☐ EXPEDITE
☐ No Hearing is set
☑ Hearing is set:
Date: 11/9/2018
Time: 9 AM
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' REPLY IN SUPPORT OF THEIR REQUEST FOR JUDICIAL NOTICE AND MOTION TO SUPPLEMENT THE RECORD

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I. INTRODUCTION

Petitioners submitted a modest Request for Judicial Notice and Motion to Supplement the Record ("Motion to Supplement" or "Mot. to Supp."), designed to provide the Court with fundamental facts to adjudicate claims brought in their Petition for Judicial Review, Declaratory Judgment and Injunctive Relief ("Petition"). Respondent Washington Department of Fish and Wildlife ("WDFW"), and Respondent Pacific Northwest Aquaculture ("PNA") and Intervenor Taylor Shellfish (collectively, "Taylor") oppose the motion on illusory legal technicalities, a misreading of the applicable statute, and misguided assertions. Petitioners respectfully submit this reply brief asking the Court to grant the Motion to Supplement and deny the motions to strike contained in both WDFW's Opposition to Petitioners' Request for Judicial Notice and Motion to Supplement the Record ("WDFW Opp.") and PNA and Taylor's Opposition to Petitioners' Request for Judicial Notice and Motion to Supplement the Record ("Taylor Opp.").

II. REQUEST FOR JUDICIAL NOTICE

A. The Requested Documents and Their Contents are Relevant to the Matter

As an initial matter, both WDFW and Taylor misapprehend the nature of the judicial notice that Petitioners seek. Petitioners are not attempting to use the process of judicial notice "to establish as 'fact' contested allegations." Taylor Opp. at 1. To the contrary, Petitioners are not seeking judicial notice of the truth of any of the information contained in the biological opinions by the United States Fish and Wildlife Service or the National Marine Fisheries Service (Ex. A, D); the state's Proposed Aquatic Lands Habitat Conservation Plan or the draft Environmental Impact Statement prepared in support (Exs. B, E); the biological assessment by the United States Army Corps of Engineers (Ex. C); or the two documents submitted seeking approval for the Taylor aquaculture facility in Zangle Cove (Exs, F, G). Mot. to Supp. at 2 & n.2. Rather, Petitioners merely seek notice of "the existence and contents" of these official governmental documents. *Id.* at 2.[1]

[1] Notably, neither WDFW nor Taylor contest that the documents are authentic or publicly available, or that the excerpts submitted by Petitioners accurately reflect their contents. Rather, Taylor disputes Petitioners' *characterization* of some of the contents of these documents. Taylor Opp. at 3-6. Taylor is free to make this

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It is entirely proper for a court to take judicial notice of the existence and content of a public document, *without* taking judicial notice of the truth of all of the statements contained therein. *See, e.g.*, *Klein v. Freedom Strategic Partners*, 595 F. Supp. 2d 1152, 1157 (D. Nev. 2009) ("When a court takes judicial notice of a public record, 'it may do so not for the truth of the facts recited therein, but for the existence of the [record], which is not subject to reasonable dispute over its authenticity.'") (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)). In particular, it is appropriate for the court to take judicial notice of the existence and contents of a document such as a biological opinion. *See Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 276 n.4 (4th Cir. 2018).

Although Petitioners do not ask the Court to take judicial notice of the truth of the facts within these public documents, that does not mean that they concede that the documents are not "relevant" to this proceeding. Taylor Opp. at 1. The contents of these documents are relevant for several purposes. For example, the descriptions of the general nature of commercial aquaculture operations by multiple state and federal government agencies is relevant to demonstrate that in the absence of an exemption, the Hydraulic Code would generally apply to such operations. Open. Br. at 9. The fact that these reports recognized the potential for such operations to impact fish life is likewise relevant to show that Petitioners have standing—which requires Petitioners to show that WDFW's exemption of commercial aquaculture facilities from has prejudiced their interest in abundant fish life, and that a judgment eliminating this exemption would substantially redress this prejudice. *Id.* (citing RCW 34.05.530). Finally, the recognition by these government agencies of the potential impact of commercial aquaculture on aquatic life and habitats is relevant to the determination of whether this matter constitutes an issue of substantial public importance under the Uniform Declaratory Judgments Act ("UDJA").[2] Open. Br. at 23 (citing *Lewis Cty. v. State*, 178 Wn. App. 431, 435, 315 P.3d 550 (2013)).

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argument in its briefing on the merits (including by offering additional excerpts), but it does not affect the issue of whether it is proper for the Court to take judicial notice of the proffered documents and their contents.

