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Hearing date: 11/09/2018  
Hearing time: 9:00 AM  
Judge/Calendar:  
Honorable Christopher Lanese

SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY

PROTECT ZANGLE COVE, et al.,  
  
Petitioners,  
  
v.  
  
WASHINGTON DEPARTMENT OF FISH  
AND WILDLIFE, et al.,  
  
Respondents.

No. 18-2-01972-34  
  
PACIFIC NORTHWEST  
AQUACULTURE, LLC'S REPLY  
ON MOTION FOR JUDGMENT  
ON THE PLEADINGS

REPLY ON MOTION FOR JUDGMENT ON THE  
PLEADINGS

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**I. INTRODUCTION**

Petitioners’ challenge to Pacific Northwest Aquaculture, LLC’s (“PNA’s”) geoduck farm is an inappropriate attempt to privately enforce the Hydraulic Code. The Legislature exclusively vested the agency with expertise on fish and fish habitat—the Washington Department of Fish and Wildlife (“WDFW”)— with discretion to decide how best to enforce the Hydraulic Code in the event work is conducted without a required hydraulic project approval (“HPA”). By contrast, the Legislature provided third parties such as Petitioners a limited role with regard to HPA permitting: the right to appeal certain HPA permit decisions, assuming they meet standing and other requirements. Because Petitioners are attempting to use Claim Three of their Petition to privately enforce the Hydraulic Code against PNA, that claim must be dismissed.

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**II. ARGUMENT AND AUTHORITY**

**A. PNA’s Motion Is Timely.**

Petitioners’ argument that PNA’s motion for judgment on the pleadings (“Motion”) is untimely has no merit. Pet’rs’ Resp. 5-6. Washington State Superior Court Civil Rule (“CR”) 12(c) states motions for judgment on the pleadings may be brought “within such time as not to delay the trial . . . .” The Thurston County Local Court Rules (“LCR”) provide that CR 12(c) motions shall be filed and served as provided in CR 56 and LCR 56. LCR 5(d)(1)(D). CR 56 requires motions to be filed and served at least 28 calendar days before the hearing, and motions must be heard more than 14 calendar days before the trial date. PNA filed the Motion 36 days before the motion hearing, and it set the hearing for 28 days before the trial date. It cannot be disputed that PNA’s Motion complies with the timelines established in the state and local rules.

Nonetheless, Petitioners complain the timing of the Motion does not allow the

1 parties to adjust their briefing to account for a Court ruling on the Motion. Pet'rs' Resp. 5.  
2 At most, this argument takes issue with the fact that, if the Court grants the pending  
3 Motion, Petitioners' opening brief will have included unnecessary argument addressing  
4 Claim Three. But this is not the timing standard for filing CR 12(c) motions. And it is  
5 Petitioners that chose to bring Claim Three against PNA; they should not now be heard to  
6 complain about having to fully brief a claim that they alone decided to pursue.

7 Petitioners also argue the Court should refuse to entertain PNA's Motion because  
8 it does not advance judicial economy. Pet'rs' Resp. 5-6. Judicial economy is not a  
9 criterion for filing CR 12(c) motions. Even if it were, disposing of Claim Three will  
10 advance judicial economy by reducing the number of issues and parties before the Court  
11 at the hearing on the merits. And since the parties will already be before the Court on  
12 November 9 to address Petitioners' delayed request for judicial notice and to supplement  
13 the record, the additional burden on the parties to argue this motion is minimal.

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

15 Petitioners do not dispute that the Hydraulic Code, chapter 77.55 RCW, contains  
16 no express cause of action authorizing them to act as private Attorneys General, enjoining  
17 PNA from continuing to farm geoduck on its property without obtaining an HPA permit.  
18 While Petitioners' primary argument, addressed below, is that they are not asserting a  
19 private right of action under the Hydraulic Code, they also half-heartedly argue that the  
20 Hydraulic Code supports finding an implied private right of action. Pet'rs' Resp. 11. The  
21 Hydraulic Code does not support such an argument.

22 As stated in the Motion, courts have adopted a three-part test to determine whether  
23 a private cause of action can be implied in a statute:

24 (1) whether the plaintiffs are within the class of persons for whose benefit  
25 the statute was enacted; (2) whether legislative intent, explicitly or

1 implicitly, supports creating or denying a remedy; and (3) whether  
2 implying a remedy is consistent with the underlying purpose of the  
3 legislation.

4 *Wash. State Coal. for the Homeless v. Dep't of Soc. and Health Servs.*, 133 Wn.2d 894,  
5 912-13, 949 P.2d 1291 (1997).

