☐ EXPEDITE
☑ No Hearing is set
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Date:
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Judge/Calendar:

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. _____ PETITION FOR JUDICIAL REVIEW, DECLARATORY JUDGMENT, AND INJUNCTIVE RELIEF

Petitioners Protect Zangle Cove, the Coalition to Protect Puget Sound Habitat, and Wild Fish Conservancy (collectively, "Petitioners") seek a declaration that the Washington Department of Fish and Wildlife ("WDFW") improperly exempts commercial shellfish aquaculture operations from the requirement that they obtain Hydraulic Project Approval ("HPA") permits under chapter 77.55 RCW; an order invalidating WAC 220-660-040(2)(l); and an order requiring that Respondent Pacific Northwest Aquaculture, LLC ("PNA") obtain an HPA permit from WDFW pursuant to RCW 77.55.021 before engaging in commercial geoduck aquaculture operations.

NATURE OF THE ACTION

1. This is an action for declaratory and injunctive relief arising out of and alleging violations of the Washington law that requires an HPA permit for a "hydraulic project."

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RCW 77.55.021. Petitioners seek a declaration that engaging in a commercial intertidal shellfish aquaculture operation without first receiving an HPA permit from WDFW is a violation of Washington law because it is a hydraulic project that involves the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of waters of the state, as defined by RCW 77.55.011(11); an order invalidating WAC 220-660-040(2)(l), which exceeds WDFW's legal authority by exempting aquaculture-related construction projects from HPA permitting in contravention of RCW 77.55.021; and an injunction preventing PNA from engaging in commercial intertidal geoduck aquaculture operations without first obtaining an HPA permit pursuant to RCW 77.55.021.

JURISDICTION AND VENUE

2. The Court has jurisdiction under RCW 34.05.570(2) (judicial review of agency rules), chapter 7.24 RCW (declaratory relief), and chapter 7.40 RCW (injunctive relief).

3. Venue is proper in this Court under RCW 34.05.570(2)(b) as a rule challenge, and pursuant to RCW 4.92.010 because PNA's proposed commercial aquaculture operation (the "Facility") is located in Thurston County, Washington, and because WDFW is headquartered in Thurston County.

PARTIES

4. Petitioner Protect Zangle Cove, P.O. Box 1786, Olympia, WA 98507, is a non-profit organization incorporated under the laws of the State of Washington and recognized by the Internal Revenue Service as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, and headquartered in Thurston County. Protect Zangle Cove is an alliance of interested citizens who reside in Boston Harbor on the shores of Puget Sound, including on Zangle Cove, and study and work to protect, as well as recreate in, the waters of Puget Sound in Thurston County. Protect Zangle Cove and its members and supporters recreate and boat in both the nearshore environment and the public waters of Puget Sound. They are concerned about, and will be adversely affected by, the expansion of industrial aquaculture in both the nearshore environment and public waters of Puget Sound, and its impact on plants,

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fish, animals, and the ecological health of Puget Sound. Protect Zangle Cove and its members are concerned about the impact of currently approved and planned commercial aquaculture projects on the public's enjoyment of the waters of Puget Sound, and in particular, on their recreational activities and aesthetic enjoyment of those waters, both near their homes and throughout the areas of Puget Sound that they visit.

5. Petitioner Coalition to Protect Puget Sound Habitat (the "Coalition"), P.O. Box 233, Burley, WA 98322, is a non-profit organization incorporated under the laws of the State of Washington. The Coalition is an alliance of interested citizens, environmentalists, scientists, and recreational users who reside near Washington's coastal waters, including in Willapa Bay, Grays Harbor, and Puget Sound, specifically, Zangle Cove, and who study and work to protect, as well as recreate in, these waters. The Coalition and its members and supporters are concerned about the expanding aquaculture in both the nearshore environment and public waters of Puget Sound and its impact on aquatic and nearshore life and the health of the Puget Sound habitat. The Coalition and its members are also concerned about the impact of currently approved and planned commercial aquaculture projects and their adverse impacts on the public's ability to use and enjoy the waters of Puget Sound. These projects have a direct impact on the aesthetic enjoyment and recreational activities of the Coalition's members, both in and around waterways near their homes and throughout the areas of the Puget Sound that they visit.

6. Petitioner Wild Fish Conservancy (the "Conservancy"), P.O. Box 402, Duvall, WA 98109, is a non-profit organization incorporated in the State of Washington with its principal place of business in Duvall, Washington. The Conservancy is dedicated to the preservation and recovery of Washington's native fish species and the ecosystems upon which those species depend. The Conservancy brings this action on behalf of itself and its approximately 2,400 members. As an environmental watchdog, the Conservancy actively informs the public on matters affecting water quality, fish, and fish habitat in Washington through publications, commentary to the press, and sponsorship of educational programs. The Conservancy also conducts field research on wild fish populations and designs and implements

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habitat restoration projects. The Conservancy lobbies, advocates, and publicly comments on federal and state actions that affect the region's native fish and ecosystems. The Conservancy routinely seeks to compel government agencies to follow the laws designed to protect native fish species, and particularly threatened and endangered species.