[2] WDFW incorrectly claims that Petitioners did not bring a valid claim under the UDJA. WDFW Opp. at 4. Regardless, WDFW has not sought to dismiss that claim, so the requirements to bring such a claim are still relevant for the Court to consider in the final merits briefing.

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As to all of these issues, it is thus relevant for the Court to have a "background" understanding of commercial shellfish aquaculture. Mot. to Supp. at 2. The fact that public reports by government agencies have recognized the nature of commercial aquaculture facilities and their potential impact is thus relevant. However, it is not necessary for the Court to make findings as to any of the specific facts described in these reports. For example, it is not important for the Court to examine whether the use of gravel harms or benefits fish habitat. Taylor Opp. at 5. Rather, the description of the use of gravel in the public reports shows an example of a construction activity that would be regulated by the Hydraulic Code in the absence of an exemption—in which case, it would be the responsibility of WDFW to determine whether the use of gravel in a particular instance harmed fish life. Open. Br. at 5. Similarly, the Court need not make a finding as to the exact shoreline acreage occupied by shellfish aquaculture (Taylor Opp. at 5-6), but the fact that government reports recognize that such facilities occupy significant acreage may be a factor as the question of public importance. Open. Br. at 23.

B. "Adjudicative Facts" Distinction is Unclear and Unimportant

In opposing Petitioners' request for judicial notice, both WDFW and Taylor focus on an illusory distinction between "adjudicative" and "legislative" facts. WDFW Opp. at 2-3; Taylor Opp. at 2-3. But the distinction between adjudicative and legislative facts is anything but clear: "Whether a particular fact is *adjudicative* (as the term was intended to be defined in Rule 201) is often a matter of degree, and if the determination were critical, Rule 201 could be the source of endless quibbling." *See* 5 Wash Prac., Evidence Law and Practice § 201.2 (6th ed. June 2018 Update).

Moreover, the distinction between adjudicative and legislative facts described in Black's Law Dictionary and cited by both opposition briefs are largely inapposite. An adjudicative fact is a "controlling or operative fact rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties. For example, adjudicative facts include those that the jury weighs." *Adjudicative Fact*, Black's Law Dictionary (10th ed. 2014) (earlier

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edition cited by WDFW Opp. at 3; Taylor Opp. at 2 (quoting *In re Disciplinary Proceeding Against Sanai*, 177 Wn2d 743, 750 n.2, 302 P.3d 864 (2013))). In this case, the jury will not "weigh" any facts. And facts that might seem to be "background fact[s]" that do not specifically "concern[] the parties" might nevertheless also be "operative" facts that are important for the Court to determine "how the law applies to [the] parties." *See id.* Before the Court decides whether WDFW may properly apply an exemption to the Hydraulic Code for commercial shellfish aquaculture, it needs a basic understanding of the nature of such aquaculture in order to determine whether the Hydraulic Code would apply in the absence of such an exemption.[3] Similarly, a "background" understanding of the potential impact of such aquaculture is relevant to determine fundamental issues such Petitioners' standing to bring their claims, and whether the claim is justiciable and a matter of significant public importance under the UDJA.[4]

Most importantly, the question of whether the public documents and their contents are "adjudicative facts" is not decisive as to whether the Court will grant judicial notice. *See* 5 Wash Prac. § 201.2. ("the distinction between adjudicative facts and other facts is of little practical significance under the Washington version of the rule"). WDFW and Taylor are correct that Rule 201 establishes restrictions that apply only to adjudicative facts. WDFW Opp. at 2; Taylor Opp. at 2. But they are incorrect in asserting that if a fact is not an "adjudicative fact," it would "defeat[] any basis for judicial notice." WDFW Opp. at 2. Rather, if a court finds that a fact is not an "adjudicative fact," it simply means that the restrictions in Rule 201 do not govern judicial notice. 5 Wash Prac. § 201.1; *see Cameron v. Murray*, 151 Wn. App. 646, 659, 214 P.3d 150 (2009). Because Petitioners believe that the public documents and their contents are most fairly construed as adjudicative facts, they erred on the side of caution in applying the restrictions of ER 201 in the Motion to Supplement. However, should the Court decide that the

[3] While it is possible that both Petitioners and Intervenors will concede the applicability of the Hydraulic Code in the absence of an exemption, Petitioners cannot presume such a concession upon filing of the Opening Brief.

