Notable Administrative Law Cases in Washington

2020 NAA CLE

Bill Pardee, Tax Referee, Washington State Board of Tax Appeals

Fields v. Dep't of Early Learning, 193 Wn.2d 36, 434 P.3d 999 (2019)

In 1988, petitioner (Fields) pleaded guilty to attempted second degree robbery for trying to snatch a woman's purse to help pay for her drug habit. Fields led a troubled life until 2006 when she turned her life around by successfully completing a drug program and has been clean and sober ever since. As a result of her second-degree robbery conviction, Fields was permanently disqualified from working at any licensed childcare facility in Washington pursuant to regulations promulgated by respondent Department of Early Learning (DEL).

In February 2013, Fields submitted a portable background check to DEL. Based on the information Fields provided, DEL cleared Fields to work at a childcare facility. She worked in that childcare facility for six months after she received her background clearance. A local news report on childcare centers brought Fields's undisclosed criminal history to DEL's attention.

The licensing supervisor for DEL sent a notice of disqualification to Fields. The notice informed Fields that she was permanently disqualified, effective immediately, "meaning that you cannot work with or have unsupervised access to childcare children." Fields appealed to the Office of Administrative Hearings (OAH). Fields also requested reconsideration by the licensing supervisor, pointing to both factual inaccuracies in the notice of disqualification and evidence of her rehabilitation. The court noted that it does not appear from the record that Fields' request for reconsideration had been considered on its merits.

On appeal, DEL moved for summary judgment, arguing that in accordance with former WAC 170-06-0120(1) (2015), Fields must be disqualified from having unsupervised access to children or obtaining a childcare license under former WAC 170-06-0070(1) (2015) due to her 1988 conviction. Fields did not challenge the fact of her 1988 conviction but contended that the disqualification regulations violated her constitutional right to due process of law, both facially and as applied. OAH determined that such questions were beyond the scope of its review and therefore granted summary judgment to DEL.

Fields petitioned for review in superior court, again arguing that the disqualification regulations violated her state and federal rights to procedural and substantive due process, both facially and as applied. The superior court dismissed the petition for review and determined that Fields had not met her burden of proving that the disqualification regulations were unconstitutional. The Court of Appeals affirmed. The Washington Supreme Court then granted Fields' petition for review.

4-member lead opinion by Justice Yu

The court observed that DEL's regulations provide that a subject individual who has a background containing any of the permanent convictions on the director's list (former WAC 170-06-0210), 50 in all, including robbery, will be permanently disqualified from providing licensed child care. A person with a permanently disqualifying conviction has no recourse at the administrative level. DEL regulations prohibit any administrative decision-maker from finding any regulation invalid or unenforceable and further prohibit reconsideration of permanent disqualifications on a case-by-case basis.

The court observed that Fields is claiming that her permanent disqualification based solely on her 30-year old robbery conviction constitutes an arbitrary deprivation of her protected interest in pursuing lawful employment in her chosen field. The court emphasized that Fields has a procedural due process right to have this claim heard at meaningful time and in a meaningful manner. Since DEL's regulations prohibit any consideration of Fields' claim at the administrative level, the only procedural mechanism available to her is judicial review pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. To resolve Fields' as-applied procedural due process claim, the court noted it must determine whether APA review is sufficient to protect against an erroneous deprivation of Fields' protected interest considering the specific circumstances presented.

The court reasoned that using Fields' 1988 robbery conviction as the sole basis for her permanent disqualification, with no opportunity for an individualized determination, presented an unusually high risk of arbitrary, erroneous deprivation. Considering this unusually high risk, the court concluded that the additional procedure of an individualized determination at the administrative level would be "extremely valuable," because it would mitigate the risk of erroneous deprivation. Further, the court concluded that because DEL regulations explicitly prohibit such an individualized determination of a person with a permanently disqualifying conviction, in such circumstances, "APA review does not provide sufficient procedural protections given the high risk of erroneous deprivation." The court reasoned that an individualized determination at the administrative level would drastically reduce the risk of erroneous deprivation in Fields' case, and properly and fairly conducted, an individualized

determination will ensure that even if Fields is ultimately disqualified, "it will not be arbitrary, but, instead, based on her 'character, suitability, and competence to provide child care and early learning services to children.'"

The court noted that the procedure on remand "need not be unusual or burdensome," noting that DEL already has regulations governing individual determinations of those with troubling past behavior but without any disqualifying convictions. The court also stressed that "Fields is only entitled to be heard in accordance with existing procedures, where her attempted second-degree robbery conviction is considered along with the rest of her history, both favorable and unfavorable." The court recognized that DEL "also has a legitimate interest in easing administrative burdens that would come with requiring a case-by-case evaluation of every person who seeks qualification to work in licensed childcare facilities." That said, the court emphasized that DEL's "interest is extremely minimal given the as-applied nature of this challenge."

The court stated that it does not hold that every person with a permanently disqualifying conviction must be given an individualized administrative hearing, but only holds that in light of the unusually high risk of erroneous deprivation in Fields' particular case, the additional protection of an individualized determination of her qualifications is required as a matter of procedural due process. The court therefore remanded back to DEL for further administrative proceedings, at which Fields' entire history and the totality of her circumstances must be considered on an individualized basis.

Justice McCloud concurrence

The concurrence believed that DEL violated Fields' federal right to substantive due process. While it disagreed with the lead opinion's reasoning, it concurred in the result. The concurrence noted that should DEL want to disqualify Fields for other reasons, it must go through additional administrative proceedings and comply with procedural and substantive due process. "But DEL may not permanently disqualify Fields based solely on her 1988 conviction because doing so violates substantive due process."

The concurrence reasoned that because the right to pursue a trade or profession is a protected right but not a fundamental right, we apply a rational basis test. Under this test, we determine whether the challenged regulations are rationally related to a legitimate state interest. The concurrence concluded that the challenged regulation, as applied to Fields, was not rationally related to any legitimate state interest.

The concurrence agreed with the dissent that the lead opinion conflated procedural and substantive due process, noting that procedural due process only guarantees that individuals have notice and an opportunity to be heard to contest whether the rule does not apply to them, not whether it should. Noting that everyone agrees that the regulation at issue bars Fields from working at a licensed childcare facility, the concurrence views the issue as whether barring Fields because of her conviction is rationally related to a legitimate state interest, which is a question of substantive due process.

While recognizing that DEL has a legitimate interest in avoiding the administrative burden of holding an individualized inquiry in every case, the concurrence states that DEL is not required to hold an individualized inquiry in every case, but if DEL can write a bright-line regulation that seldom, if ever, violates substantive due process as applied, it can avoid individualized inquiries in most, if not all, cases. The concurrence further states that in drafting a rule that is less likely to violate a person's substantive due process rights, DEL might consider how old the person was when she or he committed the crime and the amount of time that has elapsed since the crime was committed.

In sum, the concurrence held that the challenged regulation, as applied to Fields, was not rationally related to a legitimate state interest, and therefore amounts to arbitrary and capricious government action and violates Fields' federal right to substantive due process.

4-member dissenting opinion by Chief Justice Fairhurst

The dissent states that in arguing that procedural due process requires DEL to give her an individualized hearing, both Fields and the lead opinion conflate procedural and substantive due process. The dissent views Fields' argument as that DEL's rule is over inclusive and therefore there is a risk that Fields will be deprived of the right to provide childcare even though she may not pose a risk to children. The dissent observes that Fields' true claim is one of substantive due process, and that she fails to meet the heavy burden of showing that the decision to permanently disqualify her from providing childcare services based on her conviction is not rationally related to the legitimate government interest in protecting children.
The dissent observes that although procedural due process sets limitations on the process the government must provide before depriving an individual of liberty or property interests, substantive due process limits the rules the government may adopt governing those deprivations. The dissent notes that procedural due process only guarantees that individuals have notice and an opportunity to be heard to contest whether the rules apply to them, not whether they should. Moreover, the dissent states that the fact that Fields was not able to challenge the constitutionality of the DEL rule within the administrative process itself is not a procedural due process violation. Along those lines, the dissent states: "Procedural due process does not require an agency to hear a constitutional challenge with the administrative process." (Citing *Dixon v. Love*, 431 U.S. 105, 113-114, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977)).

The dissent observes that, as in *Dixon*, the decision to disqualify Fields is automatic under DEL rules once she admitted that she had a prior conviction. The dissent notes that Fields is arguing for the right to appear in person in the administrative process to argue that DEL should show leniency and depart from its own rules. In response, the dissent states that in *Dixon* the United States Supreme Court rejected the argument that procedural due process grants this right, and it would reject it here also. (Citing *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) in which the Court unanimously rejected a due process claim because the law at issue did not allow for individualized considerations of dangerousness – stating "plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme.") In applying *Doe*, the dissent reasoned that Fields is not entitled to an individualized administrative hearing because she cannot show that the facts she seeks to establish in that hearing are relevant under the statutory scheme. Regardless, the dissent also emphasized that Fields did have the

opportunity to obtain review of her claim that the DEL rule was unconstitutional as applied to her by filing in the superior court. The dissent stated that just because she could not make this challenge, or any other constitutional challenge, during the administrative process did not violate Fields' rights to procedural due process. Along those lines, the dissent stated: "Procedural due process does not require that administrative hearings consider all possible claims, such as whether a rule violates substantive due process as applied in a particular case." The dissent concludes that because "Fields had the opportunity to make her substantive due process claims in superior court, she was not denied procedural due process."

The dissent indicates that the lead opinion fails to acknowledge the extent of the increase in the administrative burden on DEL based on its ruling, which it believes will be great. DEL explained that it receives 21,000 applications each year. The dissent believes that it is inevitable with that number of applications that others, like Fields, will also argue they are rehabilitated despite their convictions for disqualifying crimes. As such, the DEL will be forced to make a choice each time a person claims to be rehabilitated: It can provide individualized hearings to everyone who makes this claim, including people with disqualifying convictions for child molestation and child rape, as Fields advocated for at oral argument; or it can deny individualized hearings to other applicants, in which case this court may decide that this violates their procedural due process rights. Furthermore, the dissent reasons that by holding that Fields was denied procedural due process in this case, the lead opinion will require the agency to consider the argument that its own rule is unconstitutional as applied. But DEL's regulations do not allow parties to make constitutional claims in the administrative process for good reason: questions of constitutionality are best left to the courts. The dissent believes that by expanding the bounds of procedural due process, the lead opinion "invites a flood of litigation." Some applicants who are clearly disqualified will file suit, and a superior court will have to determine whether the applicant is in the same situation as Fields, or a sufficiently similar situation, to demand the same relief. The dissent notes that even if these decisions could be easily made, having to hear these new challenges would impose a large burden on DEL and the court system. The dissent believes that although DEL's disqualification rule may be both under and over inclusive in certain instances, it provides the clear advantage of avoiding the time and expense of individualized hearings in each of these cases. In sum, the dissent would find that Fields' procedural due process claim fails because, as the lead opinion admits, there is no risk of erroneously applying the law at issue here, and the burden on the state of granting individualized hearings would be great.

As for Fields' substantive due process claim, the dissent notes that when applying the rational basis test, the courts do not require that the government's action *actually* advance its stated purposes, but merely look to see whether the government *could* have a legitimate reason for acting as it did. The dissent continues stating that if it is at least fairly debatable that the government's conduct is rationally related to a legitimate government interest, then there has been no violating of substantive due process. The dissent states that in this case the question is whether there could be a rational basis for permanently disqualifying Fields based on her robbery conviction without giving her an individualized hearing. The dissent reasons that although it is not a guarantee that a robbery conviction means a person will pose a danger to children and it may be true that Fields in fact does not pose a danger to children today, under the rational basis test, the court need only find that DEL could have a rational basis for acting as it did. The dissent concludes that DEL's disqualification regulations are a reasonable means to advance the

state's legitimate interests. The dissent believes that it is not irrational for DEL to conclude that because Fields has committed a violent crime that she has demonstrated an impulsivity and a willingness to hurt another human such that she should be categorically barred from work in childcare facilities. The dissent observes that Fields "has failed to meet her heavy burden under the rational basis test to show that DEL's decision to permanently disqualify her based on her robbery conviction is not even rationally related to the State's strong interest in protecting children and avoiding the administrative expense of holding an individualized hearing." Based upon this, the dissent states that it would hold that Fields has failed to show that the DEL rule is an unconstitutional violation of her substantive due process rights.

