratory judgment for
3 enforcement of the Code if WDFW completely abdicated its responsibility. Such is the case
4 here. WDFW has refused to enforce the Hydraulic Code against an entire industry that routinely
5 engages in hydraulic construction. It is consistent with the citizen enforcement provision of the
6 Hydraulic Code to allow citizens to bring actions for declaratory and injunctive relief to ensure
7 that the purpose of the Code is being achieved, rather than frustrated by a refusal to act on the
8 part of the agency entrusted with its enforcement.⁴

9 For similar reasons, implying a remedy is consistent with the underlying legislative
10 purpose of the Hydraulic Code. Again, the purpose of the Code is the “protection of fish life.”
11 RCW 77.55.021(1). Commercial shellfish aquaculture is a case study in how WDFW has failed
12 in its obligation to satisfy this purpose. Industry practices result in the destruction of “native
13 aquatic vegetation and animal life through the use of heavy equipment, the application of
14 herbicides and pesticides, the installation of netting and plastic tubing, and the release of
15 sediments, plastics, and other pollutants.” Pet. ¶ 29. All of these techniques are harmful to fish.
16 *See, generally, id.* ¶¶ 28-39. Yet WDFW has broadly exempted industrial aquaculture from
17 HPA permitting requirements. WAC 220-660-040(2)(1). The agency did not make this
18 determination based on science or its technical expertise. It did so purely on the basis of a flawed
19 statutory interpretation. WDFW is the agency tasked by the legislature with enforcing the
20 hydraulic code. Here, it has failed to do so. Allowing a private injunctive remedy in such a case
21 would be consistent with the purpose of the Hydraulic Code, which is to effectively provide for
22 the protection of fish life.

24 ⁴ Doing so would not, as PNA contends, usurp WDFW’s expertise or discretion in administering the details of the
25 Hydraulic Code. JP Mot. at 10. Petitioners only seek a declaration from the Court clarifying the applicability of
26 the Hydraulic Code to commercial shellfish aquaculture, and an injunction against PNA demanding that it halt
27 hydraulic construction until WDFW issues a permit accordingly. Petitioners do not ask the Court to instruct
WDFW as to whether such a permit should be issued, or if it is, what it should include. Rather, a challenge to the
details of a permit would properly be brought under the right of appeal found directly in the Hydraulic Code,
discussed *supra*.

1 **IV. CONCLUSION**

2 PNA's Motion for Judgment is untimely, will waste the resources of the Court, and in
3 the end, would have little impact on the practical resolution of any matter before the Court. The
4 Court should decline to consider the Motion for Judgment separate from the hearing on the
5 merits, and strike the November 7, 2018 hearing date. When the Court does consider the merits
6 of the Motion to Supplement, it should be denied, because it represents a fundamental
7 misunderstanding of Petitioners claims for declaratory and injunctive relief.

8 DATED: October 26, 2018

9 LANE POWELL PC

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11 

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the
3 laws of the State of Washington, that on the 26th day of October, 2018, the document attached
4 hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system, and
5 that it was served on all parties or their counsel of record via email in accordance with an Electronic
6 Service Agreement:

<p>8 Bob Ferguson, Attorney General 9 Attn: Division of Fish, Wildlife and Parks 10 1125 Washington Street SE 11 Olympia, WA 98501</p> <p>12 NoelleC@atg.wa.gov 13 MichaelY@atg.wa.gov 14 JeanneR@atg.wa.gov 15 DomiS@atg.wa.gov 16 fwdef@atg.wa.gov</p>	<p><input type="checkbox"/> by Thurston County ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>
<p>15 Plauche & Carr LLP 16 811 First Avenue, Suite 630 17 Seattle, WA 98104</p> <p>18 Jesse@plauchecarr.com 19 Billy@plauchecarr.com 20 Sarah@plauchecarr.com</p>	<p><input type="checkbox"/> by Thurston County ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>

21 Executed on the 26th day of October, 2018, at Seattle, Washington.

22 *s/Patti Lane*
23 _____
24 Patti Lane, Legal Assistant