

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

| | | |
|-------------------------|---|--------------------|
| NORTHWEST SPORTFISHING, |) | |
| et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| vs. |) | |
| |) | |
| WASHINGTON STATE |) | SUPERIOR COURT NO. |
| DEPARTMENT OF ECOLOGY, |) | 10-2-01236-0 |
| et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on May 20th, 2011,
the above-entitled and numbered cause came on for
hearing before JUDGE LISA L. SUTTON, Thurston County
Superior Court, Olympia, Washington.

Pamela R. Jones, Official Court Reporter
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A P P E A R A N C E S

ALL APPEARANCES VIA SPEAKERPHONE

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1 May 20, 2011

Olympia, Washington

2 AFTERNOON SESSION

3 Department 8

Hon. Lisa L. Sutton, Presiding

4 APPEARANCES:

5 For the Petitioners, Steve Mashuda and Amada
6 Goodin, Attorneys at Law; for the Respondents,
7 Joan Marchioro, Assistant Attorney General and
8 and Beth Ginsberg, Attorney at Law

9 Pamela R. Jones, Official Reporter

10 * * * * *

11 THE COURT: Hi, this is Judge Sutton. Could
12 you identify yourselves for the record.

13 MS. MARCHIORO: Joan Marchioro with the
14 Attorney General's Office, and on the phone with me
15 is my colleague, Steven North.

16 MS. GINSBERG: Beth Ginsberg and Jason Morgan
17 on behalf of Northwest River Partners, and with us is
18 Terry Flores, the executive director.

19 MR. MASHUDA: And you have Steve Mashuda and
20 Amanda Goodin from Earth Justice representing the
21 petitioners, Northwest Sportfishing Industry
22 Association.

23 THE COURT: And we have the court reporter
24 here, Pam, taking down what's said, and we also have
25 the clerk assisting us today.

Thank you for participating by phone. I know this
might be a little awkward, but we'll do the best we

1 can, and hopefully those of you that are at a CLE can
2 return promptly for your presentation.

3 Just so you know, since the last hearing where we
4 heard oral argument in this matter, I have 20 pages
5 of typed notes that I took, including footnotes, and
6 I also reviewed my handwritten notes that I took
7 during the oral presentations. I looked at the
8 briefs again, as we discussed. I looked at the key
9 material that was provided as part of the record,
10 some of which I had in front of me at the hearing. I
11 actually had the whole record back in chambers but I
12 had some key provisions in front of me at the
13 hearing.

14 I have in front of me the petition to amend the
15 WAC 173-201A-200(1)(f)(ii) regarding the water
16 quality standards, and so I'm just going to proceed,
17 but first I want to again compliment the parties for
18 their briefing and their oral presentation. I very
19 much appreciated the timeliness by which the briefing
20 was filed to allow me to prepare in advance, well in
21 advance of the oral hearing, and also to allow me to
22 review the materials again and take it under
23 advisement. I appreciate that. And again, as I
24 indicated earlier, I knew it was important for the
25 parties that the Court issue a ruling promptly, and

1 so I wanted to give you a date certain, today's date,
2 by which I would rule.

3 As I indicated I have reviewed all the materials
4 here. Oral arguments took place on May 13, 2011,
5 with all parties present, and I have indicated all of
6 the materials I have reviewed including the
7 administrative record filed with the court.

8 The petitioners here include a coalition of sport
9 and commercial fishing organizations and conservation
10 groups. They are represented here by Mr. Steve
11 Mashuda and Amanda Goodin. Respondents include the
12 Washington State Department of Ecology, and they were
13 represented by Senior Counsel Joan Marchioro and
14 intervenor, Northwest River Partners.

15 The Washington State Department of Ecology is
16 charged with protecting the quality of waters in the
17 State of Washington, and their statutory authority is
18 set forth in RCW 90.48.010. I should say that the
19 Northwest River Partners, the intervenor, includes a
20 group of electric customers, ports, business owners
21 and farmers, and they are represented by Beth
22 Ginsberg and Jason Morgan.