7. Petitioners seek to give a voice to citizens' concerns about industrial aquaculture and its impact on the health and quality of the shoreline and the waters of Puget Sound, as well as the flora and fauna that depend upon these irreplaceable resources. Petitioners' members and supporters live near and/or use Puget Sound, including Zangle Cove, and are and will be directly and adversely affected by the expansion of an aquaculture industry that does not have to comply with HPA regulations designed to limit the environmental impact of nearshore projects, including the PNA Facility in particular. This expansion undermines the protection and enhancement of the waters of Puget Sound and may endanger the many plant and animal species that depend upon those waters for food and habitat. WDFW has failed to require that commercial aquaculture facilities, including the PNA Facility, comply with HPA permit requirements. This failure interferes with the ability of Petitioners' members and supporters to use, enjoy, and recreate in the waterways of Puget Sound.

8. Petitioners have representational standing to bring this action. Petitioners' members and supporters regularly spend time in estuarine, nearshore, and marine areas throughout Puget Sound, including Zangle Cove. Petitioners' members and supporters plan to continue to visit these areas on a regular basis, during the coming months and in the future. These members and supporters observe, study, photograph, and appreciate wildlife habitat in and around the waters and tributaries of Puget Sound, as well as enjoy hiking, fishing, camping, and swimming in and around these waters. These members and supporters also derive scientific, educational, recreational, health, conservation, spiritual, and aesthetic benefits from Puget Sound and its tributaries, the surrounding areas, wild native fish species in those waters, and the existence of natural, wild, and healthy ecosystems.

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9. The aesthetic, recreational, scientific, educational, and procedural interests of Petitioners and their members and supporters have been and will be adversely affected and irreparably injured by WDFW's decision to allow aquaculture facilities, including the PNA Facility, to operate without the environmental protections required by HPA permits. The adverse impacts that will result from WDFW's decision will cause actual, imminent, concrete, and particularized harm to the interests of Petitioners and their members and supporters.

10. The relief sought by Petitioners will remedy the injuries suffered by Petitioners and their members and supporters.

11. Respondent WDFW is an agency of the State of Washington, under the auspices of the Washington Fish and Wildlife Commission (the "Commission"). WDFW is located in the Natural Resources Building at 1111 Washington Street SE, Olympia, WA 98501, and its mailing address is P.O. Box 43200, Olympia, WA 98504-3200. The mission of WDFW is to "preserve, protect, and perpetuate" wildlife and ecosystems.[1] WDFW consists of the Commission and the Director of WDFW. RCW 77.04.020. The Commission may delegate to the Director any of the powers and duties vested in the Commission. WDFW is responsible for awarding HPA permits based on "the adequacy of the means proposed for the protection of fish life." RCW 77.55.021(1). WDFW also promulgated the rule exempting aquaculture at issue in this case. Wash. St. Reg. 15-02-029 (Dec. 30, 2014) (adopting WAC 220-660-040 effective July 1, 2015).

12. Respondent Joe Stohr ("Stohr") is the Acting Director of WDFW and is being sued in his official capacity. Stohr's authority derives in part from Title 77 RCW, chapter 7.84 and chapter 37.12. The Director of WDFW supervises the administration and operation of WDFW and performs the duties prescribed by law and delegated by the Commission. RCW 77.04.080. The Director carries out the basic goals and objectives prescribed under RCW 77.04.055, including "to preserve, protect, and perpetuate wildlife, fish, and wildlife and fish

[1] WDFW, *Mission and Goals*, http://wdfw.wa.gov/about/mission_goals.html (last visited Apr. 6, 2018).

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habitat," and "maximize fishing, hunting, and outdoor recreational opportunities compatible with healthy and diverse fish and wildlife populations."

13. Respondent Pacific Northwest Aquaculture, LLC plans to operate a commercial geoduck facility at 930 76th Avenue NE, Olympia, WA 98506, on tidelands within Zangle Cove, Thurston County. On information and belief, PNA plans to develop and operate the Facility without obtaining an HPA permit.

FACTUAL BACKGROUND

A. Zangle Cove

14. Zangle Cove is a nearly pristine estuary located at the north end of Boston Harbor in unincorporated Thurston County. It is one of the last undeveloped estuaries in South Puget Sound.

Zangle Cove, including the tidelands that are the site of the proposed PNA Facility.

15. Existing land uses in Zangle Cove are primarily single-family residences on small waterfront lots. The area is home to numerous wildlife species, such as otters, bald eagles,

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great blue herons, pigeon guillemots, sea stars, Chinook and Coho salmon, Dungeness and red crabs, and shellfish, including native wild geoducks.

16. Patches of native eelgrass (Zostera marina) have occurred in Zangle Cove, which is currently the site of an eelgrass restoration project funded by the U.S. Department of Energy and the U.S. Environmental Protection Agency. Eelgrass is a prime indicator of ecosystem health and provides crucial habitat for several species. Washington has established a goal of increasing eelgrass in Puget Sound by 20% by the year 2020. Zangle Cove is one of two test sites to show initial success in the state's eelgrass restoration effort, and this test site is within 330 feet of the proposed PNA Facility. The Facility will adversely impact eelgrass beds, which expand and move.

17. Zangle Cove is a critical habitat for the Endangered Species Act ("ESA") listed Puget Sound Chinook salmon and Puget Sound steelhead. *See* 50 C.F.R. § 226.212 (Mar. 25, 2016). Past surveys have documented juvenile Chinook salmon and Coho salmon in the immediate vicinity of Zangle Cove. The shoreline near Zangle Cove (and throughout much of Puget Sound) is also a critical habitat for ESA-listed Puget Sound steelhead (*see* 81 Fed. Reg. 9,252 (Feb. 24, 2016)), and the Hood Canal shoreline is a critical habitat for ESA-listed summer-run Chum salmon (*see* 70 Fed. Reg. 52,630 (Sept. 2, 2005)).