[4] Both WDFW and Taylor seem to concede that the existence and content of the application documents filed in support of the Zangle Cove development are adjudicative facts appropriate for judicial notice and relevant to Petitioners' claim against PNA. *See* WDFW Opp. at 3; Taylor Opp at 3 n.3.

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facts do not meet the definition of "adjudicative facts," it can apply the same principles in taking judicial notice of them as "legislative facts."[5] Indeed, because this distinction is not significant under Washington law—or in federal law outside the context of a criminal trial—in many cases courts take judicial notice without specifying the type of fact of which they are taking notice. *See, e.g.*, *Welch Foods v. Benton Cty*, 136 Wn. App. 314, 324, 148 P.3d 1092 (2006).

III. MOTION TO SUPPLEMENT

WDFW contends that supplementation of the record is inappropriate because the "certified record is complete." WDFW Opp at 4. Yet the agency's record contains no documents related to either of the claims brought under the UDJA (Claims 1 and 3), and it's rulemaking file is nearly devoid of materials to support the expansive Hydraulic Code exemption that it provided to the commercial aquaculture industry under WAC 220-660-040(2)(l). Indeed, the file contains only two items that support the basis for this decision: a 2007 opinion letter from Attorney General Rob McKenna ("AG's Opinion") and a one-sentence response to comments opposing the exemption. AR 390, 949–58. Both conclude that the Legislature stripped WDFW of its authority to regulate the industry's hydraulic activities through an implied exemption in the 1985 Aquatic Farming Act. *Id.*

Just because WDFW may have included everything in the certified record that it was *required* to include in its rulemaking file, that does not mean that Petitioners must litigate this action based on such a sparse record. Supplementation of an agency record is governed by RCW 34.05.562(1), which provides that the Court may receive supplementary evidence if (1) "it relates to the validity of the agency action at the time it was taken;" and (2) this evidence is "needed to decide disputed issues regarding . . . [m]aterial facts in rule making . . . not required

[5] "Legislative facts" are defined as the sort of "background information a judge takes into account when determining the constitutionality or proper interpretation of a statute, when extending or restricting a common-law rule, or the like." 5 Wash Prac. § 201.16. This definition may also apply to the documents for which Petitioners' seek judicial notice, because the breadth and impact of commercial shellfish aquaculture are relevant to the issue of whether the legislature intended to grant such a significant exemption to the Hydraulic Code without express language doing so. Open. Br. at 17. For this reason, Petitioners should have sought judicial notice of these documents as "legislative facts" in the alternative, and not doing so was an oversight. However, because the Court can take judicial notice of a fact with or without a request from a party, it can nevertheless take judicial notice of these documents as "legislative facts" if it believes that classification is more appropriate. ER 201(c).

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to be determined on the agency record." This rule clearly contemplates the potential supplementation of an agency's rulemaking record upon judicial review, with documents that were not required to be included in the original rulemaking file.

WDFW seeks to categorically preclude such supplementation based on RCW 34.05.370, which designates what an agency is required to maintain in its official rule-making file for public inspection—regardless of whether the rule in question has been challenged in court. WDFW Opp. at 5, 7. The question of whether the agency was required to include a document in its rule-making file, however, is not dispositive as to whether such a document may be "needed to decide disputed issues regarding . . . [m]aterial facts in rule making . . . not required to be determined on the agency record." RCW 34.05.562(1). And WDFW provides no authority for using the final clause of RCW 34.05.370, providing a commonsense admonition that "the official agency rule-making file need not been the exclusive basis for agency action on that rule," as a some kind of limitation on RCW 34.05.562(1). *See* WDFW Opp. at 5. But the rule contains no such limitation that supplementation is only available when it is necessary "to resolve a dispute over the validity of an agency action taken on the basis of the challenged rule." *Id.* To the contrary, it explicitly provides for supplementation of "material facts in rule making." RCW 34.05.562(1).

In addition, WDFW does not dispute the authenticity of any of the documents proposed by Petitioners for supplementation or that its record provides no documents related to Petitioners' claims brought under the UDJA. *See* Petition at ¶¶ 64-73 (Claim One); 78-82 (Claim Three). Such claims are not limited by the constraints imposed by RCW 34.05.562(1). Petitioners would have theoretically been entitled to discovery on these claims, but that was not necessary since they are linked so closely with the rulemaking challenge. However, this does not preclude Petitioners from supplementing the record upon review with a handful of documents to support the basis for these claims.