23 Judge Carol Murphy previously heard oral argument
24 on the intervenor's motion to dismiss on the basis of
25 collateral estoppel. That motion was denied on the

1 basis that Ecology's denial of the petition, which is
2 at issue here, to compel Ecology to initiate
3 rulemaking, Judge Murphy ruled that that was a
4 quasi-legislative rulemaking decision and therefore
5 the doctrine of collateral estoppel did not apply.
6 That order was entered on April 1st, 2011. We're
7 here today because the petitioners have appealed the
8 Department of Ecology's denial of their request that
9 Ecology initiate rulemaking to modify or eliminate
10 Washington's current water quality standards for
11 total dissolved gas, or as referred to, TDG. Those
12 current standards are set forth in
13 WAC 173-201A(200)(1)(f)(ii).

14 The purpose of the current rule is to provide a
15 special fish passage exemption for the Snake and
16 Columbia Rivers to apply when spilling water at dams
17 is necessary to aid fish passage over the
18 hydroelectric dams when consistent with the Ecology's
19 approved gas abatement plan. This plan is
20 accompanied by fisheries management and physical and
21 biological monitoring plans as well. The idea is to
22 increase the fish passage without causing more harm
23 to the fish population.

24 Here, there were two prior petitions that were
25 filed by a subpart of the petitioner's group, and

1 those were filed previously and denied by Ecology.
2 The first petition, I believe, was filed in March
3 '07. That was withdrawn. Excuse me, it was
4 withdrawn so that the parties could enter into
5 discussions, and subsequently in June 2007 the
6 Adoptive Management Team, commonly referred to as
7 AMT, was formed as part of a study group. The Save
8 Our Wild Salmon was part of this study group, and
9 they met for a period of time from roughly November
10 '07 to September '08. And then on August 10th, '09,
11 Ecology denied the June '09 petition.

12 Save Our Wild Salmon resubmitted another petition
13 on March 8th, 2010. This was the third petition
14 filed with Ecology to amend or remove the 115 percent
15 forebay standard. Ecology denied that 2010 petition
16 on May 7th 2010.

17 And just so the parties know, I'm going to
18 summarize briefly Ecology's bases, and this again is
19 a summary, for their denial decision. Ecology found
20 that some of the aquatic organisms would experience
21 adverse effects at TDG saturation levels approaching
22 120 percent, and Ecology contended that retaining the
23 current 115 percent forebay limit was necessary to
24 fully protect all species of aquatic life as they
25 believe they're required to do under state and

1 federal laws. And again, that's just a summary.
2 Ecology's decision is set forth in the materials at
3 Ecology 1840.62 and Ecology 1840.63, and I'm
4 referring to by number the administrative record.

5 The petitioners here argue that Ecology's denial
6 was arbitrary and capricious, contrary to sound
7 science and outside the scope of Ecology's statutory
8 authority for the following reasons. And again, I'm
9 not going to repeat all of the petitioners' arguments
10 because they argued very well to the court earlier in
11 their oral presentation, but I will summarize for
12 purposes of this ruling their arguments.

13 First, the petitioners felt that in so issuing its
14 denial, Ecology had failed to consider all of the
15 relevant studies which demonstrate that aquatic life,
16 petitioners assert, would not be harmed by the
17 removal or the amendment of the 115 percent forebay
18 limit.

19 Secondly, that Ecology in conducting its
20 risk-benefit analysis did not appropriately consider
21 the benefits to salmon and all other aquatic life,
22 such as the Pacific lamprey, from potential increases
23 in spill resulting from the petition rule change.
24 And they felt that based on the relevant evidence and
25 new information, as well as the June 2009 petition

1 that the petitioners had filed previously, that they
2 felt that it was reasonable for Ecology to grant
3 their petition as has the State of Oregon and remove
4 the 115 percent forebay limit or, alternatively, that
5 Ecology should increase that limit to 120 percent by
6 initiating the rulemaking process to alter or
7 eliminate the current standard, and again, I've cited
8 the WAC that's at issue here.

9 This court has jurisdiction over this matter under
10 RCW 34.05.570, and that statute authorizes judicial
11 review of a state agency's action, including review
12 of an agency's rule, review of a state agency's
13 failure to perform a legally required duty, and
14 review of the exercise of a state agency's
15 discretion.

16 The pending matter here involves a rule challenge.
17 Venue is proper in this county, and this action
18 that's currently before the court was timely filed
19 under RCW 34.05.542.