18. Zangle Cove is an historic recreation area for the Boston Harbor community. It is a prime destination for boating and kayaking from the Boston Harbor Marina and is a popular site for beach walking, wildlife watching, recreational fishing, and recreational harvest of native geoducks, Dungeness crab, and red crab. The Squaxin Tribe fishes for salmon in Zangle Cove.

B. Commercial Shellfish Aquaculture in Washington

19. Shellfish have been commercially cultivated in Washington for more than 150 years, including oysters, mussels and clams. However, in recent years, the nature of these operations has changed and expanded dramatically. Among these changes was the beginning of the commercial cultivation of geoduck clams on or about 1994. As of October 2015, commercial shellfish aquaculture occupied as many as 50,000 shoreline acres in Washington,

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or roughly a quarter of all state tidelands. The bulk of this development has been in Willapa Bay in Pacific County, the state's largest outer coast estuary, with significant additional development in nearby Grays Harbor. Puget Sound and Hood Canal account for the rest of the acreage and are the locations where much of the future expansion is planned. The shellfish raised in Willapa Bay and Grays Harbor are primarily oysters and clams, while geoducks are largely cultivated in Puget Sound and Hood Canal.

20. Commercial oyster facilities use a variety of techniques. "Beach culture" involves planting oyster spat (oyster larvae that has attached to a surface) on the beach in the intertidal zone and may include building fenced pens for the oysters or covering them with nets to keep out wildlife. This method is often combined with "bag culture," through which oyster spat is placed in large mesh bags that are attached to lines that are staked to the beach. With "suspended culture," facility operators insert oyster spat in nets or trays and suspend them using devices such as rafts, buoys and long lines. "Dike culture" is often used to grow Olympia oysters, and involves building rock or cement walls around pools of water in the intertidal zone to ensure the oysters are always covered with water. Many of these techniques for commercial oyster facilities qualify as "hydraulic projects" under RCW 77.55.011(11), including, but not limited to: the construction of fenced pens; the staking of bags to the beach; the placement and use of rafts, buoys and long lines; and the construction of rock or cement walls in the intertidal zone. However, WDFW currently exempts all these practices from HPA requirements.

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A commercial oyster facility in Totten Inlet featuring oyster "bag culture."

21. Two clam species are routinely commercially grown in Washington: native littleneck clams and nonnative Manila clams. Commercial clam operations often enclose the clams in trays that are secured with nylon window screen or mosquito netting, stacked six or seven feet high, and secured to the intertidal zone with rebar or anchored with sand bags. Seed clams may also be placed in mesh bags secured with plastic, which are anchored to the beach or partially buried in the sand and secured with metal rods or rebar pins. Clams may also be grown directly on a beach, and are often covered for the entire three-year growing cycle with plastic mesh netting to exclude wildlife. This netting is then buried in trenches or weighted with a lead line and secured with rebar stakes in the intertidal zone to ensure the oysters are always covered with water. The common procedures involved in commercial clam operations, including, but not limited to the placement and anchoring of clam trays and mesh bags in the

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intertidal zone, meet the definition of hydraulic projects under RCW 77.55.011(11). However, WDFW currently exempts all these practices from HPA requirements.

22. Commercial oyster and clam operations, including geoduck operations, often clear the tidelands of native plants and animals with large tractors before planting and use chemicals to remove animals such as burrowing shrimp and aquatic vegetation such as Spartina grass and eelgrass. Over the past 40 years, operators of commercial oyster facilities have aerially sprayed more than three tons of an insecticide called carbaryl, a likely human carcinogen, on tidelands in Willapa Bay and Grays Harbor, in order to kill burrowing shrimp. The permit for spraying carbaryl was terminated in 2015 and carbaryl has now been banned in Washington, as well as many countries. Commercial aquaculture facilities have also sprayed the herbicides glyphosate and imazapyr over tidelands to eradicate Spartina grass, and used the herbicide imazamox, which kills all varieties of eelgrass, to eradicate Japanese eelgrass in Willapa Bay and Puget Sound.

23. The next wave of commercial aquaculture expansion is slated to involve a large increase in geoduck aquaculture in Hood Canal and Puget Sound.

24. Commercial geoduck aquaculture is particularly destructive to the nearshore environment. Although most individual geoduck plots are relatively small, these plots are numerous and increasing rapidly.

25. In general, before planting geoducks, a commercial operator will prepare the intertidal area by removing local plant and animal species. After the intertidal area has been cleared, the operator will insert four- or six-inch diameter PVC tubes, approximately ten inches long, into the beach, leaving a few inches of the tubes protruding above the surface. Around 44,000 PVC tubes are usually placed per acre. This amounts to approximately seven miles of PVC tubing per acre, weighing approximately 11 tons if four-inch wide pipes are used, or 23

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tons if the tubes are six inches wide. The operator then plants up to 3 juvenile geoduck seeds into each tube, or approximately 132,000 geoducks per acre.

A geoduck facility with roughly 44,000 PVC tubing per acre similar to what is planned for the PNA Facility.

26. After seeding, either the individual PVC tubes or the general area is covered with netting to keep wildlife away.

A geoduck facility in Totten Inlet with netting similar to that planned for the PNA Facility.