***Matter of Kittitas Cty. for a Declaratory Order v. Washington State Liquor and Cannabis Bd.*, 8 Wn. App. 2d 585, 438 P.3d 1199 (2019)**

In December 2013, Kittitas County (the County) notified the Washington State Liquor and Cannabis Board (the Board) of its objection to a license application for a marijuana producer/processor operation. The objection was based solely on the location of the operation. Marijuana production and processing is permitted in the County only "in certain land use zoning designations" and "under strict conditions." The Board granted the license over the County's objection. In correspondence to the County, the Board indicated that it could not base its denial of an application on local zoning laws.

In response, the County petitioned the Board under RCW 34.05.240 for a declaratory order. The County argued that the site-specific nature of marijuana licenses means that licensing decisions are subject to local zoning regulations. In response, after issuing a notice of proceedings and receiving input from numerous cities and counties which generally supported the County's position, the Board determined that neither the marijuana licensing statute nor the Growth Management Act (GMA), chapter 36.70A RCW, required its adherence to "all local zoning laws and land use ordinances prior to granting a license."

The County successfully appealed the Board's decision to the Kittitas County Superior Court. In reversing the Board's decision, the superior court ordered the Board to "only approve those licenses which are in compliance with local zoning."

On appeal, the County argued that the GMA requires the Board to deny marijuana licenses to marijuana producers, processors, and retailers whose site locations are in areas with local zoning restrictions. The County reasoned that, because the Board is a state agency, RCW 36.70A.103 requires it to adhere to local zoning restrictions when it issues site-specific marijuana licenses. In response, the Board stated that RCW 36.70A.103 applies only to actions taken by a state agency acting in its proprietary capacity as the developer or operator of a public facility site. Based upon this, the Board reasoned that because licensing decisions, even if site specific, do not involve a state agency acting in its proprietary capacity, RCW 36.70A.103 is inapplicable.

The court concluded that the plain language of RCW 36.70A.103 favored the Board's approach, because that statute is concerned with governmental agencies involved with siting public facilities, a view supported by WAC 365-196-530(2), a Department of Commerce regulation. But, the court noted, nothing in that statute suggests state agencies must be concerned with local zoning restrictions when engaged in purely governmental functions, such as determining the

appropriateness of a state license. The court noted that the GMA merely "implies" that governmental agencies "should take into account" growth management programs when engaged in "discretionary decision making." WAC 365-196-530(4).

As to the Board's decision to issue marijuana licenses, the court concluded this was not a siting activity, and even though such licenses are location-specific, they do not confer final authority to open a marijuana site. The Board's regulations specify that a license holder must comply with local laws, including zoning requirements, before going into business. WAC 314-55-020(15). The Court observed that zoning laws remain in full force regardless of whether a license is issued, the Board's decision to license a business in a zoning-restricted area may mean the license will have little utility, and nothing in the limited nature of the Board's license changes local development plans or undermines the GMA's policy of coordinated development.

In response to the County's claim that the state marijuana laws (RCW 69.50.331(7) and (10)) themselves require the Board to adhere to local zoning rules in issuing licenses, the Court concluded that the County's reliance on those laws was misplaced. The court stated this statute only requires communication with local governments, but not compliance with local zoning laws. The court observed that if the legislature intended to require the Board to adhere to local zoning laws, it would have done so directly (citing RCW 69.50.331(8)(c)). Moreover, the marijuana licensing statutes sets forth numerous circumstances requiring license denial, but noncompliance with local zoning standards is not among them. RCW 69.50.331(1)(b), (2)(b), and (8).

The court also noted that although normally a licensee's failure to begin operations within 24 months of licensure will result in license forfeiture (RCW 69.50.325(3)(c)(ii)(B)), under a 2017 amendment a licensee who is unable to open a business due to zoning restrictions is protected from the forfeiture rule. RCW 69.50.325(3)(c)(v). The court reasoned that by adopting such protections for those who cannot begin operations because of zoning restrictions, "the legislature recognized that the Board's licensing decisions are not dependent on zoning regulations," but rather "the legislature's action indicates an understanding that a licensing decision is separate and apart from zoning compliance."

In conclusion, the court stated while there appeared to be broad support for imposing zoning restrictions on the Board's licensing authority, "this is a matter that must be taken up by the legislative or rule-making process. It is not a matter to be resolved by the judiciary."

***Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 444 P.3d 1235 (2019)**

In July 2017 Seattle enacted an ordinance imposing an income tax on high-income residents. Individual taxpayers earning more than $250,000, and married taxpayers earning more than $500,000, were required to pay 2.25 percent of all income over those thresholds.

Four separate lawsuits were brought to enjoin enforcement of the ordinance. The superior court granted summary judgment for the tax opponents, concluding that no statute gave Seattle the authority to levy an income tax, and even if it had the authority, RCW 36.65.030 prohibited it from levying a net income tax. Seattle and the Economic Opportunity Institute (EOI) appealed the court's grant of summary judgment.

The court noted that after 1930, article VII, section 1 of the state constitution required that "all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership."

The court stated that beginning in *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), as to the comprehensive definition of property in the constitution, the court classified income as intangible property under article VII, section 1, and that a tax upon income is a tax upon property. The court noted that given *Culliton* and its progeny, it is no longer subject to question that income is property.

The court observed that RCW 35.22.280(2) explicitly grants first-class cities, like Seattle, the authority to levy a property tax on real or personal property for municipal needs. Because income is property, Seattle possessed valid statutory authority to levy a property tax on income. But the tax opponents argued that legislature constrained its grant of taxing authority to Seattle by enacting RCW 36.65.030, which prohibits any "county, city, or city-county" from levying "a tax on net income." Seattle and EOI insisted that the statute was inapplicable because Seattle's ordinance taxed "total" income rather than "net" income.

The court stated that because RCW 36.65.030 does not define "net income," it looks to the dictionary. Because Seattle's net income tax measured a city resident's taxable income based on the sum of net calculations, it was a net income tax for purposes of RCW 36.65.030, and therefore fell within its prohibition.

But the court concluded that the prohibition in RCW 36.65.030 was irrelevant, however, because that statute itself was unconstitutional, because the legislation that enacted it, Substitute Senate Bill (SSB) 4313, violated article II, section 19 of the state constitution. Article II, section 19, states that "no bill shall embrace more than one subject, and that shall be expressed in the title." After reviewing extensive case law, the court stated that the several subjects of SSB 4313 lacked a unifying theme and because it was impossible to assess whether the broad prohibition on net income taxes would have passed without the bill's unrelated provisions, the court held that SSB 4313 violated the single subject rule in article II, section 19. Accordingly, the court held that chapter 36.65 RCW, which was enacted in its entirety by SSB 4313, is unconstitutional.

That said, having addressed the statutory questions surrounding Seattle's authority to levy a net income tax, it then considered whether its tax was unconstitutional. The court reiterated that article VII, section 1 contains a comprehensive definition of "property" and requires that all taxes be uniform on the same classes of property. Under Seattle's graduated taxing scheme, income is broken into two classes and taxed at different rates depending on its classification. For example, the court reasoned, all individual income above $250,000 is taxed at a rate of 2.25 percent, and all income at or below $250,000 is not taxed at all. The court held that this is nonuniform taxation levied upon income, a single class of property. Whether authorized by RCW 35.22.280(2) or not, the court held that Seattle's graduated income tax violated the uniformity clause in article VII, section 1 of the state constitution, and is unconstitutional.

***Ass'n of Washington Business v. Dep't of Ecology*, 195 Wn.2d 1, 455 P.3d 1126 (2020)**

5-member majority opinion by C.J. Stephens

In 2008 the legislature enacted RCW ch. 70.235, "Limiting Greenhouse Gas Emissions," which encouraged the Department of Ecology (Ecology) to take swift action to address climate change, allowing "actions taken using existing statutory authority to proceed prior to approval of the greenhouse gas reduction plan." Following this enactment, the legislature's progress in addressing climate change stalled, declining in 2009 and 2015, to pass two major bills designed to further regulate and reduce greenhouse gas emissions. Following this, Governor Jay Inslee directed Ecology to reexamine its statutory authority to curb greenhouse gas emissions by setting emission standards. In response, Ecology promulgated the clean air rule (Rule), ch. 173-442 WAC. Relying on Ecology's authority under the Washington Clean Air Act (Act), ch. 70.94 RCW, the Rule creates greenhouse gas emission standards for 3 types of businesses: (1) certain stationary sources; (2) petroleum product producers and importers; and (3) natural gas distributors. The Rule requires most of these businesses to reduce their greenhouse gas emissions by 1.7 percent every year.

The Rule gives covered businesses two nonexclusive options reducing their greenhouse gas emissions: (1) Businesses can modify their operations at their facilities to lower their actual emissions; or (2) They can acquire and submit "emission reduction units," which are accounting units representing the reduction of one metric ton of carbon dioxide or its equivalent. Covered businesses can obtain emission reduction units in 3 ways: (1) by reducing their actual greenhouse gas emissions below the reduction requirement for a given compliance period; (2) undertaking recognized projects, programs, or activities that reduce emissions in real, specific, quantifiable, permanent, and verifiable ways; or (3) by purchasing emission reduction units in greenhouse gas emission markets outside of Washington.

As promulgated, the Rule covers roughly 68 percent of all the greenhouse gas emissions in Washington. Of those emissions covered by the Rule, approximately 74 percent are generated by the combustion of products sold by natural gas distributors and petroleum product producers and importers. Because these businesses only sell products but do not control the amount of fuel or gas burned, Ecology acknowledges these businesses cannot make direct emission reductions. The emission reduction unit program therefore provides the sole mechanism through which natural gas distributors and petroleum product producers and importers can address the emissions generated by the products they sell. Essentially, the Rule requires these businesses to pay to offset the emissions caused by third parties using their products.

Soon after Ecology promulgated the Rule in 2016, the Association of Washington Business joined with seven other industry trade organizations (collectively AWB) and filed a petition for review under the Administrative Procedure Act (APA), RCW ch. 34.05. Among other things, AWB argued Ecology lacked statutory authority under the Act to promulgate the Rule. Four utility companies that distribute natural gas throughout Washington also filed a petition for review. The two petitions were consolidated into a single challenge to the Rule. The trial court permitted the Washington Environmental Council and two other environmental organizations (collectively WEC) to intervene in defense of the Rule.

In 2017, the trial court ruled that Ecology's authority under the Act is limited to entities who introduce contaminants into the air, not entities who sell commodities. The trial court subsequently held that the Rule was invalid under the APA because the Rule exceeds the statutory authority of the agency conferred by law. The trial also denied Ecology's request to sever the portions of the Rule that were held invalid. Ecology and WEC filed notices of direct review with the Washington Supreme Court, and the latter granted review.

The heart of this case is whether the plain meaning of the Act empowers Ecology to use emission standards to regulate businesses that do not emit greenhouse gases. Ecology responds that it has the authority to promulgate the Rule regulating nonemitters through emission standards under the Act generally, and RCW 70.94.331(2)(c) and .030(12) in particular. Ecology argues that the Rule is a valid exercise of its authority under the Act because it is a "requirement that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis" "based upon a system of classification by types of emission," per RCW 70.94.030(12), .331(2)(c). Ecology is mistaken because although the Act grants Ecology significant authority to regulate emissions in the manner it deems best, Ecology cannot exercise this authority outside the scope delineated by the legislature. RCW 34.05.570(2)(c).

The plain meaning of the Act's "emission standard" definition limits the scope of Ecology's authority to promulgate emission standards to those entities that actually emit air pollutants. RCW 70.94.030(12).

The crux of Ecology's argument is that because the Rule is based on a type of emission – greenhouse gases – it can cover businesses that do not directly emit greenhouse gases, but whose products eventually do.

An emission standard is "a requirement . . . that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis." RCW 70.94.030(12). The Act defines "emission" as "a release of air contaminants into the ambient air." RCW 70.94.030(11). Reading these definitions together, an emission standard is best understood as a limit on how and when regulated entities can release air contaminants into the ambient air. If an emission standard regulates the release of air contaminants, it naturally follows that emission standards are intended to regulate those entities that directly cause such releases.

Another indication that emission standards are meant to regulate only actual emitters is the fact that the definition in RCW 70.94.030(12) applies to both "emission standard" and "emission limitation," and the Act uses the term "emission limitation" exclusively in reference to direct sources of emissions. Because "emission standard" is synonymous with "emission limitation," emission standard cannot reasonably be interpreted more broadly than emission limitation. Because the term "emission limitation" is used exclusively in reference to direct sources of emissions strongly suggests that the related term "emission standard" also applies only to direct sources of emission.