20 There was argument here about what the standard of
21 review was, and again, I won't purport to resummari-
22 ze what's in the briefing here, but an agency's denial
23 of a petition for rulemaking is subject to judicial
24 review under the Washington State Administrative
25 Procedures Act. The case law is *Northwest Ecosystem*

1 *Alliance vs. Forest Practices Board* found at
2 149 Wn.2d 67, at page 74. That's a 2003 decision. A
3 state agency's decision to deny a petition for review
4 is other agency action reviewable under RCW, the APA,
5 34.05.57(4)(c) standards. Relief will only be
6 granted if the court determines that the agency's
7 decision to deny rulemaking is unconstitutional,
8 outside the agency's statutory authority, arbitrary
9 and capricious, or made by unauthorized persons.
10 RCW 34.05.570(4)(c).

11 In making this determination, the court here will
12 review the agency's record under RCW 34.05.558. And
13 here there was supplemental information provided to
14 the agency record which the court has as part of the
15 administrative record below. The petitioners here,
16 as the parties challenging the agency's actions, have
17 the burden to demonstrate the invalidity of Ecology's
18 actions under RCW 34.05.570(1).

19 Now here, the petitioners in their opening brief
20 at pages 10 and 11 argued that Ecology's denial was
21 arbitrary and capricious, and therefore this court
22 should engage in a thorough, probing, in-depth
23 review, and they cited the case of *Neah Bay Chamber*
24 *of Commerce vs. Department of Fisheries*, which cited
25 and quotes the *Citizens to Overton Park* decision.

1 The petitioners here felt that there was a broader
2 standard of review that the court must engage in here
3 that would allow the court to examine the relevant
4 data and articulate a satisfactory explanation for
5 its actions including a rational connection between
6 the facts found and the choice made, and the
7 petitioners have represented and argued to the court
8 that they don't believe Ecology did so.

9 This court has reviewed the relevant standard of
10 review in this matter, which standard of review is a
11 question of law. There was citation by both parties
12 to the *Rios* case here, and the court is finding here
13 that where there is room for two opinions, an action
14 taken after due consideration is not arbitrary and
15 capricious, even though a reviewing court may believe
16 it to be erroneous. And that's the *Hillis vs.*
17 *Department of Ecology* case, 131 Wn.2d 373 at page
18 383. Agency action is arbitrary and capricious if it
19 is willful and unreasoning and taken without regard
20 to the attending facts or circumstances. That's the
21 *Hillis* decision at page 383.

22 On matters involving complex factual issues, which
23 are technical and within the agency's expertise, such
24 as the matters presently before this court, the
25 courts are highly deferential, citing the case of

1 *Department of Ecology vs. PUD No. 1 of Jefferson*
2 *County*, 121 Wn.2d 179 at page 201.

3 The Department of Ecology is the state's water
4 pollution control agency for all purposes under the
5 federal Clean Water Act. State law requires that
6 Ecology participate fully in the programs of the
7 Clean Water Act and take all necessary action to
8 secure to the state the benefits and to meet the
9 requirements of this federal law. Washington has
10 adopted certain regulations, and they're found in WAC
11 173-201A, and that those regulations contain three
12 parts, based upon the designated uses of the body of
13 waters in the State of Washington.

14 This first part of those regulations govern the
15 classification of all surface waters based upon their
16 designated beneficial uses; the second part of the
17 regulations contain water quality criteria deemed
18 necessary to support the specific identified
19 beneficial use; and the third part of those
20 regulations set forth the anti-degradation policy.

21 Washington conducts a triennial review of its
22 water quality standards as required under the federal
23 Clean Water Act. That includes public hearings,
24 receiving public input and taking comments with
25 respect to whether or not Ecology should modify or

1 adopt new standards. If there is any modification or
2 new standards, they are subject to review and
3 approval by the federal Environment Protection Agency
4 who must find, in part, that the standard to protect
5 the designated water uses under federal regulations.

6 If the proposed water quality standards are likely
7 to adversely impact listed species or designated
8 critical habitat, federal EPA must formally consult
9 with the Secretaries of Commerce and/or Interior
10 Departments before EPA can approve the proposed
11 state's water quality standards, and that's under
12 federal law.

13 And in circumstances where formal consultation is
14 required, the Secretary must issue a biological
15 opinion which discusses the effects on the protected
16 species and indicate whether the Secretary believes
17 that jeopardy is likely to result from the state's
18 proposed action.