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27. After approximately two years, when the geoducks have grown enough to avoid predation, the operator removes the tubes and netting. Approximately five to seven years after planting, geoducks reach marketable size. At that point, the geoducks have burrowed two or three feet below the surface. To retrieve the geoducks, the operator will use pressurized water forced through a hand-held wand that is inserted into the substrate to loosen and remove the geoducks. The tideland will be liquefied to a depth of about two to three feet. Because the geoducks are planted close together, the entire area will undergo liquefaction and silt will be flushed into the surrounding water. The common procedures involved in commercial geoduck operations, including but not limited to, the insertion of PVC tubes into the intertidal bed and harvesting of geoducks using high-pressure water hoses that liquefy the tideland, are "hydraulic projects" under RCW 77.55.011(11). However, WDFW currently exempts all these practices from HPA requirements.

C. Adverse Impacts of Commercial Shellfish Aquaculture

28. The shoreline and intertidal habitats where commercial aquaculture takes place are essential to the entire marine ecosystem. They serve as nurseries, feeding grounds, and migratory corridors to numerous aquatic species and play a critical role in cycling nutrients throughout the ocean.

29. Industrial aquaculture operations have significantly altered the biologically diverse nearshore environment by removing diverse plants and animals from the tidelands and replacing them with a single species that consume phytoplankton, a critical source of food for native fish and shellfish. These operations kill or harm native aquatic vegetation and animal life through the use of heavy equipment, the application of herbicides and pesticides, the installation of netting and plastic tubing, and the release of sediments, plastics, and other pollutants. Especially when considered cumulatively, these changes disrupt natural ecosystems and adversely impact endangered and threatened species such as Puget Sound Chinook salmon, chum, coho, steelhead, North American green sturgeon, marbeled murrelets, and Southern Resident killer whales.

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30. Commercial aquaculture operations overlap with the habitat of a number of forage fish species, such as Pacific herring, surf smelt and Pacific sand lance, which form the backbone of a healthy Salish Sea. Forage fish deposit their eggs in the upper intertidal zone, which puts them at significant risk from development and construction impacts from shellfish aquaculture. The U.S. Army Corps of Engineers ("USACE") indicates that there is "substantial overlap" between shellfish aquaculture sites and forage fish spawning areas. In Willapa Bay alone, USACE estimates that shellfish aquaculture currently overlaps with more than half of the total herring spawning area mapped by WDFW.

31. Forage fish are critically important to the ecosystem because they provide a food source needed for the survival of species such as Chinook salmon, steelhead, bull trout and marbled murrelets. Chinook salmon are the preferred prey for the critically endangered Southern Resident killer whale population in Puget Sound. The Southern Resident killer whales are in danger of extinction, in large part because Chinook salmon populations are a fraction of historic levels.[2]

32. Commercially grown shellfish species compete with naturally occurring species for food, including fish eggs, larvae, crab zoeas, other zooplankton, and phytoplankton. The culture and potential release of nonnative species, such as Pacific oysters and Manila clams, can dominate native species and destroy habitat.[3]

33. Most commercial aquaculture facilities use netting to keep fish, birds and other animals away, driving wildlife away from its natural feeding grounds, depriving it of access to an essential food source, and sometimes trapping and killing birds and other animals.

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[2] *See* Robert C. Lacy, et al., *Evaluating Anthropogenic Threats to Endangered Killer Whales to Inform Effective Recovery Plans*, 7 SCI. REP. 1 (2017), https://www.nature.com/articles/s41598-017-14471-0.pdf.

[3] *See* Jennifer Molnar, *Assessing the Global Threat of Invasive Species to Marine Biodiversity*, 6 FRONTIERS IN ECOLOGY & THE ENV'T 485 (2008).

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A juvenile eagle right after its release from a geoduck wildlife net on Harstine Island in 2006.

34. Eelgrass is especially vulnerable to the expansion of industrial aquaculture. Eelgrass is considered a prime indicator of ecosystem health and is an important component of the estuarine and nearshore food web, harboring numerous invertebrates and forage fish, and providing a migratory corridor for juvenile salmon. USACE estimates that 66% of the current active aquaculture acreage overlaps with sites containing eelgrass. Shellfish aquaculture often involves the intentional removal of eelgrass species when preparing the beds, either by using herbicides or by raking the tidal beds, often with heavy machinery. Nets and other equipment used in shellfish aquaculture can also reduce or eliminate eelgrass by shading the beds. The turbidity created during harvesting can block light as well as cover and kill the plants.

35. Water quality is impacted through the release of pollutants from intensive shellfish aquaculture, including, but not limited to, sediment, nutrients, and metal and plastic debris.

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36. The use of rafts, floating longlines, oyster longlines, and rack and bag culturing structures can affect water currents and circulation patterns, increase erosion and sedimentation, and alter tidal channels. Wastes from cultured shellfish settles to the substrate and may cause sedimentation and nutrient over-enrichment. Elevated concentrations of nutrients can lead to excessive growth of aquatic plants, reducing dissolved oxygen in water and altering aquatic habitat that is critical for fish and other aquatic life. Shellfish culture using rafts and longlines frequently leads to the accumulation of biological waste and shell material. Harvesting geoducks with hydraulic hoses releases a significant amount of silt and sediment, spreading it throughout the water column. The release of sediment disrupts and harms aquatic plants and benthic organisms and destroys habitat that provides protection, nurseries, and food for native aquatic animals such as salmon.

