

1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set  
4 Date: November 9, 2018  
5 Time: 9:00 a.m.  
6 The Honorable Christopher Lanese

7  
8 **STATE OF WASHINGTON**  
9 **THURSTON COUNTY SUPERIOR COURT**

10 PROTECT ZANGLE COVE, et al.,

No. 18-2-01972-34

11 Petitioners,

WDFW'S OPPOSITION TO  
12 PETITIONERS' REQUEST FOR  
13 JUDICIAL NOTICE AND MOTION  
14 TO SUPPLEMENT THE RECORD

15 v.

16 WASHINGTON DEPARTMENT OF  
17 FISH AND WILDLIFE, et al.,

18 Respondents.

19  
20 **INTRODUCTION**

21 Petitioners' action is based on only one issue, and it is a pure question of law: Does the  
22 Washington Department of Fish and Wildlife have statutory authority to require aquatic farmers  
23 to obtain hydraulic project permits under chapter 77.55 RCW when they cultivate aquatic  
24 products? The Court need not adjudicate any facts to answer this question. Yet, Petitioners  
25 contend that the Court must judicially notice certain documents and supplement the agency's  
26 record with numerous other documents. Petitioners do not meet any of the governing standards,  
and their Motion should be denied.

First, Petitioners expressly concede that the documents submitted for judicial notice are  
neither necessary to determine their claims nor offered for the truth. This admission defeats any  
basis for judicial notice, which ER 201 restricts to adjudicative facts.

1 Second, WDFW relied upon only a narrow group of records as justification for its rule  
2 indicating that hydraulic project approval permits are not required for most aquaculture  
3 operations. WAC 220-660-040(2)(1). That narrow group of records includes everything  
4 “regarded by the agency as important to adoption of the rule.” RCW 34.05.370(2)(c). Petitioners  
5 invoke RCW 34.05.562(1)(c) as a basis for supplementing the record, but none of the proposed  
6 materials directly relate to WDFW’s rulemaking or interpretation of its statutory authority.

7 Because none of the proffered documents are necessary for this Court to decide the sole  
8 legal question before it, it should deny the Motion. Should the Court deny any part of the  
9 Motion, WDFW requests the Court to strike Petitioners’ opening brief and order them to re-file,  
10 with corresponding adjustments to the briefing schedule for WDFW’s response.

11 **I. By admitting Exhibits A-G are not necessary for the Court’s adjudication of the sole**  
12 **legal question, Petitioners concede they are not proper subjects of judicial notice.**

13 Petitioners purport that Exhibits A through G to the Declaration of Claire Davis are  
14 proper subjects of judicial notice under ER 201 because they are “matters of public record” and  
15 because they “supply factual background helpful to understand some of the issues in this case.”  
16 (Mot. at 2.) But in the same breath, Petitioners state: “The outcome of this case does not hinge  
17 upon any of the facts contained in this documents [sic], and Petitioners do not ask the Court to  
18 take judicial notice of the truth of any of the facts asserted within these public documents.”  
19 (Mot. at 2 n. 2.) This admission—that the Court need not adjudicate any issue represented by  
20 or raised in any of these documents—precludes the application of ER 201, which expressly  
21 “governs *only* judicial notice of *adjudicative* facts.” ER 201(a) (emphasis added).

22 According to Judicial Council Comment 201, reproduced in 5 Wash. Prac., Evidence  
23 Law and Practice, § 201.1 (6th ed.):

24 The rule applies only to judicial notice of ‘adjudicative facts’ as  
25 distinguished from ‘legislative facts’. An adjudicative fact is the  
26 ‘what-happened’, ‘who-did-what-and-when’ kind of question that  
normally goes to a jury...Legislative facts are those a court takes into

1 account in determining the constitutionality or interpretation of a  
2 statute or the extension or restriction of a common-law rule upon  
grounds of policy....

3 Our state Supreme Court agrees: “An adjudicative fact is a ‘controlling or operative fact, rather  
4 than a background fact; a fact that concerns the parties to a judicial or administrative proceeding  
5 and that helps the court or agency determine how the law applies to those parties.’ Black’s Law  
6 Dictionary 669 (9th ed. 2009).” *In re Disciplinary Proceeding Against Sanai*, 177 Wn.2d 743,  
7 753, 302 P.3d 864 (2013). Moreover, “[t]he purpose of judicial notice is to save time during  
8 trial.” *In re Marriage of Campbell*, 37 Wn. App. 840, 846, 683 P.2d 604 (1984).

