

# Superior Court of the State of Washington

## For Thurston County

**Paula Casey, Judge**  
Department No. 1  
**Richard A. Strophy, Judge**  
Department No. 2  
**Wm. Thomas McPhee, Judge**  
Department No. 3  
**Richard D. Hicks, Judge**  
Department No. 4  
**Christine A. Pomeroy, Judge**  
Department No. 5  
**Gary R. Tibor, Judge**  
Department No. 6  
**Chris Wickham, Judge**  
Department No. 7  
**Anne Hirsch, Judge**  
Department No. 8



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October 6, 2008

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Re: Puget Sound Harvesters Association/Purse Seine Vessel Owners  
Association v Washington Department of Fish and Wildlife, Thurston  
County Superior Court No 08-2-01744-1

Dear Counsel:

On October 3, 2008, this court heard argument on motions for preliminary injunction from each petitioner in these consolidated cases. The decision on those motions follows.

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Petitioner Purse Seine Vessel Owners Association ("PSVOA", the purse seiners) is requesting an injunction against Respondent Washington State Department of Fish and Wildlife (the Department) preventing it from implementing its 2008 Puget Sound commercial salmon fishing rules as they relate to Areas 8, 8A, 10, 11, and 12B. PSVOA asserts that a commercial fishing schedule that provides its members with other than an equal amount of time on the water with other gear groups is arbitrary and capricious and also violative of equal protection guarantees under the federal and state constitutions.

Petitioner Puget Sound Harvesters Association ("PSHA", the gillnetters) is similarly requesting an injunction against the Department's implementation of the 2008 Puget Sound commercial salmon fishing rules as they relate to Areas 10 and 11. PSHA argues that the schedule is arbitrary and capricious.

The legal standard for granting of a preliminary injunction was set forth in *Tyler Pipe Indus., Inc. v State Dept. of Revenue*, 96 Wn. 2d 785, 638 P. 2d 1213 (1982). The requirements are:

- (1) A clear legal right
- (2) A well-grounded fear of immediate invasion of that right;
- (3) The acts complained of will result in actual and substantial injury; and
- (4) A likelihood of success on the merits.

This case having been brought under the Administrative Procedures Act, RCW 34.05.570, to prevail a petitioner must show the actions of the agency (in this case the Department) were either

- (1) unconstitutional
- (2) outside the statutory authority of the agency
- (3) arbitrary or capricious; or
- (4) taken by persons who were not properly constituted as agency officials

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Petitioners, as previously indicated, are arguing that the salmon schedule, as promulgated, is either arbitrary or capricious or unconstitutional or both.

The Department is given authority to preserve, protect, perpetuate, and manage wildlife, fish and shellfish by statute. RCW 77.50.120. In discharging that responsibility, the Department recognizes its legal obligation is to establish rules that meet the following objectives:

- (1) Ensure the conservation of target species – meet spawning goals;
- (2) Minimize catch of or impacts on non-target species (bycatch);
- (3) Monitor and sample all fisheries;
- (4) Maintain the economic well-being and stability of the fishing industry;
- (5) Fully utilize the non-Indian allowable catch; and
- (6) Fairly allocate harvest opportunity between gear groups.

In a similar proceeding, this court previously found the 2007 Puget Sound commercial salmon fishing rules arbitrary and capricious because the record did not disclose a rational basis for the adoption of those rules. AR 62.

In this case, the court considered the declarations submitted by the parties and the testimony of Patrick Pattillo, Salmon Policy Coordinator in the Intergovernmental Resource Management group of the Department. The record in this case shows that the Department adopted the 2008 Puget Sound commercial salmon fishing rules by first considering a proposed schedule submitted (“under duress”) by PSHA which would have given PSHA members Sundays and a short Wednesday each week and PSVOA members Mondays. AR 305. The short Wednesdays were intended to support the local marketing of the gillnetters by allowing them to provide fresh salmon in time for local markets, generally open Thursday through Sundays or directly off their boats during that time period. The Department added a Wednesday for PSVOA to weeks 44 and 46 because historically the purse seine catch is a reliable indicator of the abundance of fish and Wednesday is an appropriate day to measure the overall catch. Giving the purse seiners an

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opening on these Wednesdays meant adjusting the gillnetters' days so as to avoid having both gear groups on the water at the same time. The gillnetters were then moved to Tuesday and Thursday of weeks 44 and 46.

