☐ EXPEDITE
☐ No Hearing is set
☑ Hearing is set:
Date: 12/7/18
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 BRIEF

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I. INTRODUCTION

Faced with Petitioners' careful analysis of statutory language, history, and intent, Respondents are unable to identify any clear evidence that the Legislature intended to wholly exempt commercial aquaculture from the requirements of the Hydraulic Code. Respondents[1] claim an HPA permit exemption was created by the Aquatic Farming Act of 1985, but this interpretation ignores the plain language of the Act, the context in which it was passed, and all indications of legislative intent. Nor is there any evidence that anyone, including WDFW administrators and industry advisors, believed that such an exemption existed immediately after the passage of the Act. Indeed, it was not until 2007 that the Attorney General issued an opinion finding that the Legislature had silently exempted the entire industry from the Hydraulic Code more than 20 years earlier. Finally, in 2015, nearly 30 years after Act, WDFW promulgated a rule, WAC 220-660-040(2)(1), codifying the purported exemption.

The erroneous AG Opinion and invalid rule has had far-reaching consequences: A rapidly expanding industry with broad environmental impacts suddenly became exempt from one of the state's primary environmental statues. More than 25% of the state's tidelands already have commercial aquaculture facilities, or have federal permits to develop them—by 2022, this number could grow to 33%. Ex. LL[2] at 106, 108. In a 2017 analysis, the Army Corp found the cumulative effect of the state's burgeoning shellfish aquaculture industry was having a substantial impact on forage fish habitat, and was likely to adversely affect critical habitat for endangered species, including the Chinook salmon.[3] Supp. Townsend Decl., Ex. 8 at 111. This situation was not created by the Legislature: the Legislature enacted strong environmental

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[1]Terms have the same meaning as in the Opening Brief ("OB"). "Respondents" refers to both Respondents and Taylor Shellfish. WDFW's response is "WDFW Br." and the response by PNA and Taylor is "PNA Br.".

[2]Exhibits II-NN are attached to the Supplemental Declaration of Claire Loebs Davis. Petitioners request judicial notice of Exs. II-MM, on the same basis described in their prior Request for Judicial Notice, as these are government reports and other publicly available documents whose content is not subject to dispute.

[3] Mitigating these impacts is vital to the survival of the critically endangered Southern Resident Killer Whales. On November 16, 2018, the Southern Resident Orca Task Force released urgent recommendations to save the species from extinction, including the restoration of nearshore habitat for forage fish, and strengthening protections for this habitat through improvements and increased enforcement of the Hydraulic Code. Ex. II at 3-5.

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protections, and there is no sign it meant to exempt the aquaculture industry from those laws. Rather, it developed due to a deeply flawed statutory interpretation that has now solidified into an invalid rule. Petitioners ask the Court to correct this legal error.

II. ARGUMENT

A. The Hydraulic Code Does Not Exempt Shellfish Aquaculture

Absent an exemption, WDFW must require permits for "work that will use, divert, obstruct, or change the natural flow or bed" of any state waters. RCW 77.55.011(11). Petitioners are not asking the Court to declare that all commercial shellfish aquaculture will heretofore always be subject to the Code. WDFW Br. at 19; PNA Br. at 18. But Respondents do not, and cannot, seriously contest that the commercial aquaculture industry generally engages in practices subject to the Code, including dredging and liquefying tidal beds; inserting PVC pipe, plastics, netting, and rebar into the substrate; and using docks, floats, and buoys. OB at 2-3, 9.

The Hydraulic Code lists several exemptions, which were consolidated into sequential sections in 2005. Notably absent is any exemption for commercial shellfish aquaculture. OB at 19-20. Respondents are unable to identify any other exemptions not listed in chapter 77.55 RCW. Yet they claim the Legislature found it unnecessary to include the aquaculture exemption in the Hydraulic Code in either 1985 or 2005, because the Code's "general language did not specifically refer to aquatic farmers or their products[.]" WDFW Br. at 10; *see also* PNA Br. at 5 (similar). This rings hollow. The Code does not list all the possible types of activities to which it might apply—it applies to *all* hydraulic projects, with a few enumerated exceptions. And most of the express HPA exemptions involve subjects not mentioned elsewhere in the Code. *See*, *e.g.* RCW 77.55.100(9) (2004) (driving across a ford); RCW 77.12.865(3) (2004) (removal of derelict fishing gear). These exemptions are nevertheless in the Code so that it can be read and understood—the Legislature does not hide exemption Easter eggs throughout state law.