9 Petitioners do not maintain that any of Exhibits A through G are legislative facts relating  
10 to the validity of WDFW’s rule—Petitioners have submitted other proposed records as  
11 legislative facts, but not Exhibits A-G. Because the materials in Exhibits A through G are neither  
12 adjudicative nor legislative facts, written and oral argument about the contents of those  
13 documents would unnecessarily consume judicial resources and distract from the sole legal  
14 question before the Court. For this reason, the Court should deny the request for judicial notice.

15 Alternatively, with respect to Exhibit F (Respondent Pacific Northwest Aquaculture,  
16 LLC’s (“PNA”) December 18, 2014 Joint Aquatic Resources Permit Application) and Exhibit  
17 G (PNA’s December 30, 2014 Hydraulic Permit Approval permit application No. 2529), despite  
18 the disclaimer that none of Exhibits A-G are necessary for the Court’s decision on the merits,  
19 Petitioners also appear to maintain that Exhibits F and G establish “the basis for Petitioners’  
20 claim for declaratory and injunctive relief against PNA” (Mot. at 4) and/or “establish eligibility  
21 for declaratory judgment” against PNA by “show[ing] a justiciable controversy” (Mot. at 4 n.  
22 3). Whether Petitioners may state a claim against PNA in this action is currently the subject of  
23 PNA’s pending CR 12(c) motion for judgment on the pleadings to dismiss Claim 3 against  
24 PNA. To the extent the Court finds that Exhibits F or G will assist it in adjudicating PNA’s  
25 motion or Claim 3, WDFW does not oppose those exhibits.  
26

1 In Claim 2, Petitioners challenge WDFW's rule on the basis it is an "exemption" that  
2 exceeds WDFW's statutory authority, and seek a declaration that WAC 220-660-040(2)(1) is  
3 invalid and unenforceable. (Pet. at ¶¶ 74-77.) WDFW does not concede that Petitioners state a  
4 valid claim against WDFW under the Uniform Declaratory Judgment Act ("UDJA"). Judicial  
5 review of agency rules proceeds under the APA. RCW 34.05.570(2). The UDJA "does not apply  
6 to state agency action reviewable under chapter 34.05 RCW." RCW 7.24.146. Claim 1 also  
7 purports to request a declaration under the UDJA "that WDFW's policy and practice of  
8 exempting" is invalid. (Pet. at ¶ 73.) But the Petition does not identify any alleged "policy or  
9 practice of exempting" apart from the alleged "exemption" within WAC 220-660-040(2)(1), the  
10 legal validity of which is the sole legal issue presented to this court for APA review. Claim 1  
11 being subsumed within Claim 2, the APA displaces any UDJA claim against WDFW.

12 **II. WDFW's certified record is complete.**

13 In 2011, WDFW began a rulemaking process to overhaul its rules under the Hydraulic  
14 Code, chapter 77.55 RCW, which are now codified at chapter 220-660 WAC. The rulemaking  
15 lasted through 2014. In this process, WDFW clarified the extent of its authority with respect to  
16 aquaculture hydraulic projects when it re-codified, amended, and adopted WAC 220-660-  
17 040(2)(1): WDFW cannot require hydraulic project approval permits ("HPAs") for hydraulic  
18 projects for private sector cultured aquatic products, but can require HPAs for accessory  
19 structures. WDFW based this rule on its interpretation of its statutory authority over  
20 aquaculture, and based this interpretation on the Attorney General's formal opinion on this very  
21 question. (AR-949-958 [2007 AGO No. 1].)

22 In the rulemaking, WDFW received public comments challenging the proposed rule,  
23 and specifically, WDFW's interpretation of its statutory authority and the formal Attorney  
24 General opinion. (AR-964; AR-968; AR-986-987.) In response, WDFW reiterated the statutory  
25 basis for the rule. (AR-964; AR-968; AR-986 to -987.) After Petitioners filed their petition for  
26 judicial review of the rule, WDFW filed the agency's record for the case, certifying that it

1 constituted the agency's rulemaking file. The record includes the foregoing comments,  
2 responses, and 2007 AGO No. 1. The record thus includes "[a]ll written...comments received  
3 by the agency and all other written material regarded by the agency as important to adoption of  
4 the rule" (RCW 34.05.370(2)(c)) as well as all "documents [1] identified by the agency as  
5 having been considered by it before its action and [2] used as the basis for its action" (RCW  
6 34.05.566(1) (brackets added)). The record is therefore complete.