6 Petitioners contend they are within the class for whose special benefit the  
7 Hydraulic Code was enacted because they, unlike "all Washingtonians," have interests in  
8 healthy nearshore fish populations. Pet'rs' Resp. 12. Petitioners offer no support for the  
9 statement that their interests in fish exceeds that of the general public. Regardless, their  
10 reasoning has been rejected by the United States Supreme Court.<sup>1</sup> In *California v. Sierra*  
11 *Club*, 451 U.S. 287, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981), the Supreme Court held  
12 Section 10 of the Rivers and Harbors Act of 1899, which prohibits constructing  
13 obstructions to navigable waters without a permit, does not contain a private action:

14 Without analyzing either the language or legislative history of the Act, the  
15 Court of Appeals here concluded that the Act was designed for the  
16 especial benefit of private parties who may suffer "special injury" caused  
17 by an unauthorized obstruction to a navigable waterway. It was apparently  
18 reasoned that since Congress enacted a statute that forbids such  
19 obstructions in navigable waters, any person who would be "especially  
20 harmed" by an unauthorized obstruction was an especial beneficiary of the  
21 Act. But such a definition of "especial" beneficiary makes this factor  
22 meaningless. Under this view, a victim of any crime would be deemed an  
23 especial beneficiary of the criminal statute's proscription. *Cort* did not  
24 adopt such a broad-gauge approach. *Cort v. Ash*, [422 U.S. 66, 80-82, 95  
25 S. Ct. 2080, 2089, 45 L. Ed. 2d 26 (1975)]. The question is not simply  
26 who would benefit from the Act, but whether Congress intended to confer  
27 federal rights upon those beneficiaries. *See Cannon [v. University of*  
28 *Chicago*, 441 U.S. 677, 690-93, n. 13, 99 S. Ct. 1946, 1954-56, n. 13, 60  
29 L. Ed. 2d 560 (1979)].

30 451 U.S. at 293-94. Here, as noted in PNA's Motion, the Hydraulic Code is intended to

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<sup>1</sup> Washington State's three-part implied cause of action test is borrowed from a similar test developed by the  
United States Supreme Court. *Bennett v. Hardy*, 113 Wn.2d 912, 919-20 n.3, 784 P.2d 1258 (1990).

1 protect fish. It was not enacted to benefit any particular class of people and contrasts  
2 sharply with statutes that have been found to benefit particular classes. Mot. 5-6.

3 With regard to the second and third prongs of the implied cause of action test,  
4 Petitioners argue that the fact that the Legislature authorized private parties to appeal  
5 certain HPA permit decisions somehow shows that the Legislature intended to create an  
6 implied right of action to enforce the Hydraulic Code. Pet'rs' Resp. 12-13. The opposite is  
7 true. The fact that the Legislature expressly authorized third-party appeals of certain HPA  
8 permitting decisions but chose not to include a citizens' suit provision authorizing third  
9 parties to enforce the Hydraulic Code is a strong showing that the Legislature did not  
10 intend to create a private right of enforcement. Mot. 7-9; *Transamerica Mortgage*  
11 *Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979).

12 Petitioners do not meet the test for finding an implied cause of action to enforce  
13 the Hydraulic Code. That enforcement authority is entrusted exclusively to WDFW, and  
14 Claim Three fails to state a claim upon which relief can be granted.

15 **C. Petitioners Have Not Brought a Uniform Declaratory Judgments Act**  
16 **Action Against Petitioners.**

17 In an apparent recognition that the Hydraulic Code does not create a private cause  
18 of action authorizing Claim Three, Petitioners contend in their response brief that the  
19 Uniform Declaratory Judgments Act ("UDJA"), chapter 7.24 RCW, provides a basis for  
20 Claim Three. Pet'rs' Resp. 7-11. Petitioners' argument fails because the Petition does not  
21 plead a claim against PNA under the UDJA or request declaratory relief against PNA.

22 CR 8(a) requires pleadings to "contain (1) a short and plain statement of the claim  
23 showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to  
24 which the pleader deems the pleader is entitled." "Although inexpert pleading is  
25 permitted, insufficient pleading is not." *Nw. Line Constructors Chapter of Nat. Elec.*

1 *Contractors Ass'n v. Snohomish Cty. Pub. Util. Dist. No. 1*, 104 Wn. App. 842, 848–49,  
2 17 P.3d 1251 (2001). A pleading is insufficient if it does not “apprise the defendant of the  
3 nature of the plaintiff’s claims and the legal grounds upon which the claims rest.” *Molloy*  
4 *v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993).