Ecology argues that by holding emission standards apply only to sources that directly emit contaminants into the air, the trial court "gave effect to only one clause in the definition" and ignored the importance of examples that could be read to apply to nonemitters. But an example illustrating a definition should not be read to expand the definition. A "requirement [to] . . . limit

. . . emissions of air contaminants" is just what it says: a rule requiring covered entities to limit their emissions. RCW 70.94.030(12). The definition's inclusion of some examples that *could conceivably* apply to nonemitters does not prove the legislature intended the Act to authorize Ecology to regulate more than direct emissions. We do not defer to agency interpretations of their own authority because their interpretation *could* have been what the legislature intended.

At oral argument, Ecology suggested that the only limit on its rule-making reach is the practical ability to measure and assess indirect impacts. But the Act's direction to use "all known, available, and reasonable methods to reduce, prevent, and control air pollution" is not an invitation to regulate every entity whose activities may eventually contribute to quantifiable emissions. RCW 70.94.011. The plain meaning of "emission standard" in the Act applies only to actual emitters of air pollution. RCW 70.94.030(12).

The legislature has not empowered Ecology to do whatever Ecology deems best for the environment. To the contrary, the legislature has provided Ecology with a variety of tools to fulfill its environmental responsibilities. One such tool is an air quality standard. Another tool is emission standards, which govern sources that directly emit air contaminants into the atmosphere. Emission standards govern what is emitted, while air quality standards govern permissible levels of a given air contaminant in the air.

Ecology claims its Rule is an emission standard and an emission standard only, but rather than regulate identified sources of greenhouse gases – as an emission standard ought to do – the Rule attempts to curb the overall effect of greenhouse gases by "requiring certain companies that sell, distribute, or import petroleum products and natural gas to . . . internalize some of the environmental costs associated with the products from which they profit." Forcing businesses to internalize the environmental costs of their customers' action may indirectly help limit the aggregate concentration of greenhouse gases in the atmosphere, but it does not actually regulate the release of those contaminants. By doing this, the Rule creeps beyond the scope of an emission standard and into the realm of an air quality standard. Although we need not decide today whether the Rule would have been properly promulgated as an air quality standard, we do conclude that it is an improper emission standard when applied to businesses that do not directly emit greenhouse gases.

There may be other options open to Ecology, now or in the future, for addressing the impact of petitioner businesses and utilities on climate change. But regulating them as so-called "indirect emitters" under the Act is not statutorily authorized. We therefore hold that the Rule exceeds Ecology's authority under the Act and is invalid to the extent it purports to regulate via emission standards businesses that do not directly emit greenhouse gases, but whose products ultimately do.

As to whether the remaining provisions of the Rule survive without the invalid provisions (i.e., is severable), the Rule contains an express severability clause, WAC 173-442-370, and Ecology asks us to preserve those portions of the Rule, including its application to actual emitters, that are a valid exercise of its regulatory authority. While we have not before addressed severability in the context of an administrative rule, we have recognized with regard to statutes that the presence of a severability clause "may provide the assurance that the legislative body would have enacted the remaining sections even if others are found invalid," though it "is not necessarily dispositive

on that question." *McGowan v. State*, 148 Wn.2d 278, 294-95, 60 P.3d 67 (2002). We examine the challenged statute to determine whether the legislature could have intended to enact valid sections alone and whether those valid sections alone work to achieve the legislature's goals. *Id.* When evaluating the severability of regulations, the United States Supreme Court looks to similar questions of intent and workability. *See K Mart Cor. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1181, 100 L.Ed. 2d 313 (1988).

Like the United States Supreme Court, we believe the test for severability of regulations should be governed by the concepts of intent and workability that inform our test for the severability of statutes. To determine whether an invalid portion or aspect of a regulation is severable, we ask (1) whether the authorized and unauthorized portions of the regulation are so intertwined that the agency would not have believably promulgated one without the other and (2) whether the invalid portion is so intimately connected with the purpose of the regulation as to make the severed regulation useless to advance the purpose of the statute under which it is promulgated. Applying this test here, we conclude that the portions of the Rule applying to natural gas distributors and petroleum product producers and importers are severable from the remainder of the Rule, which will continue to advance the purpose of the Act even without these provisions.

First, Ecology argues it would have adopted a clean air rule creating an emission standard applicable only to direct emitters. While AWB and the trial court are correct that most of the Rule's benefits were expected from the provisions we invalidate today, this does not show that the unauthorized provisions are so intertwined with the authorized provisions that Ecology would not have reasonably promulgated a rule without these provisions. To the contrary, the Rule regulates covered entities on an individual basis, and the unauthorized regulation of any particular nonemitter does not bear on the authorized regulation of any particular emitter. The Rule's structure is such that one does not depend on the other – the regulation of each entity is independent of any other. We believe Ecology would have reasonably promulgated a clean air rule without the unauthorized provisions we invalidate today.

Second, Ecology argues that a severed version of the Rule would still advance the purpose of the Rule and the Act by requiring annual emission reductions from the state's 48 largest stationary sources of greenhouse gas emissions. We agree that regulation of these sources alone marks significant progress in Washington's efforts to curb greenhouse gas emissions and combat climate change. A less effective regulation can still advance the purpose of the statute under which it is promulgated, particularly where – as here - the unauthorized portions of the Rule can be severed without impact on the operation of the remainder of the Rule.

Because Ecology would have reasonably promulgated a rule regulating only direct emitters of greenhouse gases and such a rule would still advance the purposes of the Act, we hold that the unauthorized portions of the Rule are severable from its validly authorized provisions.

<u>4-member dissenting opinion by Justice Owens</u>

We are asked to decide whether Ecology may establish and enforce greenhouse gas emission standards as applied to natural gas distributors and petroleum product producers and importers, which sell products that generate greenhouse gases when combusted by end users. The plain meaning of RCW 70.94.030(12), defining "emission standard" and "emission limitation,"

unambiguously evinces that "emission standards" may apply to either or both direct and indirect emitters.

"When passing laws that protect Washington's environmental interests, the legislature intended those laws to be broadly construed to achieve the statute's goals." *Quinalt Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460,470, 387 P.3d 670 (2017). The Act's public policies and purpose section states that "it is the purpose of this chapter to . . . provide for the use of all known, available, and reasonable methods to reduce, prevent, and control air pollution." RCW 70.94.011.

The majority concludes by combining the definitions of "emission standards" and "emission" in the Act that because emission standards regulate air contaminants, "it naturally follows" that emission standards serve as regulations for entities "that directly cause such releases." This conclusion does not follow. At no point do these provisions state that only entities *directly* emitting air contaminants may be regulated under the Act. Rather, the plain language of RCW 70.94.030(12) reflects that "emission standards" need only be a requirement that limits the concentration of emissions; it does not reflect that "emission standards" be a requirement that limits the concentration of emissions *from direct sources*. We have historically found that when passing laws that protect Washington's environmental interests, the legislature intended those laws to be *broadly construed* to achieve the statute's goals. *Quinalt Indian Nation*, 187 Wn.2d at 470 (emphasis added). Therefore, since the Act's focus is to reduce emissions across the state from various sources, this potential ambiguity under the Act should be broadly construed to encompass both direct and indirect emission sources.

The Act's public policies and procedures section states that "it is the purpose of this chapter to . . . provide for the use of *all* known, available, and reasonable methods to reduce, prevent, and control air pollution." RCW 70.94.011 (emphasis added). The Act also emphasizes that the state's policy under the Act is to reduce emissions from "thousands of small individual sources." *Id.* Regulating the producers and distributors of products that generate significant emissions when combusted "by thousands of small individual sources" is not only reasonable . . . but doing so may well be the "most feasible" way to reduce emissions from myriad small sources. RCW 70.94.331(2)(c) (authorizing Ecology to establish emission standards based on types of emissions or types of sources, or a combination, depending on what the Department determines "most feasible for purposes of this chapter").

Because the Rule properly constitutes an emissions standard as applied to natural gas distributors and petroleum product producers and importers, the Department did not exceed its statutory authority in promulgating the Rule.

***Associated Press v. Washington State Legislature*, 194 Wn.2d 915, 454 P.3d 93 (2019)**

4-member lead opinion by Justice Owens

Between January 25 and July 26, 2017, members of the news media submitted 163 requests under the Public Records Act (PRA), RCW ch. 42.56, to the state senate, house of representatives, and the legislature as a whole, as well as the offices of individual state senators and representatives. Senate and house counsel responded to the news media's PRA requests on

behalf of the chambers' chief administrative officers, the secretary of the senate (Secretary) and the chief clerk of the house of representatives (Clerk). In response to some requests, senate and house counsel stated that the legislature did not possess responsive records considering the definition of "public records" applicable to the legislature. In response to other requests, senate and house counsel and certain individual legislators voluntarily provided limited records. Some records provided contained redactions, though no PRA exemptions were identified.

Not satisfied with the responses to their PRA requests, on July 26th, members of the news media collectively submitted, via counsel, identical PRA requests to the senate, the house, and all individual legislators. The July 26 requests stated that if the recipients failed to adequately respond, the news media would "be forced to file a lawsuit addressing the PRA violations." House counsel again responded in a limited capacity, citing the "specific definition of 'public records' [that] applies to the Legislature."

On September 12, 2017, a coalition of news media outlets (collectively News Media Plaintiffs) filed a complaint against the institutional legislative bodies and four individual legislative leaders in their official capacities (collectively Legislative Defendants). In response to the News Media Plaintiffs' allegation that the Legislative Defendants violated the PRA by withholding public records, the Legislative Defendants responded that the PRA set out a narrower public records disclosure mandate specific to the legislative branch, which they argued exempted both its institutional bodies and individual legislators' offices from the PRA's general public disclosure mandate binding on "agencies."

In November 2017, the parties filed cross motions for summary judgment. The trial court requested that the Attorney General's Office (AG) file a brief offering its analysis of the issue. The AG amicus brief proffered that individual legislators' offices are "agencies" subject to the PRA's general public records disclosure mandate, while the institutional legislative bodies are not. On January 19, 2018, the trial court granted in part and denied in party each party's motion for summary judgment, ruling in line with the AG's analysis. The trial court then granted a joint motion to certify questions of law to this court. Our Commissioner granted first the stay and later the motions for direct discretionary review.

The court summarized the issues as: (1) Whether individual legislators' offices are "agencies" for purposes of the PRA and therefore subject the PRA's general public records disclosure mandate; and (2) whether institutional legislative bodies are "agencies" for purposes of the PRA and therefore subject to the PRA's general public records disclosure mandate.

The PRA's general public records disclosure mandate requires that "[e]ach *agency* . . . shall make available for public inspection and copying all public records." RCW 42.56.070(1) (emphasis added). The PRA defines "agency" as including "all state agencies." RCW 42.56.010(1). The PRA defines "state agency" in turn as including "every state office, department, division, bureau, board, commission, or other state agency." *Id.* The PRA does not expressly define "state office" or the terms enumerated in the definition of "state agency." Neither does the PRA expressly indicate whether individual legislators or the senate, the house, and the legislature as a whole are "agencies" for purposes of the PRA.

The PRA provides an exception to the general public records disclosure mandate for the Secretary and the Clerk. RCW 42.56.010(3). Additionally, the PRA distinguishes the Secretary and the Clerk from "agencies" by repeatedly referring to an "agency, the office of the secretary of the senate, or the office of the clerk of the house of representatives." RCW 42.56.070(8), .100, and .120. In effect, the PRA establishes a narrower public records disclosure mandate for the Secretary and the Clerk. But the PRA does not expressly indicate whether that mandate encompasses records generated by individual legislators' offices and/or the institutional legislative bodies. However, the Secretary and the Clerk serve as the chief administrative officers for their respective chambers, responsible for classifying, arranging, maintaining, and preserving legislative records. RCW 40.14.130; RCW 40.14.140. Because the offices of the Secretary and the Clerk exist to support the legislature's administrative functions, their narrower public records disclosure mandate clearly attaches to the legislative entities in some capacity.

The issues before us thus boil down to which legislative entities are subject only to the narrower public records disclosure mandate by and through the Secretary and the Clerk, and which, if any, legislative entities are "agencies" subject to the PRA's general public records disclosure mandate.