19 If the Secretary determines that jeopardy will
20 occur, he or she must specify reasonable and prudent
21 alternatives that will avoid jeopardy and state
22 whether such alternatives are available. If after
23 this consultation the Secretary concludes no jeopardy
24 will result from the proposed project, the Secretary
25 shall provide the state agency an application, if

1 any, with an incidental take statement, and that's a
2 phrase that's used in federal law. Once formal
3 consultation is done, EPA may act on the state's
4 water quality standards.

5 All right. Here, TDG is defined as the measure of
6 the sum total of all gas partial pressures, including
7 water vapor, in water. That's found in the
8 administrative record at Ecology 32.24. When water
9 becomes supersaturated with gas, gas bubbles can form
10 in the blood and tissues of aquatic organisms. And
11 I'm referring again to the same part of the
12 administrative record. The exposure of fish and
13 other aquatic organisms to excess dissolved gas can
14 produce physiological problems referred to by the
15 parties as gas bubble disease or gas bubble trauma.
16 The citation is Ecology 2150.1 and Ecology 2141.1 and
17 2141.2. Gas bubble trauma can, in turn, cause rapid
18 acute mortality as well as increase long-term
19 mortality in aquatic organisms. Ecology 32.24. The
20 spilling of water over the spillways and dams is a
21 major source of elevated TDG in the Snake and
22 Columbia River system, and that's described in
23 Ecology 2150.3.

24 So here generally, the rule statewide is that the
25 TDG cannot exceed 110 percent saturation. But here,

1 as we've indicated, Ecology amended the water quality
2 standards back in 1997 to permit a relaxation of that
3 standard not to exceed 125 percent in the tailraces
4 of each dam for water being spilled for fish passage
5 and in aid of fish passage in the Snake and Columbia
6 Rivers. The rule then was reviewed as required in
7 2003 and Ecology proposed to make permanent the
8 exemption which exists today.

9 And by way of background, here Oregon Department
10 of Environmental Quality was directed by the Oregon
11 Environment Quality Commission to evaluate the need
12 here as to whether or not the 115 percent forebay TDG
13 requirement for fish passage should be revised. And
14 again, there was an Adaptive Management Team referred
15 to as the AMT process that reviewed this matter and
16 reviewed the literature associated with it. The
17 parties in their materials point to various
18 literature and studies that were reviewed as part of
19 the AMT process in support of their various
20 positions. I'm not going to go over that; it's well
21 spelled out in the briefing and in the administrative
22 record below.

23 It is true here that Oregon concluded that removal
24 of the 115 percent forebay standard "will not cause
25 excessive harm to the beneficial use, aquatic species

1 in the Columbia River, during fish passage spill
2 season." The record there is Ecology 1840.61.
3 What's also true is that the intervenor, Northwest
4 River Partners, noted that there were differences
5 between Washington and Oregon's process, and that's
6 described in their responsive brief at page 10,
7 footnote 7. They claim here that Oregon's process
8 for eliminating the standard is substantially simpler
9 than Washington's. Oregon simply had to modify, and
10 apparently they did, an existing order to establish a
11 TDG waiver. And that's described in Ecology
12 001017-10. Unlike Oregon, Ecology here to alter or
13 revise their 115 percent forebay TDG standard, would
14 be required to undergo and initiate a new rulemaking
15 process. Unlike Washington's TDG standard, Oregon's
16 TDG standard includes a 105 percent shallow water TDG
17 criteria to protect species including frogs,
18 mollusks, other invertebrates and fish larva, that
19 cannot dive to sufficient depths to avoid harmful
20 levels of TDG.

21 In the administrative record starting at Ecology
22 1840.3 up to 1842.1, there was an evaluation of the
23 115 percent total dissolved gas forebay requirement
24 by the Adoptive Management Team for the Columbia and
25 Snake Rivers. Those materials also included comments

1 by Ecology. That group of teams, AMT, included a
2 broad scope of members and attendees, each of whom
3 had specific expertise, data and analysis, all of
4 whom contributed their input regarding spill volume
5 analysis, fish survival impacts and gas bubble trauma
6 impacts. The water qualities agencies used all of
7 this information submitted during the AMT process to
8 make an informed decision. And the document that
9 states this specifically is Ecology 1840.61.