7 **III. Because Petitioners facially challenge the validity of WDFW's rule, there is no**  
8 **basis to admit new evidence.**

9 "Under the APA, judicial review is limited to the agency record. RCW 34.05.566(1)."  
10 *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). RCW 34.05.562(1)  
11 provides narrow exceptions to the rule that "new evidence is inadmissible." *Id.* If new evidence  
12 were admissible at the superior court level outside of those "highly limited circumstances," "the  
13 superior court would become a tribunal of original, rather than appellate, jurisdiction." *Id.*

14 Petitioners appear to ask that the Court "supplement" the agency's record under RCW  
15 34.05.562(1)(c). (Mot. at 5). This request misconstrues the purpose of this statute. The statute  
16 is a means by which the superior court may receive evidence if "it relates to the validity of the  
17 agency action at the time it was taken and is needed to decide disputed issues  
18 regarding:...[m]aterial facts in rulemaking...not required to be determined on the agency  
19 record." RCW 34.05.562(1)(c). This exception may be necessary in judicial review actions  
20 involving rule challenges because, under the APA, "the official agency rule-making file need  
21 not be the exclusive basis *for agency action on that rule.*" RCW 34.05.370(4) (emphasis added).  
22 In other words, the APA permits admission of new evidence if it is necessary not only to  
23 determine whether a rule is valid, but also to resolve a dispute over the validity of an agency  
24 action taken on the basis of the challenged rule.

25 This exception does not apply here. Petitioners facially challenge the legal validity of  
26 WDFW's rule on the ground the rule exceeds WDFW's statutory authority. More specifically,

1 in Claim 2, Petitioners allege WAC 220-660-040(2)(1) is an invalid “exemption” for aquaculture  
2 from the HPA requirement. (Pet. at ¶ 76.) Petitioners also bring Claim 1, alleging an invalid  
3 “policy and practice of exempting” such work from the HPA requirement (*Id.* at ¶ 73). Yet,  
4 Petitioners do not identify any specific agency action other than the allegedly invalid rule. Nor  
5 could they. As pleaded, the subjects of Claims 1 and 2 are one and the same. They pose the  
6 same question of statutory authority, which is a pure issue of law.

7 None of Petitioners’ proffered documents meet the standards governing the contents of  
8 either agency records or superior court records in judicial review rule challenges under the APA:

9 **Davis Decl., Ex. K:** Exhibit K is Representative Lantz’s 2006 letter to the Attorney  
10 General, seeking a formal opinion on WDFW’s authority to “require private parties engaged in  
11 the practice of planting, growing, and harvesting farm raised geoduck clams as part of an  
12 aquaculture operation to obtain a hydraulic project approval permit.” Petitioners’ basis for  
13 asking that the letter “be included as a supplement to the Agency Record” is that, “[i]f the AG’s  
14 Opinion was a material fact in WDFW’s rulemaking, then so was Representative Lantz’s  
15 request for that opinion. See RCW 34.05.562(1)(c).” (Mot. at 5.) RCW 34.05.562(1)(c) does  
16 not state, and “materiality” does not constitute, the standard for what must be included in an  
17 agency record. WDFW included 2007 AGO No. 1 in its record because the agency (1)  
18 considered that opinion before adopting WAC 220-660-040(2)(1) and (2) used the opinion as  
19 the basis for adopting that rule. RCW 34.05.566(1). Because Petitioners do not challenge any  
20 agency action taken *on the basis of* WDFW’s rule, there is no material fact in dispute for which  
21 this document would be necessary to resolve. RCW 34.05.370(4); 34.05.562(1)(c). Moreover,  
22 even if the fact of the existence of Rep. Lantz’s letter were material, it is not in dispute: 2007  
23 AGO No. 1 is addressed to Rep. Lantz and references her request. As for the ultimate, and  
24 purely legal, question of statutory authority, the Court will determine that *de novo*.

1        **Davis Decl., Exs. L, M, P:** Exhibits L, M and P consist of correspondence dating from  
2 1999 to 2000, which predate by over a decade the only agency action challenged here, *i.e.*, the  
3 2014 adoption of WAC 220-660-040(2)(1). As a result, they have no relevance to the 2014 rule.