Individual legislators' offices are plainly "agencies" for purposes of the PRA considering a closely related statute, former RCW 42.17A.005 (2011). Former RCW 42.17A.005 is the definitions section of the campaign disclosure and contribution law (CDC), RCW ch. 42.17A. The laws that are today the CDC and the PRA were enacted via initiative in 1972 as a single law, the Public Disclosure Act. For 35 years, the CDC and the PRA were codified together within an omnibus chapter, former RCW ch. 42.17 (2002). The CDC and the PRA thus exemplify "related statutes." *Campbell & Gwinn*, 146 Wn.2d at 11.

The CDC and the PRA continue to share identical definitions of "agency" and "state agency": "'Agency' includes all state agencies [and] 'State agency' includes every state office." Former RCW 42.17A.005(2); RCW 42.56.010(1). The CDC also defines "state office" as including "state legislative office," and "legislative office" as including "the office of a member of the state house of representatives or the office of a member of the state senate." Former RCW 42.17A.005(44), (29). Thus, the offices of individual legislators are "agencies" under the CDC. Given that former RCW 42.17A.005 is closely related and discloses legislative intent about the provision in question, we conclude that individual legislators' offices are plainly and unambiguously "agencies" for purposes of the PRA as well.

In 2005, the legislature recodified the public records disclosure provisions into a separate chapter, the PRA. Rather than establishing independent definitions for the newly minted PRA, however, the legislature incorporated by reference the definitions in the omnibus chapter, RCW Ch. 42.17. In 2007, the legislature amended the PRA to add a definitions section, eliminating the incorporation by reference of the omnibus chapter's definitions, and importing word for word into the PRA the omnibus chapter's definition of "agency," which remains unaltered, but the rest of the definitional chain was not imported. RCW 42.56.010.

The Legislative Defendants argue that the 2005 and 2007 amendments divested individual legislators' offices of the PRA's general public records disclosure mandate. Because the meaning of "agency" as pertains to individual legislators' offices is plain, the Legislative

Defendants' reliance on legislative history is premature and does not support their claim. Rather House bill reports were clear that the 2005 recodification of the PRA effected "no substantive change," and "no exemptions [we]re modified, deleted, or added." The PRA specifically included individual legislators' offices in the definitional chain of "agency" before and after the PRA was separated into its own chapter. Neither the 2005 nor 2007 amendments broke that chain.

The PRA and the CDC are profoundly related. For more than three decades, the PRA and the CDC were one law. Until 2007, they shared common definitions. Today they remain housed in the same title and their definitions of "agency" remain identical. Though the legislature ended the PRA's express incorporation of the omnibus chapter's definitions in 2007, rules of statutory interpretation direct us to consider related statutes for purpose of discerning the plain meaning of a provision. *Campbell & Gwinn*, 146 Wn.2d at 11. Here, the CDC is closely related and clarifies the PRA's plain meaning of "agency."

If, as the Legislative Defendants argue, individual legislators' offices were not "agencies" subject to the PRA's general public records disclosure mandate, then ostensibly neither would be the governor's office or the eight other executive branch entities enumerated in the CDC's definitional chain of "agency" because, like legislative offices, they are not expressly included in the PRA's definition of "agency." Such an interpretation of the PRA would untenable given long-standing practice regarding the PRA's applicability to executive branch offices.

In sum, we conclude that under the plain meaning of the PRA, individual legislators' offices are "agencies" subject to the PRA's general public records disclosure mandate. Accordingly, we hold that the News Media Plaintiffs are entitled to judgment as a matter of law on this issue.

Institutional legislative bodies, on the other hand, are not "agencies" for purposes of the PRA in light of closely related former RCW 42.17A.005 and relevant legislative history. Instead, we conclude that institutional legislative bodies are subject to the narrower public records disclosure mandate via the Secretary and the Clerk. Unlike individual legislators' offices, the senate, the house, and the legislature are not included in the definitional chain of "agency" memorialized in the closely related CDC. Former RCW 42.17A.005 (2), (29), (44). Unlike offices of individual legislators and the governor, which are specifically listed as "agencies" subject to the PRA's general public records disclosure mandate, institutional legislative bodies are not. Citing *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) for the principle of expressio unius est exclusio alterius.

Although the News Media Plaintiffs argue that institutional legislative bodies should be considered "agencies" for purposes of the PRA in light of the chapter governing ethics in public service wherein RCW 42.52.010(1) defines "agency" as including "the state legislature," in contrast to the CDC, RCW ch. 42.52 is not closely related to the PRA for purposes of disclosing legislative intent about the meaning of "agency." Whereas the PRA and the CDC were enacted in a single initiative and codified together in an omnibus chapter for 35 years, RCW ch. 42.52 was enacted independently in 1994 and codified separately from the omnibus chapter. RCW 42.52.010(1) only demonstrates that the legislature knew how to include its institutional bodies in a statutory definition of "agency" and chose not to do so in the PRA or CDC. We thus conclude that institutional legislative bodies are plainly not "agencies" for purposes of the PRA.

Unlike individual legislators' offices, the senate, the house, and the legislature were never included in the definitional chain of "agency" set out in the omnibus chapter, indicating that the institutional bodies are not subject to the PRA's general public records disclosure mandate. Former RCW 42.17.020(1), (39) (1995). Instead, the 1995 amendment set out a narrower scope of public records for each chambers' chief administrative officer. The senate bill report stated that the "[p]ublic disclosure statutes are amended to specifically address access to and production of public records in the possession of the Senate and the House of Representatives."

We conclude that the narrower public records disclosure mandate incumbent on the Secretary and the Clerk inures to the institutional legislative bodies and comprises the extent of their PRA obligations. We find that the senate, the house, and the legislature as a whole are subject to the PRA through the Secretary and the Clerk, who fulfill the institutions' public records disclosure duties as chief administrative officers for their respective chambers.

3-member concurrence/dissent by Justice Stephens

Because I would hold the legislature remains an "agency" subject to the PRA, I respectfully dissent.

In reviewing the PRA, we must "take into account the policy . . . that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). In 1972, Washingtonians enacted the public disclosure act (PDA), former RCW ch. 42.17, now recodified as the PRA, by initiative. "Where the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation [or construction].'" *Amalg. Transit*, 142 Wn.2d 205.

The people described the public policy underlying the PDA with reference to all levels of government. LAWS OF 1973, ch. 1, § 1(2), (5), (6), (11). For example, the people made clear that "full access to information concerning the conduct of government *on every level* must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Id.* § 1(11) (emphasis added). The people defined "agency," as it remains today, to "include all state agencies and all local agencies." *Id.* § 2(1). And they defined "state agency" to "include every state office, public official, department, division, bureau, board, commission or other state agency." *Id.*

Besides the obvious breadth of the definitions of agency, the use of the word "include" generally "signal[s] that the list is meant to be illustrative rather than exhaustive." *Samantar v. Yousuf*, 560 U.S. 305, 317, 130 S. Ct. 2278, 176 L.Ed. 1047 (2010). Finally, the catchall phrase "or other state agency" further signals that the people intended the list to be nonexhaustive. Although the PDA does not specifically reference the legislature or either bicameral body in the definition of "state agency," it does not exempt the coordinate "branches" of government from the nonexhaustive list therein. Absent a plain exemption of the legislature from the definition of "state agency," its reach is ambiguous at most. Because a particular state agency could be one of the types of governmental entities listed, but also some "other state agency" not listed, the lead opinion's reliance on the expressio unius canon is misplaced. Given the people's instruction that

the PDA "shall be liberally construed," there is only one tenable conclusion we may reach: the PDA as originally enacted intended to apply to the legislature, including the house and the senate, as well as to individual legislators and their respective offices.

In 1995 the legislature determined that the Secretary and Clerk were responsible for preservation of only seven classes of legislative records. RCW 40.14.100. But all other classes of public records in the legislature's possession are still plainly subject to the general definition of "public record." Adding the sentence delegating responsibility to the Secretary and Clerk for preservation of certain classes of *legislative* records in no way worked to narrow the general responsibility of agencies subject to the general public records requirements of the PDA. If the legislature, including its bicameral bodies and other offices, had intended to exempt itself in its institutional capacity from responsibility for all other classes of public records except for legislative records, it did not say so. All it said was that the Secretary and Clerk were now responsible for the preservation of certain classes of *legislative* records.

I agree with the lead opinion's analysis about individual legislators' offices. The 2007 legislative amendments did not work to break the definitional chain, and individual legislators' offices are "agencies" subject the PRA's broad public records disclosure mandate. But I disagree that the legislature, including its bicameral bodies and other offices, are not "agencies" subject to the PRA. The lead opinion loses sight of the fact that this was an initiative originally drafted by the people. We must interpret the PRA as the "'average informed lay voter'" would. *Am. Legion*, 164 Wn.2d at 585. The failure of the electorate to name the legislature explicitly in its broad, nonexhaustive list of governmental entities is not dispositive. But the failure of the legislature to subsequently exempt itself from the broad, nonexhaustive list is more telling. In point of fact, the legislature attempted most recently during the 2018 legislative session to exempt itself from the PRA (ESB 6617) but failed. Thus, in keeping with the original intent of the electorate, I would hold that the legislature and its bicameral bodies and other offices are "agencies" subject to the PRA.

Our case law supports the definition of "state agency" is not cabined by the classes of entities listed in its definition. For example, we have held a nongovernmental, private entity may be subject to the PRA if it is found to be the "functional equivalent" of a pubic "agency." *Fortgang*, 187 Wn.2d at 512-13. Generally, a nongovernmental, private entity would not fit into one of the listed categories of "state agency," such as "state office, department, division, bureau, board, [or] commission." RCW 42.56.010(1). But such entities could fit in the "other state agency" category. It would be absurd to conclude that a nongovernmental, private entity can be subject to the PRA but the legislature cannot simply because it is not listed in the open-ended definition of "state agency." To hold that the legislature is not, at least, the functional equivalent of a "state agency" would be absurd.

The lead opinion concludes that by adding one sentence to the definition of public records, which specifies only that the Secretary and Clerk are responsible for certain classes of legislative records, the legislature dramatically narrowed the scope of general public records requirements and relieved itself of further obligations under the PRA. I disagree. To begin with, the Secretary and Clerk do not possess *all* of the legislature's public records. Instead, they possess only the legislative records (defined in RCW 40.14.100) members of the legislature's various committees and subcommittees provide. RCW 40.14.130. Thus, the Secretary and the Clerk are currently

responsible for compiling and preserving a much narrower subset of public records – legislative records – than the PRA's broad public disclosure requirements encompass. However, there are other legislatively created records, like the ones requested by the Associated Press in response to incidents of alleged sexual harassment and misconduct, which fall outside the definition of "legislative records" but must still be recognized as "public records." RCW 40.14.100; RCW 42.56.010(3). I would hold the Secretary and Clerk's responsibilities under the PRA are currently limited to the administration of legislative records, and the legislature, as an "agency," is still obliged to provide all other documents that meet the definition of "public records" under the PRA.

2-member concurrence/dissent by Justice McCloud

The clear language of the law that the people passed, but that the legislature amended, shows that the legislature chose narrower disclosure requirements for itself than for PRA-defined "agencies." I agree with the lead opinion that the legislature is not such an "agency," but rather the legislative branch of government, and is subject to the more limited disclosure requirements the PRA places on that branch. But I disagree with the lead opinion's conclusion that individual legislators constitute "agencies" that are subject to the broader public disclosure requirements of other parts of the PRA. The lead opinion's conclusion on that point is based on a definition of "agency" in a separate statute in a different chapter of the code.

Under the PRA definition, "[a]gency includes all state agencies" and "'state agency' includes every *state office*, department, division, bureau, board, commission or other state agency." RCW 42.56.010(1) (emphasis added). An individual legislator does not become a "state office" simply because the legislator has an office as a workspace or because the legislator has a legislative aide. That logic would make countless individual state employees their own "agencies" separate and apart from the state agencies that employ them. Instead, the terms in RCW 42.56.010(1) all refer to entities that have the power to act on behalf of the state – or a local government entity – by setting policy or transacting business. This context shows that an "agency" is a public entity (or a private entity acting in a public role, see *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 512-13, 387 P.3d 690 (2017)) that has the power to transact business or take action on behalf of the government. An individual legislator has no such power. Thus, under the PRA's definition of "agency," an individual legislator is not a "state office" and, by extension, not an "agency." This reading is bolstered by the fact that the PRA clearly differentiates between "agencies," on the one hand, and the legislature, or legislators, on the other, by imposing specific, more limited disclosure obligations on the legislature's records custodians, the Secretary and Clerk.