10 I would also note that Ecology's literature review
11 identified an impact to aquatic species near the
12 surface, less than one meter deep, that should not be
13 considered negligible. But review found that there
14 was a detrimental effect on aquatic life at less than
15 one meter depth and that some aquatic life may be
16 residing near the surface for long enough to suffer
17 the detrimental effects of gas bubble trauma. The
18 report then concluded that "Chronic long-term effects
19 of exposure to high TDG are difficult to fully study.
20 Some studies have been done on various aspects of
21 chronic exposures, but few studies have been
22 completed on high TDG exposures greater than one
23 month." And the citation for that is, I believe it's
24 at 1840.55. The AMT review noted the six dams on the
25 middle Columbia river that are regulated by the 115

1 percent forebay requirements and the group
2 specifically studied the potential impact at each
3 dam, the administrative record at 1840.57 and the
4 materials associated with those pages, also contained
5 charts examining the different impacts at each dam,
6 and the report noted that "There is no way to know
7 the exact impacts on fish survival due to the
8 increase in spill. Each method of determining this
9 impact has great uncertainty and controversy." And
10 I'm citing page Ecology 1840.57.

11 So for these reasons, and I have in front of me
12 Ecology's denial that is on page 1840.62 and .63, as
13 well as the reasons summarized in their denial letter
14 that was attached to the petition, the petition to
15 amend filed here starts at Ecology pages 1754 to 1.
16 That is a letter and there is a -- excuse me. This
17 was the letter, denial letter from Ecology, I
18 apologize, it's not the petition, the denial letter
19 was dated May 7th, 2010, and it starts on pages
20 Ecology 1754.1, two-page letter ending at 1754.2. It
21 had attachments. The court reviewed each of the
22 attachments and outlined the issues associated with
23 the petition and Ecology's response to the specific
24 issues.

25 In sum and substance, Ecology declined to change

1 the 115 percent TDG forebay water quality criteria
2 for the Columbia River. Ecology concluded the small
3 benefit to migrating salmon that would result from
4 the proposed 120 percent TDG relaxation was
5 insufficient to weaken the existing rule when weighed
6 in light of increased risk of injury to aquatic
7 species. Ecology's reasoning is stated as follows,
8 and I'm citing Ecology 1017.62. Ecology determined
9 that there would be a potential for a small benefit
10 to salmon related to fish spill if the 115 percent
11 forebay criterion was eliminated. But there would
12 also be the potential for a small increase in harm
13 from increased gas bubble trauma. The weight of all
14 the evidence from available scientific studies
15 clearly points to detrimental effects on aquatic life
16 near the surface when TDG approaches 120 percent.
17 Based upon the information in the AMT report, Ecology
18 does not believe that the overall benefits of
19 additional spill verses additional risk of gas bubble
20 trauma are clear and sufficient for rule revision.

21 Ecology also in its reasoning determined that
22 changing the water quality criterion at this point
23 would trigger additional administrative procedure
24 requirements including a cost-benefit analysis and a
25 small business impact statement that would be needed

1 to determine the effects of rule changes on both the
2 public and businesses in the State of Washington.
3 And Ecology concluded that the benefits of that
4 process -- the benefits from that process must
5 outweigh the cost of any rule change to justify the
6 rule's adoption. Ecology also determined that the
7 state Environment Policy Act determination would be
8 needed, and based upon what that determination would
9 be, an environment impact statement may also be
10 required. And that's found at Ecology 1840.62 and
11 also point 63.

12 This factual and legal background is important to
13 understand in light of the petitioners' matter before
14 this court and the arguments advanced in support of
15 the petitions' motion for summary judgment slash
16 petition for judicial review. I've indicated that
17 the petitioners have filed a second rulemaking
18 petition back in June 2009 arguing that either the
19 115 percent TDG forebay rule should be raised to 120
20 percent or that monitoring forebay should be
21 eliminated entirely. That's found at Ecology 1014.2.

22 For the same reasons stated earlier, Ecology chose
23 not to revise the existing TDG rule and, thus,
24 Ecology denied the second petition in August 2009,
25 and when they did so, they cited the 2007/2009 AMT

1 evaluation, review and process in support of its
2 decision. And that's found at Ecology 1746.1.

3 At that time, petitioners did not seek judicial
4 review of the denial the second petition but filed a
5 third petition for a rulemaking request, and as the
6 court has indicated, based on the paperwork that
7 third petition was filed March 8, 2010, and it sought
8 identical relief, and that third petition is found at
9 Ecology 1453.1.