Given that the Code applies to all hydraulic projects, unless they are exempt, and given that aquaculture is not among the express exemptions, the plain meaning of the Code is that it applies to all hydraulic projects undertaken for commercial shellfish aquaculture. Should a

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contrary provision exist in another chapter, therefore, it is in conflict with the Hydraulic Code.

B. Aquatic Farming Act Does Not Exempt Aquaculture from the Hydraulic Code

1. The Aquatic Farming Act Contains No Explicit Exemption

Respondents seem to contend both that provisions in the Aquatic Farming Act are "explicit," and, oddly, that they are not an "exemption" to the Hydraulic Code. WDFW Br. at 8; PNA Br. at 4. If a statute allows the commercial shellfish aquaculture industry to avoid responsibilities owed by every other person and entity, that is clearly an industry "exemption," no matter the means by which it is accomplished. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (exemption is a "freedom from a duty, liability, or other requirement; an exception"). Moreover, if such an exemption exists, it is not explicit: Nowhere does the Act say, in so many words or any like them, that the construction and operation of commercial aquaculture facilities does not need to comply with the requirements of the Hydraulic Code.

However, the Act does explicitly exempt "aquatic products" and "aquatic farmers" from a number of other pre-existing licensing, classification, and taxation requirements, through amendments to the applicable statutes. OB at 11. Respondents contend that a focus on this list of express exemptions "turns the Act on its head," because the Act was meant to revoke all of WDFW's authority except the authority specifically listed as surviving. WDFW Br. at 8; PNA Br. at 4-5 (similar). Were that true, why did the Legislature separately list so many other exemptions? Neither WDFW nor PNA point to any other responsibility or obligation that the Act lifted which is not listed explicitly among its provisions, and which is not addressed through a direct amendment to the applicable statute. *See* WDFW Br. at 8-10; PNA Br. at 5.

2. The Supposed Distinction between Aquatic and Clam Farms is a Red Herring

The glaring omission of the Hydraulic Code from the lengthy list of statutes amended by the Act is even more striking given the fact that it mentions the Code in Section 19. OB at 10-11; Ex. J §19 ("a mechanical harvester license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, on a clam farm unless the requirements of RCW 75.20.100 [the Hydraulic Code permit provision] are fulfilled

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for the proposed activity.") (underlined language added by the Act). The Legislature thus recognized that the Hydraulic Code applied to at least some aquaculture. Respondents tie themselves in knots to avoid the obvious implications for their claim of a blanket exemption. PNA Br. at 11-14; WDFW Br. at 13-19. They argue "clam farms" are not encompassed within the term "aquaculture"; and it is somehow clear the term refers to tracts of wild clams, and not tideland where clams are cultivated. WDFW Br. at 15-16. Respondents thus conclude that Section 19 only applies the Hydraulic Code to the harvesting of *wild clams*. *Id.*; PNA Br. at 13.

It is a challenge to chase down all the red herrings set loose by this tangled rationale. First, here is no support for the farfetched assertion that the Act uses the term "aquatic farms" to mean farms on which cultured aquatic products are grown, but the Legislature nonetheless meant the related term "clam farms" to refer exclusively to tracts of *wild* clams. *See* WDFW Br. at 16. To the contrary, the context indicates that a "clam farm" is a certain type of "aquatic farm," on which an "aquatic farmer" raises a particular "aquatic product," i.e. clams.

Second, by its title, preamble, and content, the Act relates to "aquatic farming." *Id.* at 2033 (title and preamble). It is not plausible that an Act explicitly related to aquaculture would include a new provision that applied *exclusively* to the harvesting of wild clams, especially because by 1985, the cultivation of clams was firmly established as part of "clam farming." Ex. MM at 1 (2005 tutorial written by Washington Sea Grant and Taylor Shellfish, describing developments in clam farming in the 1970s and 1980s). Mechanical harvesters are commonly used to harvest both wild and cultivated clams. Ex. C at 26 & Figure 3-15. If, as Respondents assert, the Legislature was concerned about the ecological impact of these machines (WDFW Br. at 16), it is safe to assume these concerns applied regardless of the parentage of the clams.

Finally, Respondents commit the very sin of statutory construction for which they incorrectly admonish Petitioners: reading extra words into the statute. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (a court "must not add words where the legislature has chosen not to include them") (quoted at WDFW Br. at 4). Where Section 19 says an HPA permit may substitute for a license to operate a mechanical device for

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"commercially harvesting clams…on a clam farm," Respondents would add the word "wild" in front of "clams," and thus dramatically change the plain meaning of the text. PNA Br. at 13.