Rather than look to the other provision of the PRA for context, in holding that legislators are "agencies," the lead opinion relies on the definitions section of the CDC, RCW ch. 42.17A, a "closely related" statute that the legislature has since taken steps to divorce from the PRA. But nothing in the text of the PRA suggests that its provisions should be read in light of the CDC. In fact, the legislature suggested just the opposite when it found that the PRA and CDC cover "discrete subjects" and created the PRA as its own freestanding enactment. RCW 42.56.001. There are two problems with the lead opinion's decision to rely on the fact that CDC and PRA were joined at the hip for 35 years to justify using the CDC to interpret the PRA now.

The first problem is that the lead opinion is resorting to legislative history to augment the plain language of the PRA, when the PRA is not ambiguous about its own definition of "agency." That is not how we interpret statutes – if the statute's text is not ambiguous, we do not resort to the legislative history. *Spokane County v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018). The second problem is that the lead opinion draws the wrong conclusion from the intertwined history of the PRA and CDC, because the legislature's decision to separate those statutes in 2005 into their own chapters must be interpreted as a legislative intention to separate those statutes.

In 2007, the legislature supplied the PRA with its own definitions section and removed the cross-reference to the CDC entirely. Those amendments had an effect. Although they imported the FCPA's definition of "agency" into the PRA word for word, they left behind other definitions, including the definition of "state office." We have to presume that the legislature intended to change the law by passing the amendment. *Jane Roe TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 751, 257 P.3d 586 (2011) ("A new legislative enactment is presumed to be an amendment that changes a law rather than a clarification of the existing law.") The lead opinion's decision to read such a cross-reference into the PRA anyway flouts basic rules of statutory interpretation.

The CDC definition of "state office" is not context for the PRA. Instead the context for a portion of the PRA is the rest of the PRA. The context shows that the PRA distinguishes an "official" – like a legislator – from an "agency." For example, RCW 42.56.060 protects every "public agency, public official, public employee, [and] custodian" from liability if that individual "acted in good faith in attempting to comply with the provisions of" the PRA. Legislators are certain "public official[s]," one of the categories listed, which suggests that they are not also "agencies," a separate category listed. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) ("Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms."). In addition, if individual legislators were "agencies," the accommodation in RCW 42.56.100 for legislative records custodians to "adopt reasonable procedures" to effectuate the aims of access, preservation, and efficiency, but permitting them to do so by "allowing for the time, resource, and personnel constraints associated with legislative sessions," would impose full PRA obligations on individual legislators, while simultaneously relaxing obligations on those same legislators' appointed records custodians, despite the expressed intent to accommodate those legislators' time, resources, and personal constraints.

Under the usual rules of statutory interpretation, the Secretary and Clerk cannot be called into court, as "agencies" can be under RCW 42.56.550 for providing unreasonable estimates of time or charges. This intentional differentiation would be undermined by subjecting individual legislators, as "agencies," to the entirety of RCW 42.56.550.
For the Secretary and Clerk, a "public record is limited to certain administrative records, official reports, and the records identified under cross-referenced RCW 40.14.100. RCW 42.56.010(3). RCW 40.14.100 basically covers the records of the legislature's committees and subcommittees. It explicitly excludes, however, "reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature." RCW 40.14.100. RCW 40.14.110 reinforces that exclusion by giving individual legislators the option to donate their personal papers or, conversely, keep them to themselves. Turning legislators into "agencies"

would frustrate this narrow definition that applies to the legislature, making the entirety of legislators' writings "public records" subject to the PRA.

***Top Cat Enterprises, LLC v. City of Arlington*, 11 Wn. App. 2d. 754, 455 P.3d 225 (2020)**

In 2012, Washington voters approved Initiative 502 (I-502), a regulatory system for the production, processing, and distribution, of limited amounts of marijuana for recreational use by adults. The Washington State Liquor and Cannabis Board (WSLCB) used a lottery system to award 334 retail licenses. Licenses granted under the lottery system were jurisdiction specific. In 2015, the Cannabis Patient Protection Act (CPPA) merged the preexisting medical marijuana program with the recreational marijuana retail stores established under I-502. The CPPA also directed the WSLCB to reopen the application period for retail stores and issue additional licenses addressing the needs of the medical market. The WSLCB increased the number of retail licenses by 222. Rather than implement a lottery system similar to I-502, the CPPA prioritized new marijuana applications as either Priority 1, Priority 2, or Priority 3, which distinguished between applicants' degree of experience and qualifications in the marijuana industry. Former RCW 69.50.331 (2015); former WAC 314-55-020 (2015). Because of the large number of applicants, only Priority 1 applicants were able to move forward with the licensing process. In addition to Priority 1 applications, the CPPA allowed licensees from I-502's lottery that were barred from opening retail stores because of local bans to transfer their license to jurisdictions without local bans on marijuana sales.

RCW 69.50.331 requires both I-502 licensees and Priority 1 CPPA applicants to meet statutory requirements before the WSLCB grants a retail license. One of the requirements prohibits WSLCB from licensing a retail business within 1000 feet of "perimeter of the grounds of" a school. RCW 69.50.331(8)(a).

Top Cat was originally selected in the I-502 lottery for a retail location in the City of Marysville. Top Cat completed the licensee process and received a license for a retail business in Marysville on November 12, 2014. During the licensing process, Marysville enacted a ban on marijuana retailers, which prevented Top Cat from opening its store. On January 29, 2016, Top Cat applied to move its retail license from Marysville to Arlington. At the time, there was only one retail license available in Arlington.

Previously, 172nd Street Cannabis applied for a marijuana retail license for leased property located at lot 500B on the Arlington Municipal Airport property (Airport property) in Arlington under the CPPA's priority system and received a Priority 1 designation on December 8, 2015. The Airport property is approximately 1,200 acres in size and is partitioned into over 100 distinct parcels that are available to lease. Arlington School District No. 16 leases lot 301 of the Airport property for Weston High School. A cyclone fence fully encloses lot 301 for security.

The WSLCB measured the distance between 172nd Street Cannabis's lot 500B and Weston High School's lot 301 and concluded that the lots are over 1,600 feet apart from one another and thus consistent with the 100-feet separation requirement. The WSLCB then issued the only retail license in Arlington to 172nd Street Cannabis and closed licensing in Arlington. The WSLCB then offered Top Cat the opportunity to remain in Marysville or relocate to another jurisdiction with retail licenses still available.

Top Cat requested an administrative hearing and the case was assigned to an ALJ at the Office of Administrative Hearings. Top Cat objected to the approval of 172nd Street Cannabis's license on the basis that the retail location was less than 1000 feet from the Airport property where Weston High School is located. Specifically, Top Cat contended that Weston High School is located within the larger Airport property and because the Airport property is immediately diagonal from the proposed retail store for 172nd Street Cannabis and separated by only 120 feet, 172nd Street Cannabis's location did not meet the 1000 foot separation requirement. The WSLCB responded that the lease lots are distinct parcels, that those boundaries are depicted on the Airport Property Boundary and Lease Lot map, and that it correctly measured the distance between lot 500B and lot 301. The ALJ affirmed the approval of 172nd Street Cannabis's license and concluded that "property line" in WAC 314-55-050(10) is not ambiguous and its usual and ordinary meaning is "those lines which separate one's lot from adjoining lots or the street." The ALJ explained that the lease lot lines for the Airport property were property lines within the meaning of WAC 314-55-050(10). Top Cat filed a petition for review of the initial order to the WSLCB. The WSLCB issued a final order affirming the initial order and adopting the ALJ's findings of fact and conclusions of law. Top Cat petitioned for review by the Snohomish County Superior Court. The superior court affirmed WSLCB's final order. Top Cat appeals.

On appeal, Top Cat contends that the WSLCB erred in concluding that the term "property line" within WAC 314-55-050(1) includes not only formal, recorded, boundary lines, but also lease lines and lot lines. Top Cat challenges whether the WSLCB's final order contained an erroneous interpretation or application of the law.

The WSLCB is prohibited from issuing "a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school." RCW 69.50.331(8)(a). The legislature also empowered the WSLCB to adopt regulations regarding retail outlet locations. RCW 69.50.341(1)(f). In response the WSLCB promulgated WAC 314-55-050(10), which states in part: "The distance shall be measured as the shortest straight line distance from the property line of the proposed building/business location to the property line of the entities listed below: (a) Elementary of secondary school."

Top Cat contends that the term "property line" means the legal description from a deed that describes the boundaries of real property. We disagree. The WSLCB concluded that "property line" is not an ambiguous term and its usual and ordinary meaning is "those lines which separate one's lot from adjoining lots or the street." We agree. Because we agree with the WSLCB that the term property line is unambiguous we do not consider the regulatory history of WAC 314-55-050(10).

The WSLCB's decision was guided by *Mall v. City of Seattle*, 108 Wn.2d 369, 373, 375, 739 P.2d 668 (1987), where the court held that property line is commonly understood as "those lines which separate one's lot from adjoining lots or the street." The WSLCB also found that the dictionary definitions of property line were consistent with *Mall's* interpretation of property line. We agree with the WSLCB. Under *Mall* and the dictionary definitions the WSLCB relied upon, "property line" is a term that includes the boundary lines delineating different types of property interests, including a lease lot line. The key is that the property boundary separates the property from other lots or properties. Here, the school's lease is on lot 301 – one of numerous lease lots

on the larger Airport property. The school property is distinct and separate from other lots within the Airport property, including lot 500B.

We also agree that the WSLCB's interpretation of the term property line is consistent with the stated legislative purpose of ensuring marijuana businesses are physically located at least 1,000 feet away from the "perimeter of the grounds" of any elementary or secondary school or other restricted entity. RCW 69.50.331(8)(a). The statute does not mention "property line" – only that a marijuana business must be 1,000 feet from the "perimeter of the ground" of a restricted entity. The second sentence of WAC 314-55-050(10) explains how to measure the distance between the licensed business and prohibited entity by measuring the shortest distance between the two property lines. WAC 314-55-010(28) also defines "perimeter" as "a property line that enclosed an area." Read together, the WSLCB cannot issue a license for a location that is within 1,000 feet of the property line that enclosed an area of the grounds of any restricted entity. As the WSLCB concluded in part: "What is important, and what is required by statute and regulation, is the physical separation of at least 1,000 feet between the perimeter of the school grounds and the premises of a marijuana retail business." We agree.

Therefore, the WSLCB did not err in determining 172nd Street Cannabis's location (lot 500B) was over 1,000 feet from Weston High School (lot 301).

***Heritage Grove v. Dep't of Health*, 11 Wn. App. 2d 406, 453 P.3d 1022 (2019)**

Washington created the certificate of need (CN) program (the Program). The Department of Health (DOH) administers the Program. RCW 70.38.105(1). Health care providers may open certain health care facilities, including nursing homes, only after receiving a CN from DOH. RCW 70.38.025(6), .105(4)(a). RCW 70.38.115(13)(b) provides that "[w]hen an entire nursing home ceases operation, the licensee or any other party who has secured an interest in the beds may reserve his or her interest in the beds for eight years or until a [CN] to replace them is issued, whichever occurs first." This procedure is referred to as "banking" beds. The statute and regulations then allow the party who has banked their beds to "unbank" them in a new facility. For providers filing a CN application seeking to unbank beds, assuming certain conditions are met including that the new beds are located in the same planning area where they were before they were banked, the applicant does not need to prove the "need" criterion, WAC 246-310-21- in their CN application. RCW 70.38.115(13)(b); WAC 246-310-396.

Until October 15, 2009, Heritage Grove operated a 97-bed nursing home. The facility closed, and Heritage Grove sent a letter to DOH requesting to bank its beds. DOH granted Heritage Grove's request and stated that Heritage Grove's reservation of the beds would expire on October 15, 2017, unless it issued a CN before then.

In December 2014, Heritage Grove submitted an application for a CN and sought to build a facility and unbank its 97 beds. The Program received public comments on Heritage Grove's application, including those by Respondent Nursing Homes, and held a public hearing. On July 15, 2015, the Program conditionally approved Heritage Grove's CN application, provided that Heritage Grove agreed to five conditions. Heritage Grove accepted all five conditions, and shortly thereafter, in August, the Program approved Heritage Grove's CN application. The

document the program sent stated: "ISSUANCE OF THIS [CN] IS BASED ON THE DEPARTMENT'S RECORD AND EVALUATION."