37. A significant amount of plastic debris such as plastic tubes and netting is released from commercial shellfish sites, including geoduck facilities, during storms and other events. Nets, bags, and ropes from shellfish aquaculture facilities shed fibers into the ocean. Debris such as metal and plastic can accumulate beneath rafts. The degradation of the plastics used in these operations, such as the PVC tubes used in commercial geoduck operations and high-density polyethylene (HDPE#2) used in net caps, zip ties, canopy netting, and mesh tubes, likely results in the release of microplastics into the water.

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PVC Plastic Pollution from a Taylor Shellfish Farms Aquaculture Facility in Case Inlet.

38. Any microplastics released from aquaculture facilities may drift into high priority foraging and spawning habitats and be ingested by animals, including birds, fish, and shellfish. Plastic particles absorb toxic pollutants from the water, such as PCBs, that poison the animals that ingest them and may contaminate fish or shellfish that end up on the plates of consumers. As these contaminants move up the food chain, their effects are magnified to the point that they threaten the lives of apex predators. For example, contamination with PCBs and other toxic pollutants from food sources is a key reason for the decline of Southern Resident killer whales.[4]

39. Commercial aquaculture significantly degrades the aesthetic and recreational value of shorelines. What once was pristine shoreline is replaced with plastic bags, PVC tubes, rebar, rafts and buoys, acres of netting, machinery, and noise and light pollution. The plastic gear prevents residents and visitors from using the nearshore waters or the shoreline, or

[4] *See* Lacy, *supra* note 2.

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enjoying recreational activities such as wading, walking, boating, beachcombing, scuba diving, windsurfing, viewing wildlife, recreational fishing, or recreational harvesting of wild shellfish.

D. PNA's Proposed Commercial Geoduck Aquaculture Facility

40. Respondent PNA's proposed commercial aquaculture Facility would be located on 1.1 acres of tidelands within Zangle Cove. ChangMook Sohn ("Sohn"), a member of PNA, owns the property on which the PNA Facility will operate and lives in a single-family residence directly upland from the proposed Facility. The PNA Facility would be the first commercial geoduck operation in Zangle Cove and the first aquaculture operation in Zangle Cove.

41. PNA has indicated that it will partner with Taylor Shellfish Farms ("Taylor Shellfish") to operate the Facility. Taylor Shellfish would purportedly be responsible for the majority of planting and harvesting activities at the Facility. The techniques that PNA indicates it will use at the Facility are the general practices used in commercial geoduck aquaculture.

42. A copy of PNA's Joint Aquatic Resources Permit Application ("JARPA") filed with Thurston County on December 18, 2014, is attached hereto as **Exhibit A**. According to the JARPA, the PNA Facility would plant geoducks between the -4.5 foot and +3 foot tidal elevation. The Facility will insert approximately 47,900 polyvinyl chloride ("PVC") tubes into the tidelands, or about one per square foot. These tubes will be four to six inches in diameter and 10 inches long, and will be buried in the substrate with two to three inches exposed. Three geoduck seeds will then be planted in each tube, for a total of approximately 152,000 geoducks on the 1.1-acre plot. These geoducks will be harvested in perpetuity on a five to six year plant/harvest cycle.

43. After seeding, the Facility will cover the PVC tubing with netting. A total of 16 nets, each measuring 50 feet by 50 feet, will be spread over the area, and will be staked with rebar every 10 feet. The rebar will be pushed into the substrate. The PVC tubes will be removed after about 18 months, but the netting may be replaced over the geoducks for an additional six months to keep wildlife away from the area.

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44. To harvest the geoducks, operators will use hand-held high-pressure water pumps to inject water into the sediment around the geoducks' siphons to loosen them so that they can be removed by hand.

45. Sohn has applied for and received a Shoreline Substantial Development Permit from the Thurston County Shoreline Hearings Board.

46. According to WDFW's online Aquatic Protection Permitting System ("APPS"),[5] Sohn applied for an HPA permit for the PNA Facility on December 30, 2014, under Application ID No. 2529. The application was deemed incomplete by WDFW on December 31, 2014. On information and belief, PNA abandoned the HPA application following WDFW's adoption on July 1, 2015, of WAC 220-660-040(2)(l), the WDFW rule challenged by Petitioners in this case, which exempts projects such as the PNA Facility from HPA requirements. On July 18, 2016, WDFW closed PNA's HPA application due to inactivity.

LEGAL BACKGROUND

A. Hydraulic Permitting Approval Permits, Generally

47. "Wildlife, fish, and shellfish are the property of the state," which WDFW is charged to preserve and protect. RCW 77.04.012.

48. Since 1943, any person planning to undertake certain construction projects or activities in or near state waters has been required to obtain a Hydraulic Project Approval permit, commonly known as an HPA. *See* Laws of 1943, ch. 40, § 1. HPA permits are required before a person can undertake a "hydraulic project." RCW 77.55.021(1); WAC 220-660-040(1). A "hydraulic project" requiring an HPA permit is defined as "the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." RCW 77.55.011(11). WDFW may issue fines of up to

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[5] WDFW, *Aquatic Protection Permitting System*, https://www.govonlinesaas.com/WA/WDFW/Public/Client/WA_WDFW/Shared/Pages/Main/Login.aspx (last visited Apr. 6, 2018).

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$100 per day to anyone conducting a hydraulic project without the required HPA permit. RCW 77.55.291(1).