3. The Aquatic Farming Act Contains No Implied Exemption

Undeterred by the plain meaning of the Act, Respondents try to weave an exemption from the fabric of two general provisions: Section 8 (RCW 77.115.010(2)) and Section 17 (RCW 77.12.047(3)). WDFW Br. at 5-8; PNA Br. at 4-6, 9-11. Once again, Respondents ignore the Legislature's plain language in favor of words that they *wish* the Legislature had used.

First, Respondents deliberately ignore the Legislature's careful use of defined terms in both sections. The Act defines three related, but distinct, terms: (1) "aquaculture" is the **"process"** of cultivating "private sector culture aquatic products" by "an aquatic farmer;" (2) an "aquatic farmer" is the **"person"** who cultivates "aquatic products"; and (3) "private sector cultured aquatic **products"** are the plants and animals cultivated on "aquatic farms" by an "aquatic farmer," including products such as clams, mussels and oysters. Ex. J § 2(3) (emphasis added). It is significant that the Legislature thus defined the ***process***, ***person***, and ***products*** related to aquatic farming separately, and equally significant that it employed some, but not all, of these terms in Sections 8 and 17. "It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent." *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).

Thus, in Section 8 of the Act (RCW 77.115.010), the Legislature limited authority to "regulate private sector culture aquatic **products** and aquatic **farmers**," but deliberately *did not* limit authority to regulate "**aquaculture**," i.e. the **"process"** of cultivating "products." Ex. J §§2(3), 8(2). Similarly, in Section 17 (RCW 77.12.047), the Legislature limited authority to adopt rules related to "private sector cultured aquatic **products,**" but *not* rules regulating either aquatic **farmers** *or* the **process** of **aquaculture.** Ex. J §17(3). This is significant because the general provisions of the Hydraulic Code are concerned only with the *process* used, and whether that process will "use, divert, obstruct or change" state waters, and harm fish. RCW 77.55.011(11). Except with regard to some of its exemptions (*see* OB at 20 & n. 12), the Code

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is indifferent to the purpose of a hydraulic project. Under the Code, a dock is a dock is a dock, regardless of who owns that dock, or if it is being constructed for oysters or kayaks.

Respondents wave away this distinction, calling it "nonsensical" and "untenable" (PNA Br. at 5), and arguing that the meaning of the term "aquaculture. . .cannot be divorced from" the definitions of "aquatic product" or "aquatic farmer" (WDFW Br. at 11). Respondents would thus merge all three defined terms into one. But "[w]hen the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). By examining the words the Legislature chose to use, Petitioners are not "adding words to the statute" (PNA Br. at 6), but preserving the meaning of the terms the Legislature carefully defined and selected.

Second, Respondents cannot rationalize away the fact that both Sections 8 and 17 apply *only* to the authority of the Department of Fisheries. Ex. J §8(2) (relating to the authority of the "department of fisheries"); Ex. J §17(1) (limiting power of the "director" to adopt rules); *see* Ex. NN (RCW 75.08.011(1)(1983) (defining "director" as the "director of fisheries"). The AG Opinion also overlooked this distinction, probably because the Department of Fisheries and Game have merged to form the current WDFW. But the 1985 Act could not have "revoked all of WDFW's authorities" (WDFW Br. at 8), because at the time, WDFW did not exist. Rather, in 1985, the two departments had concurrent authority over the Hydraulic Code. OB at 12-13. As a result, neither Section 8 nor Section 17 *could have* exempted commercial shellfish aquaculture from the HPA, because they did not affect the authority of the Department of Game. Regardless, when the departments merged in 1993, WDFW gained authority from both.

Respondents make little effort to grapple with this problem: PNA ignores it, while WDFW insists it was not necessary for the Act to limit the Department of Game's authority over hydraulic projects, because in Section 21-24, the Act removed "aquatic products" from the definition of "game fish." WDFW Br. at 10. This is a non sequitur. The Hydraulic Code would regulate the construction of an aquaculture facility not because of the product it houses, but because of the process used and its impact on fish life. It was thus irrelevant to the authority of

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the Department of Game whether the geoducks housed in PVC pipes were "game fish": its authority came from its power to protect the wild fish in the waters *around* the facility. Ex. V §75 (departments should "protect all species of fish life found at the project site").