All of the documents proposed for supplementation either meet the requirements outlined by RCW 34.05.562(1), are relevant to Petitioners' Claims One or Two, or both. Exhibit

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K is the 2006 letter from State Representative Patricia Lantz that occasioned the AG's Opinion, which later served as WDFW's sole justification for WAC 220-660-040(2)(l). Whether or not this letter meets "the standard for what must be included in an agency record," WDFW Opp. at 6, this letter provides important context for the AG's opinion, and thus for the rule that is based on that opinion, as well as providing information about Legislative intent and the lack of clarity around the agency's interpretation of the 1985 Act prior to the AG's Opinion. Exhibits L, M and P are documents from 1999 and 2000, which demonstrate that following the 1985 Act, WDFW believed that it retained the authority to regulate commercial aquaculture under the Hydraulic Code. Open. Br. at 6. Indeed, Exhibits L and M suggest that the agency may have only begun to question this authority *after* outside pressure was put on it by aquaculture facility operators. *Id.* Such documents could be particularly important if WDFW contends that the court owes deference to the agency's interpretation of a statute. *See Green River Comm. College v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 118-19 622 P.2d 826 (1980) (giving more weight to agency interpretations of a statute that are "nearly contemporaneous" with the statute).[6] Exhibits N, O, Q and R, are WDFW documents that are contemporaneous with the rule under challenge, which show that even after the 2007 AG's Opinion, the agency was not clear as to the scope of its authority to regulate commercial aquaculture under the Hydraulic Code, and indicate that it intended to address this uncertainty in the upcoming rule. Open. Br. at 7. Even though these documents may be exempt from the requirement that WDFW maintain them in the rulemaking file (WDFW Opp. at 5), that does not meant that they cannot be admitted by the court as supplements to the record if they are needed to "decide disputed issues regarding. . . material facts and rulemaking." RCW 34.05.562. WDFW's uncertainty regarding the scope of its authority is material to the validity of the rule it issued during this time, which is based on an insistence that the 1985 Act deprived it of authority to regulate commercial aquaculture. AR 390.

[6] Petitioners did not obtain agency documents that were truly contemporaneous with the passage of the Act, but these documents show that as late as 14-15 years after the passage of the Act, the agency still did not interpret it as placing limitations on its authority to regulate commercial aquaculture facilities.

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Finally, many of the documents with which Petitioners seek to supplement the record are relevant to establishing the basis for the UDJA under Claim One. *See* Exs. N, O, P, Q, R. Ironically, WDFW claims that the Motion to Supplement should be denied, in part, because Petitioners do not identify "any specific agency action other than the allegedly invalid rule." WDFW Opp. at 6. However, the same documents that WDFW seeks to exclude from the record establish that WDFW had an intermittent "policy and practice" of exempting commercial aquaculture facilities separate and apart from WAC 220-660-040(2)(l). Open. Br. at 7 ("By 2011, WDFW's general practice seems to have been to exempt commercial aquaculture[.]").

IV. REMEDY AND TIMING OF THE COURT'S CONSIDERATION

For the reasons stated above, the Court should grant Petitioners' request for judicial notice and its motion to supplement the record, thereby considering Petitioners' Exhibits A-G and K-R. If the Court declines Petitioners' request as to some or all of the documents, however, it should not grant the request in the opposition briefs to strike some or all of the arguments in Petitioners' Opening Brief. A motion to strike is not appropriate when the matter to be considered is before a judge rather than a jury–to the contrary, the challenged material should stay in the record for potential appellate review. *See, e.g.,* Keck v. Collins, 181 Wn. App. 67, 81-82, 325 P.3d 306 (2014); *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009).

As an alternative, Petitioners suggest that the Court strike the hearing on this motion scheduled for November 9, and consider the motion concurrent to December 7 merits hearing. The majority of arguments advanced by WDFW and Taylor concern the relevance of the documents that Petitioners seek to have admitted. *See discussion, supra*; WDFW Opp at 7 ("none of the proffered documents are necessary for this Court to reach and decide the sole legal question before it"); Taylor Opp. at 1 (documents submitted for judicial notice are "not relevant to this proceeding"). It is thus appropriate for the Court to decide this motion at the same time that it rules on the merits—especially because the full relevance of the contested documents cannot be fully determined until after Respondents and Intervenors have filed their briefing, so the Court can determine which of the legal issues discussed above are contested.

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DATED: November 7, 2018

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 7th day of November, 2018, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system and served upon the attorney and parties listed below:

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Executed on the 7th day of November, 2018, at Seattle, Washington.

s/Patti Lane
Patti Lane, Legal Assistant