49. Virtually all construction projects in or around Washington waters require an HPA permit. Projects and activities that require a permit include:[6]

- Docks, piers, ramps, floats, and buoys
- Boat ramps and launches
- Stream bank protection, bulkheads
- Culverts and bridges (new, repair, and replacement)
- Stream channel relocation and realignment
- Dredging and sand/gravel removal
- Log placement, repositioning, or removal
- Beaver dam removal or modification
- Pond construction
- Water diversions and intakes
- Outfall and tide gate structures
- Utility crossings and test boring
- Aquatic plant removal and control
- Mineral prospecting

50. The purpose of the HPA permit is to "ensure that construction or performance of work is done in a manner that protects fish life." WAC 220-660-010. "Protection of fish life is the only grounds upon which the department may deny or provision an HPA." RCW 77.55.021(7)(a); WAC 220-660-050(14)(a). The provisions on an HPA permit "must ensure that the project provides proper protection for fish life." WAC 220-660-050(14)(a). All hydraulic projects "must achieve no net loss" of fish life. WAC 220-660-080(3)(c). Frequently, WDFW will restrict HPA projects to certain times of the year, limiting these "work windows" in order to minimize the impact on fish in the area. Work windows are even more restricted in spawning areas for forage fish, and work is generally allowed only during very short time periods.

51. Additional restrictions for HPA permits may be imposed for "saltwater habitats of special concern," which are habitats "that provide essential functions in the development of

[6] *See* WDFW, *Hydraulic Project Approval (HPA) – For Projects in or Near Water*, http://wdfw.wa.gov/licensing/hpa/hpa_tri-fold_final_9-1.pdf (last visited Apr. 6, 2018).

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priority fish species," including eelgrass beds and spawning areas for Pacific sand lance, surf smelt, and Pacific herring. WAC 220-660-320(3). These areas "require a higher level of protection because they provide essential functions in the developmental life history of fish life." WAC 220-660-320(2)(b).

52. Chapter 77.55 RCW provides four exemptions to the HPA permit requirement: driving across an established ford, RCW 77.55.031; removing derelict fishing gear, RCW 77.55.041; removing Spartina or purple loosestrife, RCW 77.55.051; and certain remediation of hazardous contamination, RCW 77.55.061.[7]

53. WDFW processes thousands of HPA applications each year. WDFW uses APPS to manage HPA permit applications, which enables applicants to submit applications and any supporting documents online. WDFW issues most HPAs within 45 days after receipt of a complete application.[8] According to a search of APPS, WDFW issued 2339 HPA permits in 2017.

B. Aquatic Farming Act

54. In 1985, the Washington Legislature adopted the Aquatic Farming Act, declaring aquaculture to be "a branch of the agricultural industry of the state" and designating the Department of Agriculture the principal state agency for regulation of private sector aquaculture. Laws of 1985, ch. 457, § 1. In so doing, the Legislature removed the Department of Fisheries (WDFW's predecessor agency) from its role as the primary state agency licensing and regulating the taking of farmed fish and farmed shellfish from Washington waters. Aquaculture is thus exempt from otherwise applicable hunting or fishing license requirements. RCW 77.12.047(3); *see also* Laws of 1985, ch. 457, § 8.

55. The Aquatic Farming Act defines the following key terms:

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[7] A previous HPA exemption for certain hydraulic projects required for the housing of sexually violent predators expired in 2009. Laws of 2002, ch. 68, § 14 (former RCW 77.55.071).

[8] *See* WDFW, *Hydraulic Project Approval (HPA) Frequently Asked Questions*, http://wdfw.wa.gov/licensing/hpa/faq.html (last visited Apr. 6, 2018).

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> (1) "Aquaculture" means the process of growing, farming, or cultivating private sector cultured aquatic products in marine or freshwaters and includes management by an aquatic farmer.
>
> (2) "Aquatic farmer" is a private sector person who commercially farms and manages the cultivating of private sector cultured aquatic products on the person's own land or on land in which the person has a present right of possession.
>
> (3) "Private sector cultured aquatic products" are native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms under the supervision and management of a private sector aquatic farmer or that are naturally set on aquatic farms which at the time of setting are under the active supervision and management of a private sector aquatic farmer. . . .

RCW 15.85.020; Laws of 1985, ch. 457, § 2.

56. Among other things, the 1985 Aquatic Farming Act required the Departments of Agriculture and Fisheries to "jointly develop . . . a program of disease inspection and control for aquatic farmers[.]" Laws of 1985, ch. 457, § 8. The Department of Fisheries was provided authority to adopt "rules implementing this [disease control] section." *Id.* Its authority to otherwise "regulate private sector cultured aquatic products and aquatic farmers" was limited to: statistical and biological reporting; declaring restricted shellfish areas; inspection of imported oyster seed; permits for importation of fish and shellfish from offshore waters; user fees for disease control; consultation and contracting for disease control; and registration of aquatic farms. *Id.* (cross-referencing those statutory authorities). After various recodifications and refinements, that basic statutory structure remains in place to this day. *See* RCW 77.115.010.

57. The only mention of HPA permits in the 1985 Aquatic Farming Act was in a section specifically related to non-geoduck clam farms, which the Act clarified did not require a separate mechanical harvester license from the Department of Fisheries, provided that the HPA permitting process had been followed. Laws of 1985, ch. 457, § 19. Nothing in the 1985 Act, nor in the amendments made to the Act over the past three decades, purported to exempt hydraulic projects by aquatic farms from the HPA permit requirement.