4. The Legislature Did Not Intend to Exempt Aquaculture from Hydraulic Code

In their Opening Brief, Petitioners observed that there was no sign of any discussion in the Act's legislative history of a potential exemption to the Hydraulic Code. OB at 17-19. Tellingly, Respondents also point to none.[4] Likewise, Respondents largely do not contest that the canons of statutory construction intended to evaluate legislative intent counsel against reading a Hydraulic Code exemption into the 1985 Act. OB 19-21. And while the 1985 legislature did express an intent to elevate the status of aquaculture, its goal was to give it the "same status" as agriculture, such that it would be "considered a branch of the agricultural industry" for the purposes of any laws. Ex. J §1; OB at 16. As Respondents admit, agriculture is regulated by the Code—in fact, 14% of the permits granted are for agricultural purposes. AR 166; *see also* WDFW Br. at n. 4 (detailing how the Code regulates agriculture).

C. The Court Owes No Deference to Either the Agency or the Attorney General

WDFW claims that the Court should give "great weight" to both the agency interpretation and the AG Opinion. WDFW Br. at 13, 19. Neither is entitled to deference here. As PNA concedes, at best an AG Opinion is only entitled to "some" deference on matters of statutory construction. PNA Br. at 8 n. 10; *see ATU Legis. Council of Wash. State v. State*, 145 Wn.2d 544, 554, 40 P.3d 656 (2002) (courts should give "little deference to attorney general opinions on issues of statutory construction"). And any deference that the AG Opinion might otherwise be given disappears because of its failure to consider fundamental principles of statutory construction, such as the context of the 1985 Hydraulic Code; the importance of the Legislature's distinct use of separately defined terms; and the fact that the Act specifically

[4] It is not clear what point WDFW is trying to make by asserting that it "may not have understood" in 1985 that it had the authority to enforce the Code against shellfish farms. WDFW Br. at 16. A history compiled by WDFW staff members indicates WDFW began to apply the Code to marine waters in 1977. Ex. JJ at 7. But if WDFW is correct, and the Code was not widely applied to shellfish operations in 1985, that only makes it *less* likely that the Legislature intended to exempt the industry, as there is no reason the Code would have been on its mind.

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applies the Code to some aquaculture activities. Further, because the AG Opinion was rendered more than 20 years after the Act, it sheds no light on legislative intent. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (opinion has more weight if rendered in "close temporal proximity to the passage of the statute in question").

The agency interpretation here is entitled to even less weight—because there has been no clear agency interpretation. Documents introduced by Respondents show that roughly 14 years after the passage of the Act, WDFW attempted to draft rules to regulate commercial aquaculture under the Code—pulling back only after it encountered fierce industry resistance. OB at 6-7; Ex. L at 1; Ex. M at 1; Ex. N at 1-2. WDFW does not dispute these facts. Nor does it dispute that the agency has admitted to continued inconsistency and confusion about the limits of its authority. OB at 7; Ex. N at 1-2; Ex. O. Nonetheless, without any irony, WDFW now insists it should be afforded deference for its "technical expertise in articulating and applying this fact-specific distinction," and the Court should afford "great weight" to the rule it promulgated *30 years* after the Act supposedly created the exemption. WDFW Br. at 13; *see* WAC 220-660-040(2)(1); *Griffin v. Eller*, 130 Wn.2d 58, 68, 922 P.2d 788 (1996) (to be given deference, agency interpretation must be "contemporaneous" with statue at issue). Because WDFW has demonstrated no clear, consistent or principled position for the past 30 years, its interpretation is not entitled to any weight. *Safeco Ins. Co's v. Meyering*, 102 Wn.2d 385, 391-92, 687 P.2d 195 (1984) (to be afforded deference, agency must be consistent).

Finally, WDFW contends that the Legislature's failure to override the AG Opinion constitutes "acquiescence," and is "persuasive evidence that the Attorney General correctly interpreted the legislative intent of the Aquatic Farming Act." WDFW Br. at 21; PNA Br. at 8 ("Legislative inaction firmly demonstrates agreement with the [AG Opinion]"). At best, the doctrine of legislative acquiescence serves as an imperfect proxy for legislative intent, if it takes place after consistent agency action, and in reasonable temporal proximity to the passage of the statute in dispute. *See Five Corners*, 173 Wn.2d at 308. Here, Respondents do not present evidence that anyone initially interpreted the Act to provide a Hydraulic Code exemption for

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shellfish aquaculture. WDFW trying to enact rules to enforce the Code as to aquaculture as late as 2000. Ex. L (WDFW committee convened to draft HPA rules for aquaculture). Meanwhile, the University of Washington Sea Grant Program and a representative of Taylor Shellfish were advising clam farmers as late as 2005 that they needed to secure HPA permits. Ex. MM; *see* Ex. KK (similar advice given related to oysters in 1989). Indeed, before the AG Opinion in 2007, there is no sign the Legislature was "put on notice" that anybody interpreted the Act as creating an HPA exemption. And by that time, the Legislature that passed the Act was long since gone—as was any pretense that the 2007 Legislature was aware of its intent.