5 The Petition fails to satisfy the requirements of CR 8(a) to plead a claim against  
6 PNA under the UDJA. To plead such a claim, Petitioner must, at the very least, request  
7 declaratory relief against PNA. RCW 7.24.010. The Petition fails to do this. The only  
8 claim Petitioners bring against PNA is Claim Three, and the only relief Petitioners request  
9 in this claim is for the company to “be enjoined from beginning operations at its Facility  
10 until it has received the required HPA permit from WDFW under chapter 77.55 RCW.”  
11 Pet. ¶ 82. Similarly, in its concluding Prayer for Relief, the only relief requested against  
12 PNA is an injunction. There is no mention of declaratory relief against PNA anywhere in  
13 the Petition and no indication that Claim Three is grounded in the UDJA.

14 Petitioners argue that they pled a UDJA claim against PNA because Claim One  
15 includes a claim for declaratory relief under the UDJA and Claim Three “incorporat[es]  
16 by reference [this] earlier claim. . .” Pet’rs’ Resp. 8. This argument fails, however,  
17 because Petitioners bring Claim One only against WDFW and Claim One only requests  
18 that the court grant declaratory relief against WDFW. Pet. ¶ 73. Further, Claim One only  
19 alleges the UDJA authorizes an action against WDFW, not PNA. *Id.* ¶ 70 (stating the  
20 UDJA allows interested person to “request the Court to determine the construction or  
21 validity of WDFW’s action,” not PNA’s actions). And the Petition only alleges there is a  
22 justiciable controversy under the UDJA between Petitioners and WDFW, not PNA. *Id.* ¶  
23 72 (alleging elements of justiciable controversy test are satisfied but only between  
24 “Petitioners and WDFW”). 15 Wash. Prac., Civil Procedure § 42:16 (2d ed.) (a UDJA  
25 “complaint must show a justiciable controversy, and will be subject to a motion to dismiss

1 for failure to state a claim if it does not”). While the UDJA allows the Court to enter non-  
2 declaratory relief against a party after granting declaratory judgment, it does not authorize  
3 the Court to grant declaratory relief against only one party and then grant injunctive relief  
4 against a wholly separate party. RCW 7.24.080.

5 Petitioners argue they have a basis for bringing a UDJA claim as discussed in their  
6 Opening Brief, Pet’rs’ Resp. 7, and that PNA is a proper party in this action under RCW  
7 7.24.110, Pet’rs’ Resp. 9. In their Opening Brief Petitioners do state, for the first time in  
8 this proceeding, that they are seeking declaratory relief against PNA. Pet’rs’ Br. 24. But  
9 “[a] party who does not plead a cause of action or theory of recovery cannot finesse the  
10 issue by later inserting the theory into trial briefs and contending it was in the case all  
11 along.” *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).  
12 This is precisely what Petitioners attempt here, and the Court should reject Petitioners’  
13 attempt to rely on the UDJA in defending against PNA’s Motion.

14 **D. Claim Three Would Require Dismissal Even if Pled Under the UDJA.**

15 In their response brief, Petitioners obfuscate whether their purported UDJA claim  
16 against PNA is a part of their UDJA claim against WDFW (Claim One) or their stand-  
17 alone claim against PNA (Claim Three); either way, a UDJA claim against PNA fails as a  
18 matter of law. Because PNA brought its motion only with respect to Claim Three, the  
19 discussion below assumes Petitioners’ UDJA claim against PNA is part of Claim Three.<sup>2</sup>

20 Claim Three is an attempt to privately enforce the Hydraulic Code. Petitioners  
21 contend PNA’s farm needs an HPA permit under RCW 77.55.021 and request that this  
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24 <sup>2</sup> PNA and/or Taylor Shellfish Company, Inc. (“Taylor Shellfish”) contest Petitioners’ standing, their case’s  
25 justiciability, and their requested relief, and reserve the right to offer evidence and provide arguments in  
support of this position in their response to Petitioners’ opening brief.

1 Court order that the farm cease operations until an HPA permit is obtained.<sup>3</sup> Nonetheless,  
2 Petitioners argue Claim Three is not an attempt to privately enforce RCW 77.55.021 but  
3 merely to obtain “a declaratory judgment and related injunctive relief . . .” Pet’rs’ Resp. 1.