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58. Notably, WDFW did not exempt aquaculture-related hydraulic projects from HPA requirements during significant rulemaking related to HPA permits in 1994, nor during updates to these rules in subsequent years. *See* WAC 220-110-035 (2005) (miscellaneous HPA exemptions); Wash. St. Reg. 94-23-058 (Nov. 14, 1994).

C. AGO Opinion and WDFW Rulemaking

59. In September 2006, State Rep. Patricia Lantz asked the Attorney General to issue an opinion as to whether HPA permits are required for construction projects related to the establishment of commercial geoduck facilities. The Attorney General issued an opinion that conceded that, unless a statutory exemption applied, the establishment of a commercial geoduck facility that involved "inserting tubes and netting on the tidelands" would constitute a hydraulic project and require an HPA permit. 2007 AGO No. 1 (Jan. 4, 2007) ("AG Opinion").

60. The AG Opinion found such an exemption, however, through an incorrect and incomplete reading of the Aquatic Farming Act, despite the lack of any statutory language exempting aquatic farming construction projects from the HPA permitting process, and despite the fact the geoducks were not commercially cultivated until nine years after the Legislature passed the Aquatic Farming Act. Relying on language in RCW 77.115.010(2) that precludes WDFW from "regulat[ing] private sector cultured aquatic products and aquatic farmers" except through enumerated statutes related to disease control, the AG Opinion concluded that such language would be rendered meaningless unless it exempted private sector aquaculture operations from the HPA permitting process. AG Opinion at 3-5. The AG Opinion failed to construe the meaning or scope of the statutory term "regulate," ignoring the difference between the regulation of the products produced by aquaculture for the prevention of disease, and the regulation of aquaculture-related hydraulic projects to prevent environmental harms; failed to distinguish between the RCW 77.115.010(2) exemption for regulation of "aquatic farmers" and "aquatic products" and the lack of any such exemption for "aquaculture" generally; and failed to review the statutory history of the 1985 Act, including section 19, which unambiguously

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reserved to the Department of Fisheries the authority to oversee mechanical clam harvesting by aquatic farmers.

61. In 2015, WDFW amended the Hydraulic Code. Wash. St. Reg. 15-02-029 (Dec. 30, 2014; effective Jul. 1, 2015). Among the new 2015 Hydraulic Code provisions was WAC 220-660-040, which provides in relevant part:

> (2) **No HPA is required for the following hydraulic projects:** (l) Installation or maintenance of tideland and floating private sector commercial fish and shellfish culture facilities (RCW 77.12.047). However, an HPA is required to construct accessory hydraulic structures, such as bulkheads or boat ramps.

(Emphasis in original.) That rule thus codifies and expands the flawed logic of the 2007 AG Opinion to purport to exempt all aquaculture facilities from HPA permitting requirements.

62. As part of the process of adopting the 2015 Hydraulic Code, WDFW completed an environmental impact statement. With regard to WAC 220-660-040(2)(l), WDFW received a public comment from the Washington State Environmental Coalition asking that WDFW revisit the applicability of HPA to aquaculture construction projects. WDFW demurred on the basis of "prevailing statutory interpretation," an apparent reference to the 2007 AG Opinion.[9]

63. On information and belief, WDFW will not require the PNA Facility to obtain an HPA permit because it takes the position that HPA permitting is not required for "[i]nstallation or maintenance of tideland . . . private sector commercial . . . shellfish culture facilities."

FIRST CLAIM FOR RELIEF

Against Respondents WDFW and Stohr

Chapter 77.55 RCW: Commercial Shellfish Aquaculture Facilities Require HPA Permits

64. Petitioners incorporate by reference all preceding paragraphs.

65. All commercial shellfish aquaculture facilities "use" the natural saltwater beds of the state's tidelands, and thus are "hydraulic projects" under RCW 77.55.011(11).

[9] WDFW, *Final Programmatic Environmental Impact Statement – Hydraulic Code Rule Changes*, SEPA #14-049 (Oct. 27, 2014), Appendix A at A-265, available at http://wdfw.wa.gov/publications/01660/.

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66. Commercial shellfish aquaculture facilities are also "hydraulic projects" because they "obstruct" and "change" the natural saltwater beds. RCW 77.55.011(11). For example, commercial shellfish operations generally include clearing tidelands of native plants and animals and replacing them with a concentration of one or more species of shellfish. Operators commonly install anti-wildlife netting and secure it to the tideland with rebar. Commercial oyster operations typically include the installation of fencing on the tideland, the use of staked lines, rafts, or buoys, or the installation of cement or rock walls on the saltwater bed. Commercial clam operations typically grow shellfish in plastic mesh bags or trays that are secured to the tidelands with rebar or anchored with sandbags. Commercial geoduck facilities generally place 44,000 PVC tubes per acre into the intertidal bed (the equivalent of seven miles of tubing per acre), and harvest the geoducks by using high-pressure water hoses to inject water into the substrate, thus liquefying the tideland.

67. WDFW is responsible for issuing HPA permits for hydraulic projects. RCW 77.55.021(1).

68. WDFW has failed and continues to fail to require commercial shellfish aquaculture facilities to obtain HPA permits before beginning operations, even though these geoduck facilities are hydraulic projects.