Nonetheless, Rep. Lantz made clear in her letter that she did not believe the 1985 Act included an HPA exemption for aquaculture. Ex. K at 2-5. In response to the erroneous AG Opinion, Rep. Lantz co-sponsored SSHB 2220, a bill that did not address HPA permitting, but which imposed limits on geoduck aquaculture and provided funding to study its ecological effects. PNA Br. at 8. As WDFW admits, SSHB 2220 was compromise legislation that reflected pressure from economic interests. WDFW Br. at 20 n. 7 (quoting 2220-SR BRH PL 07 at 5). As such, it provides little evidence of considered legislative judgment. *See Five Corners*, 173 Wn.2d at 308-09 (no evidence of acquiescence when bill established working group to review issue); *United States v. Dep't of Mental Health*, 785 F. Supp. 846, 851 (E.D. Cal. 1992) (silence reflective of a "political compromise" rather than "legislative intent"). Regardless, legislative inaction does not relieve the Court of the burden to "ensure that the statute is interpreted consistently with the underlying policy of the statute." *Safeco Ins. Co's*, 102 Wn.2d at 392.

D. Petitioners Meet Requirements to Bring All Three Claims

Petitioners meet the requirements to bring all three claims. OB at 22-25. Claim One seeks a ruling under the Uniform Declaratory Judgments Act, Ch. 7.24 RCW, that WDFW's practice of exempting commercial shellfish aquaculture from the Code is unlawful. This claim will likely follow with the Court's ruling as to Claim Two, which asks the Court to invalidate WAC 220-660-040(2)(1), but it is not subsumed within that claim. WDFW Br. at 21-22. As demonstrated by the documents Petitioners added to the Record, WDFW had a policy of

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exempting commercial shellfish aquaculture from HPA requirements before it enacted WAC 220-660-040(2)(1). OB at 7. Absent a declaration from the Court that such a practice is unlawful, the agency could resume this policy even if WAC 220-660-040(2)(1) were invalidated. Petitioners have thus identified a "policy and practice" not otherwise reviewable under the Administrative Procedure Act, which is eligible for review under the UDJA.

PNA mounts several challenges to Claim Three, which seeks an injunction preventing PNA from continuing to operate the Zangle Cove geoduck facility until it obtains an HPA permit. Many of these objections are addressed in the Opposition to PNA's Motion for Judgment on the Pleadings. However, PNA brings a new challenge to Petitioners' standing, contending they have not adequately shown harm. PNA Br. at 19-22. But when an injury is procedural, the standards of standing are "relaxed." *Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wn. App. 787, 801, 309 P.3d 734 (2013). Because Petitioners only seek to apply the procedural protections of the Hydraulic Code, they need only demonstrate "'a reasonable probability'" that PNA's failure to acquire an HPA permit "'will threaten [their] concrete interest.'" *Id.* at 802. Petitioners have more than met this burden with evidence of shellfish aquaculture's harm to fish and to Petitioners' interests related to a healthy fish population. OB at 22-25. Petitioners are submitting an additional declaration from Patrick Townsend, describing the increased harm to his interests as a result of his recent purchase of tideland adjoining the Zangle Cove facility, and providing more support for his belief that the facility will harm local fish life. Supp. Townsend Decl. ¶¶2-13; Exs. 5-10. If the Court concludes Petitioners must prove a substantive rather than procedural injury, then Petitioners seek the opportunity to present additional evidence of such harm at an evidentiary hearing.

III. CONCLUSION

Petitioners respectfully request that the Court find that WAC 220-660-040(2)(1) is invalid, declare WDFW's policy of exempting shellfish aquaculture from HPA requirements to be contrary to law, enjoin further construction at Zangle Cove until PNA obtains an HPA permit, and direct PNA to restore the tidelands to their condition before recent construction.

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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 21st 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 pursuant to the electronic service agreement:

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Executed on the 21st day of November, 2018, at Seattle, Washington.

s/Patti Lane
Patti Lane, Legal Assistant