Respondent Nursing Homes then requested an adjudicative proceeding to contest the CN approval. After a hearing, a health law judge affirmed the Program's approval of the CN. Respondent Nursing Homes then administratively appealed the decision. On August 25, 2017, at the end of the administrative appeal process, the Secretary of DOH, via a designee, issued the Final Order denying the CN because the application failed both the financial feasibility and cost containment criteria. Heritage Grove did not petition the Secretary's designee to stay the Final Order. On September 21, 2017, Heritage Grove sought judicial review of the Final Order in superior court. Heritage Grove did not file a petition to stay the Final Order before October 15, 2017, which was eight years from when Heritage Grove "banked" its beds. On August 16, 2018, the superior court affirmed the Final Order on the merits. It also dismissed the petition on mootness grounds. Heritage Grove appeals.

The parties' mootness arguments involve two issues. First, they dispute whether, under RCW 70.38.115, DOH "issued" a CN to Heritage Grove within eight years. If we conclude that DOH did not issue a CN to Heritage Grove within eight years, then they next dispute whether RCW 34.05.574 of the Administrative Procedure Act (APA) enables this court to order specific performance and require that DOH overturn the Final Order and reinstate the Program's initial approval of Heritage Grove's CN application.

It is undisputed that Heritage Grove's CN application failed to prove "need." Heritage Grove's CN application relied on the RCW 70.38.115(13)(b) exception so that its application did not have to prove the "need" criterion. And if DOH never "issued" Heritage Grove a CN within eight years, then Heritage Grove's need-exempt status expired. RCW 70.38.115(13)(b). Therefore, if Heritage Grove's need-exempt status expired and we are bound to remand to the agency for it to reconsider the Final Order, DOH would simply deny Heritage Grove's CN application because the application failed to prove "need" and, in turn, failed to prove all of the requisite CN application criteria.

Heritage Grove contends that DOH issued a CN when the Program approved Heritage Grove's application in August 2015, and that the issuance of the CN is simply in the appeals process. We disagree. A party's reservation of beds expires after eight years unless they are "issued" a CN within those eight years. Here, the only way Heritage Grove was "issued" a CN within eight years is if the Program's August 2015 initial approval of Heritage Grove's CN application counted as such.

We conclude that the Program's initial approval of Heritage Grove's CN application did not constitute the issuance of a CN for the purpose of RCW 70.38.115(13)(b). The principles of finality illustrate our conclusion. "An administrative determination is not a final order where it is a mere preliminary step in the administrative process, but it becomes final when a legal relationship is subsequently fixed upon 'consummation of the administrative process.'" *Lewis County v. Pub. Emp't Relations Comm'n*, 31 Wn. App. 853, 862, 644 P.2d 1231 (1982). Here the initial approval was merely a preliminary step in the administrative process. Thus, Heritage Grove could not justifiably rely on the subordinate order because that order was appealable, was in fact appealed, and was later overruled. Additionally, the appeal to the superior court and to

this court is from the Final Order, not the subordinate order. Although we recognize that the subordinate order contained language indicating it was the "issuance" of a CN, the nomenclature used in that subordinate order does not overrule the fact that the subordinate order was appealable and thus subject to be overturned, which it later was.

Furthermore, Heritage Grove did not file a stay of the Final Order as permitted under the APA. RCW 34.05.467. It had approximately two months, from the time the Final Order issued and the time its banked-bed status expired, to do so. Accordingly, we conclude that DOH did not issue a CN to Heritage Grove within eight years from when Heritage Grove banked its beds. Therefore, Heritage Grove's reservation of beds expired.

Heritage Grove argues that this court can nonetheless provide meaningful relief because it has the authority under RCW 34.05.574 to correct the Final Order's errors and reinstate the Program's initial approval of the CN. We disagree. Under RCW 34.05.574(1), a court "shall not itself undertake to exercise the discretion that legislature has placed in the agency." The dispositive question here is whether the issuance of a CN is within the DOH's discretion. We conclude that the legislature has vested the discretion to issue CNs solely with DOH. Accordingly, we will not and cannot exercise the agency's discretion on its behalf. Because Heritage Grove's CN application is based on a now-expired exception to showing the "need" criterion, on remand, DOH would not consider granting the CN application. In other words, agreeing substantively with Heritage Grove that the Final Order was unlawful would not provide Heritage Grove meaningful relief. We conclude that this case is moot.

***Ehrhart v. King County*, 195 Wn.2d 388, 460 P.3d 612 (2020)**

Unanimous 9-0 opinion authored by Chief Justice Stephens

Hantavirus is a rare and serious infection transmitted by deer mice through their droppings. It initially presents with flu-like symptoms such as fever and chills but can quickly progress to life-threatening respiratory complications. In 2016, there were 40 reported cases of hantavirus in Washington.

In November 2016, a woman living near Issaquah contracted hantavirus. She went to the urgent care facility at Group Health Cooperative, where she was treated for nausea and discharged. She returned to Group Health the next day after her condition deteriorated and was then admitted as a patient at Overlake Medical Center. She then spent several days in a coma, but ultimately survived. In December 2016, Overlake notified King County of that patient's case and it promptly assigned a public health nurse to investigate. The investigation indicated the patient likely contracted hantavirus on her own property. Because she had not traveled out of the area and the likely source of hantavirus exposure was confined to her rural land outside Issaquah, King County determined there were no other likely exposures and concluded that a health advisory was not warranted. But the patient's husband repeatedly shared with King County his concerns that a potential cluster of hantavirus in the area could lead to more exposures.

In February 2017, Brian - who also lived near Issaquah – came to the emergency room of Swedish Medical Center with fever, chills, vomiting, and a persistent cough. The emergency room physician discharged Brian with instructions to return if his symptoms worsened. The next

day, Brian was rushed to the emergency room at Overlake – several of his organs were already failing. Brian died shortly thereafter.

In June 2018, Sandra Ehrhart filed suit on behalf of herself and Brian's estate against King County, the emergency room physician, and Swedish Medical Center, alleging their negligence caused Brian's death. Ehrhart argues WAC 246-101-505, which requires King County to "[r]eview and determine appropriate action" whenever it receives reports of certain serious conditions, created a duty that King County breached by failing to issue a health advisory after it learned of the November 2016 case. King County asserted the public duty doctrine in its answer.

Ehrhart moved for partial summary judgment, asking the court to strike several of King County's defenses, arguing, among other things, that the "failure to enforce" and "rescue doctrine" exceptions to the public duty doctrine applied. The trial court did not consider King County's cross motion for summary judgment alongside Ehrhart's motion for summary judgment during oral argument in September 2018. After that argument, the court ruled from the bench before issuing a brief written order. The court began by stating it "ha[d] this sense of for[e]boding" because "[t]he public duty doctrine frustrated [the court] for years." The court then briefly analyzed WAC 246-101-505 and concluded it contained both a "mandatory" provision and a provision that provided for the exercise of limited discretion. The court determined King County had discretion, but only to act "appropriately." Because the court did not "know what is appropriate" in the circumstances, it decided that question "necessarily requires some kind of a factual analysis." Despite recognizing that "[d]uty is always supposed to be a legal issue," the court decided to treat "duty as being partially legal and partially factual." So, the court ruled "that there is a mandatory duty" for King County to "review and determine" appropriate action, but that "the jury needs to decide whether what the County did was or was not appropriate." The trial court granted partial summary judgment for Ehrhart on the failure to enforce exception, "conditioned on a finding by the jury that [King] County's action was no appropriate." King County then moved for direct discretionary review by the Washington Supreme Court, which the latter granted.

The case law requires us to once again examine the public duty doctrine. We appreciate the trail court's efforts to struggle with the case law. We ultimately conclude, however, that the doctrine clearly applies in this case and precludes Ehrhart's claims against King County.

Ehrhart claims King County negligently handled the December 2016 report of a nonlethal hantavirus case and is therefore liable in tort. To prevail on a negligence claim, a plaintiff must show, among other things, (1) the existence of a duty to the plaintiff. The question of duty is dispositive – no defendant is liable for negligence unless he is under a legal duty to use care. Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be owed to the injured plaintiff, and not one owed to the public in general. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

Ehrhart argues WAC 246-101-505, which requires King County to "[r]eview and determine appropriate action" whenever it receives reports of certain serious conditions, creates a duty that King County breached by failing to issue a health advisory after it knew of the November 2016 hantavirus case. In response, King County claims the public duty doctrine bars Ehrhart's claims because the duty King County owes under WAC 246-101-505 is one it owes to the public in

general and not to Brian as an individual. Ehrhart replies that the failure to enforce exception to the public duty doctrine applies because King County failed to take appropriate action under WAC 246-101-505.

Under WAC 246-101-505, King County owes a duty to the public as a whole. Because no exception applies in this case, the public duty doctrine bars Ehrhart's suit.

The public duty and discretionary immunity doctrines often arise in the same cases, and we have not always made the distinction between them clear. See *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 885-86, 288 P.3d 328 (2012) (Chambers, J., concurring).

The public duty doctrine stands for a basic tenet of common law: "A cause of action for negligence will not lie unless the defendant owes a duty of care to [the] plaintiff." *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983). A plaintiff must show the duty breached was owed to an individual and was not merely an obligation owed to the public. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608 (2019). The public duty doctrine guides a court's analysis of whether a duty exists that can sustain a claim against the government in tort. The doctrine comes into plat when special government obligations are imposed by statute or ordinance. When laws impose duties on government not imposed upon private persons or corporations, courts must determine whether governments owe those duties to an individual or the public as a whole.

The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties owed to a particular individual which can be the basis for a tort claim. *Baerlein v. State*, 92 Wn.2d 229, 231, 595 P.2d 930 (1979). This traditional rule became known as the public duty doctrine.

Our precedent recognizes four exceptions to the public duty doctrine that provide for liability even in the face of otherwise public duties. These exceptions are: (1) Legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship. An enumerated exception is not always necessary to find a duty owed to an individual and not to the public at large. The enumerated exceptions simply identify the most common instances when governments owe a duty to particular individuals, and they often overlap. But whether a court is evaluating the public duty doctrine generally or one of its exceptions specifically, the fundamental question remains the same: Does the government owe a duty to the plaintiff individually or merely to the public as a whole?

The public duty doctrine is distinct from the discretionary immunity doctrine and addresses fundamentally different concerns. While the public duty doctrine involves questions of duty rooted in common law tort principles, discretionary immunity is rooted in separation of powers principles inherent in our constitutional system of government. And while the public duty doctrine developed from tort principles of common law, the discretionary immunity doctrine emerged in response to Washington's waiver of its sovereign immunity in the 1960's. *See Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246,253, 407 P.2d 440 (1965). The trial court conflated the public duty doctrine with the discretionary immunity doctrine and so infused its ruling on a claimed exception to the public duty doctrine with irrelevant issues of

executive branch discretion. Properly understood, the failure to enforce exception urged by Ehrhart is unconcerned with discretion and is inapplicable in this case.

To failure to enforce exception to the public duty doctrine recognizes that some statutes impose on government a duty owed to a particular class or category of individuals, such that the failure to enforce those statute breaches a duty that can sustain an action in tort. To prove the failure to enforce exception, a plaintiff must show that: (1) Governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation; (2) fail to take corrective action despite a statutory duty to do so; and (3) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).

Ehrhart claims King County violated WAC 246-101-505 because it failed to determine "appropriate" action in response to a December 2016 hantavirus report and therefore knew of its own violation. This argument fails for three reasons.

First, Ehrhart does not establish – or even argue – that King County is responsible for enforcing particular statutory requirements. Nothing in the duties listed in WAC 246-101-505 requires local health departments to enforce anything against anyone; rather the WAC simply outlines the departments' own responsibilities. Ehrhart's argument seems to be that King County is responsible for enforcing against itself a regulation promulgated by a state agency. But a requirement to comply with regulations is different from a requirement to enforce those regulations. *See Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 27, 352 P.3d 807 (2015).