When considering this schedule in terms of allocation of the resource between gear groups alone, it appears irrational. The resulting schedule (see PSHA Motion for Preliminary Injunction p. 7) reduces the ratio of opportunity for gillnetters vis-à-vis purse seiners below the ratio resulting from the 2007 schedule. Yet the catch results from 2007 shows that the schedule unfairly favored the purse seiners. (see PSHA motion pp 4-5). Given that one of the objectives of the Department is to fairly allocate harvest opportunity between gear groups, this schedule appears not to rationally achieve that objective.

However, the Department is attempting to meet various objectives, some of which conflict. As indicated above, each of the adjustments made to the schedule proposed by the gillnetters was supportive of one or more objectives of the Department. The Wednesday openings for the purse seiners was intended to assist the Department in monitoring the overall abundance of the resource, thus assisting it in its responsibilities with tribal fisheries and in conserving the resource. The subsequent adjustment of the gillnetters days was to allow the competing gear groups to be on the water on different days. And the Department ensured that the gillnetters had a Wednesday or Thursday each week to assist them with their marketing program.

In considering all of this, the schedule adopted by the Department is not necessarily the schedule this court might have adopted. There is a legitimate concern on the part of the gillnetters that they will be denied an equitable allocation of the resource because of the difference in fishing power between the two gear groups and the historical catch records of the two groups. However, this court cannot say there is no rational basis for this schedule, particularly when viewed in light of all of the Department's objectives.

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PSHA argues that the only fair method of allocation is to monitor the catch and seek a roughly equal amount of catch for each gear group. Mr. Pattillo explained that although such a method of allocation might be desirable, it would require significantly more resources for the Department than it currently employs. In a time of State hiring freezes and budget deficits, this is a real concern for all state agencies.

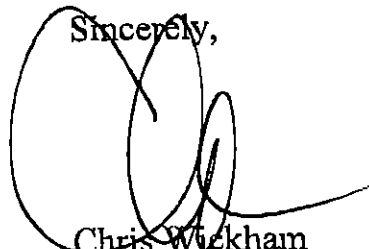
Petitioner PSVOA argues that any schedule that does not provide for equal time on the water is an unfair allocation of the resource. In argument and some of its pleadings, the Department seemed to share in this allocation basis as a legitimate goal. However, this court finds that equal time on the water is not a fair allocation of the resource between these two gear groups, given the significant difference in fishing power. PSHA ably demonstrated the consequences of similar times on the water for each of the two groups in its motion (p. 12) and Mr. Pattillo did not disagree with these numbers. Any schedule which fails to consider this difference in gear efficiency might be considered arbitrary and capricious as it would not rationally achieve the goal of fairly allocating the harvest opportunity between gear groups. PSVOA's constitutional challenge fails because there is a rational basis to treat the gillnetters and purse seiners differently and the discrimination is based on gear, not personage. See *Washington Kelpers Assn. v State*, 81 Wn. 2d 410, 502 P. 2d 1170 (1972).

PSHA's challenge is a closer call. But because of the rationale presented in the Concise Explanatory Statement (AR 11-23) and the testimony of Mr. Pattillo, this court finds that the Department has shown a rational basis for the 2008 rules sufficient to prevent PSHA from showing a likelihood of success on the merits. See *Hillis v Dept. of Ecology*, 131 Wn. 2d 373, 932 P.2d 139 (1997). The request for a preliminary injunction, therefore, by each petitioner, is denied.

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Counsel may note for presentation on a civil motion calendar an order consistent with this decision. Alternatively, the court will sign an agreed order *ex parte*.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Wickham". The signature is stylized with large loops and a long horizontal stroke extending to the right.

Chris Wickham  
Superior Court Judge

cc: Clerk, for filing