69. WDFW's failure to require commercial shellfish aquaculture facilities to obtain HPA permits before beginning operations has allowed numerous facilities to operate in violation of chapter 77.55 RCW, and consequently has caused harm to fish and the marine environment.

70. Under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, any interested person whose rights, status, or other legal relations are affected may request the Court to determine the construction or validity of WDFW's action, and obtain a declaration of rights, status, or other legal relations.

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71. This action involves issues of major public importance. *See Wash. State Coal. for the Homeless v. Dep't. of Soc. & Health Servs.*, 133 Wn.2d 894, 917-18, 949 P.2d 1291 (1997).

72. Petitioners and WDFW are engaged in an actual, present, and existing dispute; Petitioners and WDFW have genuine and opposing interests that are direct and substantial; and a judicial determination of the dispute will be final and conclusive. *See Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973).

73. Petitioners request that the Court declare that WDFW's policy and practice of exempting commercial shellfish aquaculture facilities from the requirement that they obtain HPA permits before undertaking "hydraulic projects" is contrary to law, *ultra vires*, and invalid.

SECOND CLAIM FOR RELIEF

Against Respondent WDFW

Chapter 34.05 RCW: Unlawful Rulemaking

74. Petitioners incorporate by reference all preceding paragraphs.

75. WDFW is created by statute and its powers are constrained accordingly. "An agency may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority." *Northlake Marine Works, Inc. v. Dep't of Nat. Res.*, 134 Wn. App. 272, 282, 138 P.3d 626 (2006).

76. WDFW promulgated WAC 220-660-040(2)(l), effective July 1, 2015, exempting the construction of private sector commercial fish and shellfish culture facilities from the statutory requirements of HPA permitting applicable to all "hydraulic projects" as defined in RCW 77.55.011(11). The Washington Legislature has not created such an exemption in RCW 77.55.021 or elsewhere, and has not authorized WDFW to create additional exemptions from the HPA permitting requirement. As such, WAC 220-660-040(2)(l) exceeds WDFW's statutory authority.

77. Petitioners request the Court to declare WAC 220-660-040(2)(l) invalid and unenforceable.

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THIRD CLAIM FOR RELIEF

Against Respondent PNA

Chapter 77.55 RCW: PNA's Commercial Aquaculture Facility Requires an HPA Permit

78. Petitioners incorporate by reference all preceding paragraphs.

79. PNA currently does not have an HPA permit for its proposed Facility and, on information and belief, has abandoned its effort to obtain such a permit.

80. PNA's proposed Facility is a "hydraulic project" as defined by RCW 77.55.011(11) because the planned placement of PVC tubes, anti-predator netting, and rebar at the Facility, and the use of high-pressure hoses to harvest geoducks, will involve "work or construction that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state."

81. Because it is a "hydraulic project," the PNA Facility requires an HPA permit.

82. Respondent PNA should be enjoined from beginning operations at its Facility until it has received the required HPA permit from WDFW under chapter 77.55 RCW.

PETITIONERS' PRAYER FOR RELIEF

Petitioners respectfully request that this Court:

1. Declare, pursuant to RCW 34.05.570(2)(b), that WAC 220-660-040(2)(l) exceeds WDFW's lawful authority and is therefore invalid;

2. Declare that any commercial geoduck aquaculture facility that qualifies as a "hydraulic project" must receive an HPA permit from WDFW before commencing operations;

3. Order that WDFW enforce chapter 77.55 RCW with respect to commercial geoduck aquaculture facilities that qualify as "hydraulic projects";

4. Enjoin PNA from beginning or continuing operations at its Facility until it receives an HPA permit;

5. Award Petitioners their costs of suit and attorneys' fees; and

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6. Grant Petitioners such other relief as the Court deems just and equitable.

DATED: April 12, 2018

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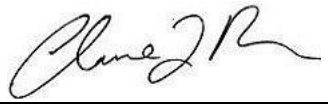
By 

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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 12th day of April, 2018, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

Bob Ferguson, Attorney General Attn: Division of Fish, Wildlife and Parks 1125 Washington Street SE Olympia, WA 98501	☐ by **Thurston County ECF** ☐ by **Electronic Mail** ☐ by **Facsimile Transmission** ☐ by **First Class Mail** ☑ by **Hand Delivery** ☐ by **Overnight Delivery**
Joe Stohr, Acting Director, Dept. of Fish and Wildlife Natural Resources Building 1111 Washington St. SE Olympia, WA 98501	☐ by **Thurston County ECF** ☐ by **Electronic Mail** ☐ by **Facsimile Transmission** ☐ by **First Class Mail** ☑ by **Hand Delivery** ☐ by **Overnight Delivery**
Dept. of Fish and Wildlife Natural Resources Building 1111 Washington St. SE Olympia, WA 98501	☐ by **Thurston County ECF** ☐ by **Electronic Mail** ☐ by **Facsimile Transmission** ☐ by **First Class Mail** ☑ by **Hand Delivery** ☐ by **Overnight Delivery**
Sukjoo Sohn, Registered Agent Pacific Northwest Aquaculture, LLC 930 76th Avenue NE Olympia, WA 98506	☐ by **Thurston County ECF** ☐ by **Electronic Mail** ☐ by **Facsimile Transmission** ☐ by **First Class Mail** ☑ by **Hand Delivery** ☐ by **Overnight Delivery**

Executed on the 12th day of April, 2018, at Seattle, Washington.

s/Patti Lane
Patti Lane, Legal Assistant

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