4 Petitioners’ position is untenable. As stated in PNA’s Motion, the Legislature  
5 vested WDFW with the exclusive authority to do what Petitioners seek in Claim Three:  
6 determine whether a person is undertaking work without a required HPA and take  
7 measures to bring people into compliance with the Hydraulic Code. Mot. 10-11. The  
8 Legislature granted WDFW a broad range of powers to enforce the Hydraulic Code,  
9 including the power to seek injunctive relief. *Id.*; WAC 220-660-480; RCW 34.05.578.

10 Moreover, the remedy that Petitioners seek here—an injunction to shut down  
11 PNA’s farm—is one of the more drastic remedies that WDFW has at its disposal, and it  
12 must take multiple preliminary steps before seeking such a remedy. RCW 77.55.291  
13 authorizes WDFW to levy civil penalties for violations of RCW 77.55.291. Before levying  
14 a civil penalty, however, WDFW must, with limited exceptions, first issue a notice of  
15 correction. RCW 43.05.110. WDFW’s decision to issue a notice of correction is  
16 discretionary. RCW 43.05.100. If the responsible party fails to comply with the correction  
17 notice and a civil penalty is imposed, the party may informally appeal the penalty to  
18 WDFW or formally appeal it to the pollution control hearings board. RCW 77.55.291(2).  
19 If a civil penalty is not paid within 30 days after it becomes due and payable, WDFW may  
20 seek enforcement of the order under RCW 77.55.291 and 34.05.578 by having the

21 <sup>3</sup> Petitioners acknowledge this lawsuit is simply the last resort in a long string of unsuccessful attempts to  
22 prevent PNA from growing native geoducks on tidelands that are privately owned by PNA’s governor, Dr.  
23 ChangMook Sohn. Townsend Decl. in Support of Pet’rs’ Opening Br. (“Townsend Decl.”) ¶ 6, 11.  
24 Petitioner Protect Zangle Cove’s governor, Patrick Townsend, and his wife “have attempted to challenge  
25 PNA’s proposed geoduck operation at every turn.” *Id.* ¶ 11. The Townsends challenged PNA’s shoreline  
substantial development permit (“SSDP”) application before Thurston County but lost. *Id.* They attempted  
to appeal the SSDP to the Shorelines Hearings Board but lost. *Id.* They filed a separate civil action against  
PNA’s farm in Thurston County Superior Court and recently sought a preliminary injunction to stop PNA  
from conducting additional farm activities; that motion was denied. *Id.*

1 Attorney General file an action in superior court. It is only at this stage that WDFW may  
2 request and obtain declaratory and injunctive relief. RCW 34.05.578(4). Authorizing  
3 Petitioners to obtain this same relief to enforce the Hydraulic Code through the UDJA  
4 would not only allow them to usurp WDFW's enforcement authority, it would authorize  
5 them to obtain particularly severe remedies in a more immediate manner than the agency  
6 with expertise and authority over the Hydraulic Code. This would circumvent the  
7 Legislature's carefully crafted system for achieving regulatory compliance.

8 Because Petitioners' use of the UDJA would disrupt the Legislature's scheme for  
9 enforcing the Hydraulic Code, it is no surprise that this tactic has been rejected by the  
10 Supreme Court of Washington. In *Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010),  
11 death row inmates filed a complaint that included a UDJA action asserting the  
12 Washington State Department of Correction's handling of substances necessary for lethal  
13 injections violated state and federal controlled substance acts. The court held appellants'  
14 claim was not justiciable under the UDJA because it would not result in a final and  
15 conclusive determination. *Id.* The court noted that a declaratory judgment has no direct or  
16 coercive effect, and the court recognized that under established case law it could not  
17 intervene to disturb an agency's enforcement authority. *Id.* at 334.<sup>4</sup>

18 The appellants in *Brown*, like Petitioners here, argued they were not seeking to  
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20 <sup>4</sup> The court in *Brown* relied principally on *Heckler v. Chaney*, 470 U.S. 821, 824–25, 105 S. Ct. 1649, 84 L.  
21 Ed. 2d 714 (1985). *Heckler* involved an attempt by death row inmates to use the federal Administrative  
22 Procedure Act ("APA") to require the Food and Drug Administration to prevent violations of laws that it  
23 oversees. The Court held the FDA's decision not to take enforcement actions requested by the respondents  
24 was not subject to judicial review under the APA. 470 U.S. at 837-38. While Claim Three is brought against  
25 PNA, to the extent Petitioners are attempting to use the UDJA to compel WDFW to take action, it fails as a  
matter of law for the same reason. *Bainbridge Citizens United v. Dep't of Nat. Res.*, 147 Wn. App. 365, 374-  
376, 198 P.3d 1033 (2008) (holding an action to compel the Department of Natural Resources to enforce  
laws under its oversight is outside the scope of the UDJA). "Declaratory judgments are not meant to compel  
government agencies to enforce laws. If the UDJA allowed otherwise, the negative implications would be  
endless. Courts would be forced to supervise administrative agencies, a function we have long found  
contrary to the judiciary's proper role." 147 Wn. App. at 375.