4        **Davis Decl., Exs. Q, R:** Exhibits Q and R consist of a 2011 JARPA application and a  
5 draft letter from a WDFW biologist to the HPA applicant. Because Petitioners do not challenge  
6 any agency action on that application, no such action is in dispute, rendering the documents  
7 immaterial to the question of whether the 2014 rule exceeds WDFW’s statutory authority.

8        **Davis Decl., Exs. N, O:** Exhibits N and O consist of 2011-2012 emails. Both reference  
9 WDFW’s rulemaking that culminated in the 2014 adoption of WAC 220-660-040(2)(1). More  
10 specifically, they relate to the distinction clarified in that rule between aquaculture-related work  
11 which requires HPAs and that which does not. But internal agency documents such as Exhibit  
12 N, to the extent they constitute preliminary “drafts, notes, recommendations, [or] intra-agency  
13 memoranda in which opinions are expressed or policies formulated or recommended,” “are  
14 exempt from inclusion in the rule-making file.” RCW 34.05.370(3). With respect to Exhibit O,  
15 because Petitioners do not challenge any WDFW action on the project referenced in the email,  
16 that action is not in dispute. Being immaterial to any disputed agency action other than the  
17 adoption of the 2014 rule, the documents do not qualify for admission under RCW 34.05.562(1).

18        Because none of the proffered documents are necessary for this Court to reach and  
19 decide the sole legal question before it, it should deny the Motion.

20 **IV. Should the Court deny any part of Petitioners’ Motion, Petitioners’ opening brief**  
21 **on the merits, which incorporates those documents, should be stricken and refiled.**

22        On Monday October 8, 2018, Petitioners’ counsel asked if Respondents’ counsel would  
23 agree to their request to supplement the agency’s record, and stated that, if Respondents did not  
24 agree, Petitioners would file their motion to supplement by Thursday October 11. Chung Decl.,  
25 Ex. A. Respondents’ counsel replied on Tuesday October 9, stating they did not agree to the  
26 request and that they would oppose a motion to supplement. *Id.* Had Petitioners filed on October

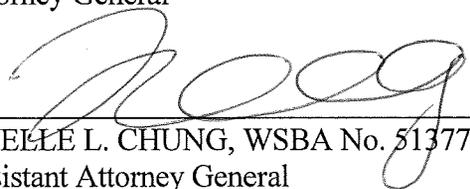
1 11, the parties would have had time to brief and argue the issues to the Court *before* Petitioners'  
2 October 26 deadline to file their opening brief on the merits. Instead, Petitioners included the  
3 documents in their opening brief without first obtaining leave of court to introduce these  
4 extensive extra-record materials. Should the Court deny any part of the Motion, WDFW  
5 requests the Court strike Petitioners' opening brief and order them to re-file. WDFW asks the  
6 court to readjust the briefing deadline accordingly so that WDFW has adequate time to file its  
7 response to the replacement opening brief before the hearing on the merits.

8 **CONCLUSION**

9 For the foregoing reasons, WDFW respectfully requests the Court deny Petitioners'  
10 request for judicial notice and motion to supplement, strike Petitioners' opening brief on the  
11 merits, and order Petitioners to re-file their opening brief.

12 Respectfully submitted this 6th day of November, 2018.

13 ROBERT W. FERGUSON  
14 Attorney General

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16 \_\_\_\_\_  
17 NOELLE L. CHUNG, WSBA No. 51377  
18 Assistant Attorney General  
19 *Attorneys for Respondents Washington Department*  
20 *of Fish and Wildlife and Joe Stohr, Acting Director of*  
21 *WDFW*

1 **CERTIFICATE OF SERVICE**

2 I certify that, pursuant to an Electronic Service Agreement, I electronically served a copy  
3 of the foregoing document on all parties or their counsel of record on the date below as follows:

4 *For Protect Zangle Cove, Coalition to Protect Puget Sound Habitat, and*  
5 *Wild Fish Conservance:*

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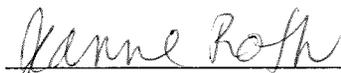
13 *For Pacific Northwest Aquaculture and Taylor Shellfish Co.:*

14 Samuel W. Plauche  
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19 I certify under penalty of perjury under the laws of the state of Washington that the  
20 foregoing is true and correct.

21 DATED this 6th day of November 2018, at Olympia, Washington.

22   
23 \_\_\_\_\_  
24 Jeanne Roth  
25 Legal Assistant  
26