Second, Ehrhart does not establish that King County had actual knowledge of a violation. Ehrhart claims that King County had an obligation to address the December 2016 report of hantavirus by determining *appropriate* action and that it took *inappropriate* action. Ehrhart argues King County's inappropriate action simultaneously (1) violated the WAC and (2) gave King County actual knowledge of that violation. But whether appropriate action was taken cannot establish that King County had actual knowledge of an alleged violation. According to Ehrhart and the trial court's reasoning, if the jury finds that King County's actions in response to the December 2016 report of hantavirus were not appropriate, then King County would have been on notice that it was violating WAC 246-101-505, *even while King County thought it was complying with the WAC*. This conundrum come from mistakenly applying a "failure to enforce" lens to a situation that does not involve a county enforcing a statute against a third party it knows to be violating the law. Viewing all facts and inferences in favor of King County – as we must – reasonable minds can conclude only that King County did not know about a statutory violation and therefore owed no duty to Brian.

Finally, Ehrhart does not establish that King County's actions violated WAC 246-101-505. Ehrhart relies on two Court of Appeals cases (*Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988); *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3d 795 (2013)) to argue a statutory violation exists for purposes of the failure to enforce exception when "there is a known hazard as well as a governmental obligation to address it" and the government fails to address the hazard. But neither case involved a statutory violation by the government. Instead, the governments' duty to act arose because private citizens violated ordinances relating to dangerous dogs. In both cases, the government officials had to determine what action would be

appropriate in response to those statutory violations by third parties. The defendants in *Livingston* and *Gorman* could be held liable because they failed to make the determination required by law. But here, King County in fact decided about how to respond to the December 2016 report of a hantavirus case; Ehrhart simply disagrees its determination was appropriate. As in *Livingston* and *Gorman*, the governmental duty was to make a determination, not to make a *particular* determination. Because King County made a determination as required by regulation, *Livingston* and *Gorman* do not support Ehrhart's argument that King County violated WAC 246-101-505.

Ehrhart has not shown that King County (1) is responsible for enforcing WAC 246-101-505 against itself; (2) violated WAC 246-101-505; or (3) had actual knowledge of an alleged violation. Ehrhart has therefore failed to satisfy the first element of the failure to enforce exception to the public duty doctrine.

Ehrhart's argument under the second element is that the same action that allegedly violated WAC 246-101-505 also constituted King's County failure to take corrective action. But the second element of the failure to enforce exception asks whether King County "fail[ed] to take corrective action despite a statutory duty to do so," not whether King County had notice of its own alleged failure to follow the WAC. And, as noted above, a requirement to follow a WAC is distinct from a requirement to enforce that WAC against third parties.

Because the crux of the public duty doctrine is whether government owes a duty to the plaintiff in particular or to the public as a whole, the third element of the failure to enforce exception is perhaps most important. The trial court was right to examine WAC 246-101-005, which explains the purpose of reporting notifiable conditions, to determine whether Brian is within the class of individuals WAC 246-101-505 is meant to protect. But we disagree with the trial court's conclusion. The plain language of WAC 246-101-005 makes clear that the class of people meant to be protected by WAC 246-101-505 is the public as a whole. Because WAC 246-101-505 creates only a general obligation to the public, and not a duty to any particular individuals, Ehrhart cannot meet the third element for the failure to enforce exception as a matter of law.

Because no enumerated exception to the public duty doctrine applies and Ehrhart has not established any other duty King County owed to Brian as an individual, the public duty doctrine bars Ehrhart's claims against King County. We hold the trial court must grant King County's motion for summary judgment on remand.

In addition to misapplying the failure to enforce exception, the trial court's ruling was procedurally improper. Summary judgment is appropriate only when there are no genuine issues of material fact. CR 56(c). Granting summary judgment on the condition that a jury find a particular material fact – as the trial court did here – is incompatible with the very nature of summary judgment. The trial court could have appropriately granted summary judgment only on those elements it believed were resolvable purely as a matter of law. Or it could have denied summary judgment altogether. But its conditional grant was not an option under CR 56. Accordingly, we vacate the trial court's conditional partial grant of summary judgment.

***Loyal Pig, LLC v. Dep't of Ecology*, 13 Wn. App. 2d. 127, 463 P.3d 106 (2020)**

Loyal Pig, LLC holds a water right certificate granted in 1970 to apply water to Franklin County farmland. The law limits a water right to an amount of use per year, a rate of flow, a point of diversion, and a location of application. The water right holder may apply for a change in the site of diversion, the place of application, or both.

In 2014 Loyal Pig's predecessor applied to the Benton County Water Conservancy Board (Benton County board) for a change in the location of the diversion and the site of application of a portion of the water right. When reviewing the 2014 change application, the Benton County Board calculated the annual consumptive quantity (ACQ) of water on the Franklin County farmland. The calculation would limit the amount of water that Loyal Pig could apply on the new location of application. The law calculates the ACQ by averaging the most recent five-year period of continuous beneficial water consumption used by the irrigator. The Benton County Board calculated the ACQ with average water use from 2009 to 2013, the five most recent years before the 2014 application for change. The Department of Ecology reviewed the Benton County Board's decision, as required by law, and approved the change in the water right certificate. Because of a lower use of water, during 2009 to 2013, the change limited the amount of the water right from its original amount in 1970.

In January 2017 Loyal Pig submitted another application with the Franklin County Water Conservancy Board (Franklin County Board) for an additional change in diversion location and place of application for the water right. In May 2017, the Franklin County board issued its decision approving the January application. In doing so, the board adopted the 2014 ACQ amount rather than calculating a new amount based on the years 2012 to 2016. The Franklin County Board reasoned that it need not perform a new calculation since Loyal Pig filed the 2017 application within five years of the 2014 calculation. The Department of Ecology is unable to perform the calculation because Loyal Pig refuses to provide the records needed.

The Department of Ecology reversed the Franklin County Board's decision because the Franklin County Board failed to perform a new annual ACQ calculation for years 2012 to 2016. Loyal Pig, together with the Columbia Snake River Irrigators Association, an association of Mid-Columbia irrigating growers, appealed to the Washington State Pollution Control Hearings Board (PCHB), Ecology's reversal of the Franklin County Board's approval of the 2017 change application. The challengers are collectively referred to as the Loyal Pig.

Before the PCHB, Loyal Pig argued that the Department of Ecology should have utilized the ACQ from the 2014 change application for the 2017 application for the following reasons: (1) the principle of res judicata precluded a new calculation; (2) a governing statute affords a five-year grace period for loss of water rights, and Ecology should apply this grace period when a water right holder applies for a second change in use within five years of the first application; (3) an Ecology policy, POL 1120, simplified the determination for an application change, and requiring a new calculation of the ACQ for each change would thwart this policy; and (4) irrigators in the Columbia Basin have relied on Ecology's application of the grace period when a water right holder applied for a second change within five years of a previous calculation of the ACQ.

Before the PCHB, the Department of Ecology argued that RCW 90.03.380 requires a full formal ACQ calculation from the most recent five-year period no matter if the applicant for a change obtained a change approval within the last five years. For the 2017 change application, according to Ecology's interpretation of the statute, the ACQ would comprise water usage during 2014-2016 in addition to the previously calculated amounts for 2012 and 2013.

Both Loyal Pig and the Department of Ecology filed cross-motions for summary judgment before the PCHB. One of Loyal Pig's declarations attached a legal memorandum from an attorney. The attorney observed that under Ecology POL 1120, Ecology may conduct a simplified tentative determination that would not require an ACQ analysis when an application is submitted within five years of a previously approved application. The Department of Ecology submitted a declaration of an employee that determined an ACQ analysis would be required for the 2017 application because the proposed change would add other irrigated acres to the water right. The employee further concluded that Ecology needed to review irrigation records for years 2014 to 2016. The PCHB granted the Department of Ecology's motion for summary judgment.

Loyal Pig appealed to the Benton County Superior Court. Before the superior court, Loyal Pig moved for summary judgment on three grounds: (1) Loyal Pig argued that language in chapter 90.14 RCW provided a five-year grace period, during which the legislature intended to protect a water user from relinquishment of his or her water right; (2) Loyal Pig contended that a conservancy board should be permitted to rely on its prior decisions under the doctrine of administrative res judicata; and (3) Loyal Pig maintained that Ecology violated the Administrative Procedure Act, chapter 34.05 RCW, when it insisted on calculating a new ACQ for the 2017 change application, because this insistence effectively adopted a regulation without following the administrative rulemaking process. One of Loyal Pig's declarations noted that a grower who rotates crops on its land will fluctuate from year to year in the amount of water used. Another declaration avowed that the Department of Ecology informally adopted a new agency order, directive, or regulation of general applicability that refused to implement a longstanding five-year grace period against relinquishment of water right, highlighting Ecology's POL 1120 promotion of a simplified procedure when forfeiture of water is not an issue. The declaration also observed that, as early as 2009, Ecology moved away from this well-established procedure, taking the position that no grace period existed. The Department of Ecology cross moved for summary judgment on Loyal Pig's claim of abuse of rulemaking authority. One declaration Ecology submitted of an employee stated that he had extensive experience with POL 1120 and stated he would not interpret this policy to bar review of ACQ if it was performed with five years of a previous ACQ analysis. Rather, another Ecology policy, POL 1210, did not bar a new ACQ analysis with a second application. POL 1210 outlines the procedures that the Department of Ecology employs when reviewing water right change applications pursuant to RCW 90.03.380(1) that seek to irrigate additional acreage. Unlike POL 1120, POL 1210 does not mention a simplified tentative policy.

The superior court reversed the PCHB and ruled that the Department of Ecology may not require a new ACQ calculation when a water right holder applies for a second change in the water right within a five-year window. The superior court also ruled that Ecology abused its rulemaking authority. The court issued a permanent injunction that bars Ecology from requiring sequential ACQ calculations unless Ecology engages in the formal rulemaking process.

This appeal raises the principal question of whether, under RCW 90.03.380, the Department of Ecology may insist that a water right holder calculate anew its ACQ when Ecology, within the past five years, already calculated the holder's ACQ because of an earlier application for change.

RCW 90.03.380(1) governs our decision. The Department of Ecology argues that the explicit language of that statute requires it to review the "most recent five year period" of water use to determine ACQ before approving a water right owner's application to change or transfer a water right, regardless of any earlier approved application. Loyal Pig contends that the more appropriate interpretation of the statute above would allow the water right owner, once Ecology approves a water change application, to seek a further change within the "five year grace period" following the approval of its application and, during this five-year grace period, no subsequent calculation of water use should be required when the user's farming practices have not been changed. According to this contention, when Loyal Pig submitted its application for a change in water use in 2017, the 2014 adjudication of the ACQ bound Ecology.

We agree with the Department of Ecology that RCW 90.03.380(1) shows legislative intent to require a new ACQ calculation with every application for a change in the water right certificate. The statute demands a review of the last five years of water consumption. The statute admits no exception when the applicant applied for a change in the water right during the last five years.

Loyal Pig fears the Department of Ecology's interpretation of RCW 90.03.380 exposes growers to a partial relinquishment of a water right. Loyal Pig relatedly argues that Ecology's interpretation of RCW 90.03.380 conflicts with the spirit behind RCW 90.14.140, which shuns penalizing a water user for nonuse of water for sufficient reasons. To understand the fear, we provide some background to Washington water law.

Washington's water law follows the western American doctrine of water rights by appropriation. Under the appropriation system, the water right holder must put the water claimed under the right to beneficial use or it relinquishes the right. RCW 90.14.160. Washington law demands that a water right return to the state, under relinquishment statutes, to the extent that, without cause, the water right holder voluntarily fails to beneficially use all or any portion of the water right for a period of five successive years. RCW 90.14.130-.180. As well as being critical to establishing the existence of a water right, beneficial use establishes the quantity of that right. *Crown West Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wn. App. 2d 710, 733, 435 P.3d 288 (2019). A user acquires the right only to the quantity of water actually put to use with reasonable diligence. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 586, 344 P.3d 199 (2015).

Loyal Pig sought changes in application of its water rights in both 2014 and 2017. Although a water right certificate limits use of the right to a particular source and diversion location and to a discrete area of land, the water right holder may apply to the Department of Ecology to change the location of diversion or the situs of irrigation. RCW 90.03.380(1) authorizes this change or transfer. RCW 90.03.380 impliedly grants Ecology the right to limit the extent of the change to the current ACQ, which could be lower than the initial water right.