1 compel an agency to enforce the law but merely seeking declaratory and injunctive relief  
2 for violations of the law. *Id.* at 334; Pet’rs’ Resp. 13 n.4. The court rejected this argument,  
3 recognizing it could neither compel an agency to enforce laws it is charged with  
4 overseeing or step into the agency’s shoes and enforce those laws itself by entering  
5 declaratory and injunctive relief against alleged violators under the UDJA. 169 Wn.2d at  
6 334. “[W]e cannot see what purpose a judgment declaring a violation would serve when  
7 enforcement of the alleged violations remains in the discretion of the agency, and no party  
8 is bound to act in accord with such judgment.” *Id.*

9         Petitioners argue this case presents an issue of major public importance and hence  
10 is reviewable under the UDJA even if it is not justiciable. Pet’rs’ Resp. 9 n.3. Petitioners  
11 provide no specific support for this argument, and it is particularly weak with respect to  
12 Claim Three given PNA’s farm has already been subject to extensive environmental  
13 scrutiny and must comply with numerous conditions to protect fish and habitat. Townsend  
14 Decl. ¶ 11; First Declaration of Diane Cooper, ¶¶ 7-10, Ex. A. Moreover, even if the court  
15 entertained Claim Three under the UDJA, given it could not compel WDFW to enforce  
16 the Hydraulic Code or assume WDFW’s enforcement authority itself, it would not  
17 terminate the uncertainty or controversy giving rise to the proceeding. RCW 7.24.060.  
18 Finally, the court in *Brown* was dealing with implementation of the death penalty, an issue  
19 of obvious societal interest, yet did not find an issue of major public importance that  
20 compelled entertaining a UDJA action. 169 Wn.2d at 333-35.

21         Petitioners do not attempt to address these limits of the UDJA but instead argue  
22 they can privately enforce the Hydraulic Code under the UDJA by relying on *Five*  
23 *Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011), and *S. Tacoma*  
24 *Way, LLC v. State*, 146 Wn. App. 639, 191 P.3d 938 (2008), *rev’d on other grounds*, 169  
25 Wash. 2d 118, 233 P.3d 871 (2010). Pet’rs’ Resp. 9-10. Neither case is on point. While

1 the court in *Five Corners* held appellants had standing under the UDJA to seek a  
2 declaration regarding the construction of a statute governing public groundwater  
3 withdrawals, the respondent did not challenge other justiciability requirements, and  
4 because the court disagreed with the appellants' construction of the statute it did not  
5 address whether injunctive relief would have been proper. 173 Wn.2d at 302 n.2. *S.*  
6 *Tacoma Way* also involved a challenge to standing, and it did not address the construction  
7 of a regulatory program that had been left to the discretion of an agency to oversee. 146  
8 Wn. App. at 647-48. The subject statute simply required the Department of Transportation  
9 to notify abutting property owners prior to selling surplus property. *Id.* at 643.

10 Petitioners cannot use the UDJA to have the Court enforce the Hydraulic Code  
11 against PNA, nor can it be used to compel WDFW to enforce the Hydraulic Code against  
12 PNA. Thus, even if Petitioners pled Claim Three under the UDJA, which they did not, it  
13 would still fail as a matter of law, and PNA's Motion should be granted.

### 14 III. CONCLUSION

15 Claim Three seeks to enforce the Hydraulic Code against PNA. The Hydraulic  
16 Code does not contain an express or implied cause of action allowing such an enforcement  
17 action. Rather, the Legislature exclusively vested WDFW with authority to enforce the  
18 Hydraulic Code. Petitioners cannot use the UDJA to subvert that legislative decision.

19 DATED this 2<sup>nd</sup> day of November, 2018.

20 PLAUCHÉ & CARR LLP

21 By: 

22 Samuel W. Plauché, WSBA #25476

23 Jesse DeNike, WSBA #39526

24 Attorneys for Pacific Northwest Aquaculture, LLC

1 **CERTIFICATE OF SERVICE**

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

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

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

15 EXECUTED at Seattle, Washington on November 2, 2018.

16  
17 

18 Sarah Fauntleroy, Legal Assistant