When Loyal Pig applied for the change in 2014, the Department of Ecology measured its ACQ and thereafter limited its water right to that quantity. If Ecology measures the ACQ again in

2017, the calculation could arrive at a smaller sum than the 2014 calculation. Use of a new ACQ could further reduce Loyal Pig's water right. Agriculture in major sections of Eastern Washington, particularly the Columbia River basin, lacks the rainfall to raise crops, and the region thrives on irrigation water. Profitable production of most crops east of the Cascade Mountains demands irrigation. Alternating crops grown on the same land helps to preserve the land, but different crops require different amounts of irrigation. Frequent changes in transfer diversion points and application sites, even within a five-year window of time, accommodate an efficient use of irrigation water from crop to crop and site to site. Under 90.03.380(1), these frequent changes could penalize irrigators by reducing a water right. The current law also promotes excessive use of irrigation water to save water rights. We would welcome a change in the law.

We observe that some statutes mitigate Loyal Pig's and our concern. For example, the legislature has afforded at least two situations in which the Department of Ecology may ignore the most recent five-year period when a water right holder applies for a change. RCW 90.03.615. We already mentioned RCW 90.14.140, which excuses a reduction in use by the water right holder due to drought, temporary reduction in water need, and the rotation of crops, among other reasons. Since we find meaning from related provisions and the statutory scheme as a whole (*State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)), we note that the language of RCW 90.03.615 bolsters our interpretation of RCW 90.03.380(1) in that the former statute also shows an intent to always measure the ACQ based on the most recent five years unless limited exceptions apply.

The Department of Ecology also asks that we reverse the superior court's entry of an order enjoining Ecology's implementation of its interpretation of RCW 90.03.380(1). The superior court deemed Ecology's requirement of a new calculation for an ACQ within a five-year window to constitute an adoption of a rule, such that Ecology needed to comply with rulemaking procedures. Ecology argues that an interpretation of an unambiguous statute by an administrative agency does not qualify as a rule. RCW 34.05.010(16), and the definition of "rule," controls the issue. Loyal Pig argues that the Department of Ecology's new interpretation of RCW 90.03.380(1) and its abandonment of earlier practice under one of its policy statements established a new qualification or requirement relating to the ability to transfer water rights, a benefit or privilege conferred by law.

If any agency action meets the definition of a rule, it must follow rulemaking procedures. *Failor's Pharmacy v. Dep't of Social & Health Svcs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). RCW 34.05.570(2)(c) invalidates any rule adopted without the process. Assuming any shift in Ecology's policy or interpretation of the statute, the law demanded that shift because of the unambiguous nature of the statute. Just as this court must enforce a statute adopted by the legislature even against the court's wishes, an administrative agency must also enforce a statute. An administrative agency's practice does not qualify as a rule, for purposes of the Administrative Procedure Act, when the practice does not create a new standard, formula, or requirement, but simply applies and interprets a statute. *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 896, 31 P.3d 1174 (2001). An agency does not engage in rulemaking when following an explicit statute. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). Even if an agency announces a new statutory interpretation, the agency may do so through adjudication, and may give retroactive effect to the interpretation in the case in which

the new interpretation is announced without rulemaking, because the agency is not really effecting a change in the law. *Andrews v. District of Columbia Police & Firefighters Retirement & Relief Bd.*, 991 A.2d 763, 771 (D.C. 2010). We deem *Campbell & Gwinn* controlling. Because Ecology merely interpreted a clear statute, it did not engage in rulemaking.

Loyal Pig contends that the Department of Ecology's action mirrors the Department of Ecology's action in *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). *Hillis* contains many similarities to Loyal Pig's challenge to Ecology's action except that, in *Hillis*, Ecology did not administer the explicit provisions of a statute. Neither did Ecology change its interpretation of a statute. We reinstate the ruling of the PCHB.

***National Parks Conservation Ass'n v. Dep't of Ecology*, 12 Wn. App. 2d 977, 460 P.3d 1107 (2020)**

The Department of Ecology (DOE) issued an air permit authorizing BP West Coast Products LLC (BP) to take certain actions at its Washington refinery. The National Parks Conservation Association (NPCA) appealed DOE's issuance of the permit to PCHB.

On July 17, 2018, the Pollution Control Hearings Board (PCHB) issued a final decision in favor of DOE and BP, denying NPCA's challenge to the permit. The same day, the PCHB served the decision on NPCA. Statutes and regulations required NPCA to file its petition for judicial review within 30 days, which was August 16. RCW 34.05.542(2); WAC 371-08-555.

On August 14, NPCA sent its petition via overnight delivery to the Thurston County Superior Court, the PCHB, BP, the Washington State Attorney General, and DOE, thus accomplishing service. RCW 34.05.542(2). NPCA also provided the required filing fee. RCW 34.05.514(1); RCW 36.18.020(2)(c). The clerk's office rejected NPCA's petition because it did not have a cover sheet as required under AR 2. At the time the preceding events occurred, the Thurston County Clerk's Office had a faulty document policy. The policy allowed the clerk's office to reject and return petitions for judicial review that failed to include a cover sheet required by AR 2.

On August 20, NPCA received its rejected petition from the clerk's office. That same day, NPCA resubmitted its petition to the superior court. The clerk's office accepted NPCA's resubmitted petition on August 21. NPCA then filed a motion to verify the timely filing of the petition. DOE and BP filed motions to dismiss, arguing that NPCA filed the petition on August 21, and therefore argued that the superior court did not have appellate jurisdiction under the Administrative Procedure Act (APA) because the petition for judicial review had not been filed in a timely manner.

Following a hearing on the motions, the court agreed with DOE and BP, and ruled that it did not have appellate jurisdiction to hear the case because NPCA did not timely file its petition for judicial review. The decision rested on the clerk rejecting NPCA's petition on August 15 because it did not have an AR 2 cover sheet. NPCA appeals.

NPCA argues that it filed its petition for judicial review within 30 days and that compliance with AR 2 is not a jurisdictional requirement. DOE now agrees with NPCA. BP argues that NPCA's

petition was not timely filed. BP contends that AR 2 is "inextricably tied to [RCW 34.05.542]." According to BP, "[a] petition for review must be *accepted* for filing within the statutory window," and if the petition is not accepted, "jurisdiction is not secured under the APA."

The APA grants superior courts limited appellate jurisdiction. RCW 34.05.514(1). Before a court can exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. *Diehl v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004). If they are not, the court must enter an order of dismissal. *Stewart v. Dep't of Emp't Sec.*, 191 Wn.2d 42, 52-53, 419 P.3d 838 (2018). We review questions of a court's jurisdiction de novo. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005).

To invoke a superior court's appellate jurisdiction, the APA requires that a petitioner comply with certain time limitations set forth in RCW 34.05.542(2). As relevant here, "[a] petition for judicial review of an order shall be filed with the [superior] court . . . within thirty days after service of the final order." RCW 34.05.542(2). In addition, "proceedings for review under [the APA] shall be instituted by paying the fee required under RCW 36.18.020." RCW 34.05.514(1).

The issue in this case is whether NCPA filed its petition and paid the requested filing fee within 30 days of the PCHB's final decision. We conclude that it did because it complied with the statutory requirements necessary to invoke the superior court's jurisdiction and AR 2 does not impose a jurisdictional requirement.

In *Biomed Comm, Inc. v. Dep't of Health Bd. of Pharmacy*, 146 Wn. App. 929, 932-33, 193 P.3d 1093 (2008), the issue was "whether the superior court lost appellate jurisdiction where a timely petition for review of the agency lacked the signature of an attorney for the corporate appellant." The court determined "that the lack of a signature of an attorney for [the corporation] on the timely petition for review . . . was not jurisdictional." *Biomed Comm*, 146 Wn. App. at 941. In support of its decision the court looked to the provisions of the APA, namely RCW 34.05.542(2) and 34.05.546. Because the statutory requirements of the APA did not require a signature, the court ruled that compliance with the civil rule did not affect the superior court's jurisdiction under the APA. *Biomed Comm*, 146 Wn. App. at 941-42.

Here, as the court did in *Biomed Comm*, we review the statutory requirements of the APA. The APA does not contain a cover sheet requirement. As in *Biomed Comm*, we do not read into the APA a jurisdictional requirement of a cover sheet "where the legislature has not stated one." NPCA complied with APA's statutory requirements. It submitted its petition to the superior court within 30 days, and its petition included the required filing fee.

BP argues that that the clerk had the authority to reject the petition under the CR 5(e) because it did not have an AR 2 cover sheet. If we adopted BP's reasoning, a jurisdictional requirement could vary from county to county, or even from case to case, depending on the discretionary actions of inactions of a county clerk. Under CR 5(e) a "clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules of and local rules or practices." The use of the word "may," when used in a court rule, indicates that the referenced course of action is discretionary rather than mandatory. *In re Dependency of M.P.*, 185 Wn. App. 108, 116 n.3, 340 P.3d 908 (2014). It is axiomatic that a

court clerk's discretionary action cannot strip a superior court of jurisdiction. A court either has jurisdiction or it does not.

Here jurisdiction is conferred by complying with the APA. Therefore, we conclude that the filing of a form required by AR 2 does not impose a jurisdictional requirement. In so ruling, we are mindful that we should be careful of relying on form over substance to deny a litigant his or her day in court. We are promoting access to justice with uniformity throughout the state. Because the legislature has stated the jurisdictional requirements to confer appellate jurisdiction on the superior court for appeals from the PCHB, and NPCA has satisfied those requirements, we reverse.

***Cascadia Wildlands v. Dep't of Fish and Wildlife, and Resources Coalition, Inc.*, Division I COA Unpublished Op. (2020), 2020 WL 1675792**

The Department of Fish and Wildlife (DFW) is tasked with both protecting fish in Washington water as well as regulating construction activities occurring in our waterways. RCW 77.04.012; RCW 77.55. The typical method of regulating the latter is via a hydraulic permit application (HPA).

DFW's waterway protection duties include regulation of prospecting and mining, with most mining activities subject to the HPA process. Due to 1997 legislation, small scale prospecting was exempted from the permitting process and DFW waived permits for such operations by describing permissible permit-free operations in the Gold and Fish pamphlet. RCW 77.55.091. In 2014, the implementing regulation was amended to exclude "small motorized equipment" from the HPA requirement by including it in the Gold and Fish pamphlet. Former WAC 220-660-300(1) (2015).

Cascadia Wildlands, an Oregon non-profit corporation whose members enjoy use of regional wilderness lands and river systems, brought a declaratory judgment action to invalidate the new regulation. Cascadia contended that suction dredging required an HPA. A prospector's organization, Resources Coalition, was permitted to intervene. Both Cascadia and DFW ultimately moved for summary judgment. The court denied Cascadia's motion and granted DFW's, ruling that the agency had the statutory authority to issue the change. Cascadia appealed to this court. The matter was administratively transferred from Division Two to Division One. This court requested and received supplemental briefing on the issue of mootness. A panel then heard oral argument of the case.

At issue is an interpretation of the authority given DFW to regulate small scale prospecting and mining without a permit. RCW 77.55.091(1) provides: "Small scale prospecting and mining shall not require a permit . . . if . . . conducted in accordance with rules established by the department." In turn, "'Small scale prospecting and mining' means the use of only the following methods: Pans, nonmotorized sluice boxes; concentrators; and minirocker boxes for the discovery and recovery of materials." RCW 77.55.011(21). DFW was directed to clarify which small scale methods required a permit and to use the Gold and Fish pamphlet to minimize the number of specific provisions of a written permit. RCW 77.55.091(3).

Using this authority, in 2014 DFW issued the following regulation, former WAC 220-660-300(1) (2015), which read in part: "The rules in this section apply to using hand-held mineral prospecting tools and small motorized equipment." This language provided the impetus for this case. Cascadia argued that the definition of "small scale prospecting" and RCW 77.55.091(1) prohibited DFW from allowing the use of any motorized equipment in small scale prospecting, whereas DFW believed its authority allowed it to regulate some motorized activity via the Gold and Fish pamphlet.

Subsequently, the regulation was amended, and a new regulation adopted to govern motorized equipment. WAC 220-660-300(1) was rewritten to govern only "hand-held mineral prospecting tools and a variety of small mineral prospecting equipment." It now concludes with the following sentences: "Suction dredging is not authorized in this section. See WAC 220-660-305 for suction dredging rules." The definition of "suction dredge" was expanded to include "any motorized or nonmotorized device" that operates as a vacuum. WAC 220-660-030(140) (2020).

A permit is now required to engage in suction dredging. WAC 220-660-305(3) (2020). Now DFW requires an individual permit for any small-scale prospecting operation that uses motorized equipment. *Id.* The controversy between Cascadia and DFW is at an end. There is simply no relief that can be granted and no reason to believe this court need address the now-disregarded theory supporting the former regulation. The case is moot. The appeal is dismissed.