10 In the third petition, petitioners asserted
11 Ecology, one, failed to consider the studies
12 petitioners relied upon in support of their position;
13 two, Ecology misrepresented other studies; three,
14 Ecology inappropriately favored certain lab studies
15 over field studies; and fourth, Ecology failed to
16 properly consider the benefits of spill.

17 Some of the petitioning groups then sought review
18 in superior court regarding Ecology's third denial,
19 and that's the matter that we have presently before
20 us. The petitioners here have dropped their second
21 and third causes of action, and that's referred to in
22 petitioners' brief, page 9 at footnote 9. The sole
23 remaining claim before this court today is whether
24 Ecology's denial of the third petition was arbitrary
25 and capricious, contrary to Washington law, and/or

1 exceeded the statutory authority of Ecology in
2 violation of RCW 34.05.570(4)(c).

3 And so that you know, I did go back and I looked
4 specifically at the petition, I looked specifically
5 at the attachment to the petition and each of the
6 petition issues that was raised by the petitioners to
7 Ecology of which there were five.

8 Petitioner issue number one. It was asserted that
9 spill is a vital salmon and steelhead protected
10 measure. Ecology agreed that the use of spill was an
11 important measure to decrease mortality in migrating
12 salmon and steelhead. To aid fish in the passage
13 over dams of the Snake and Columbia Rivers,
14 Washington adopted an exemption already to the 110
15 percent TDG criterion. And that exemption allowed
16 for increased fish passage in order to meet the
17 Endangered Species Act by reducing fish passage
18 mortality.

19 Now, petitioners claim that Ecology is required
20 under state and federal laws to set the TDG limits
21 that maximize salmon survival by balancing the
22 benefits of spill with the risk of gas bubble trauma,
23 but Ecology disagrees that the law requires them to
24 do so. The court finds that Ecology is required
25 under state regulations to maintain and protect all

1 designated and existing uses in waters of Washington
2 State under the WAC Rule 173-201A-310, which is also
3 required under federal law under 40 CFR 131.12(a).
4 The Snake and Columbia Rivers are designated uses
5 which include key species uses of salmon spawning,
6 rearing and migration and, the additional
7 requirement. "It is required that all indigenous
8 fish and nonfish aquatic species be protected in
9 waters of the state in addition to key species
10 described below." And that's set forth in
11 Washington's Regulation 173-201A-200(1).

12 Now, petitioners took issue with Ecology's
13 understanding of the state and federal obligations to
14 include protecting aquatic organisms other than
15 salmonids. The court, however, here does not find
16 that Ecology acted arbitrarily and capriciously or
17 outside its statutory authority in making its
18 decision to deny the petitioners' third petition.
19 And it was argued to the court that petitioners had
20 not met their burden of proof, and the court so
21 finds.

22 Ecology examined petition issues number two, the
23 115 percent forebay TDG criterion, as not grounded in
24 science. The court went back and looked at the
25 literature and the studies that were cited in the

1 materials, both in the briefing and in the
2 administrative record, and this issue the court
3 understood was one of the most contested ones in this
4 review given the assumptions that were made in the
5 studies and the nature of the lab studies both
6 reviewed and relied upon. Based on its review,
7 Ecology concludes that the current 115 percent
8 adjustment was not too restrictive because the data
9 and studies show that there is only limited gas
10 bubble trauma exhibited at that 115 percent level.
11 Ecology has set most of the water quality standards
12 to be more restrictive, that is more protective, and
13 thus, Ecology had concluded here that the current
14 115/120/125 percent criterion adjustments achieved,
15 and this is a quote, "The best balance between
16 increased spill for salmon migration and the
17 protection of aquatic life that have shown lethal and
18 sublethal affects due to prolonged exposure to TDG
19 supersaturation."

20 Ecology's denial letter to the third petition
21 specifically addressed petitioners' concerns
22 regarding the studies reviewed and relied upon.
23 Ecology acknowledged that they could have clarified
24 some of the result summaries, but they did not. They
25 represented that they did not misrepresent the

1 results of the studies. Some of the studies weren't
2 accorded as much weight as petitioners would have
3 liked. And Ecology's literature review, the
4 petitioners' claim, also did not include the studies
5 mentioned by petitioners, which they believe show
6 detrimental effects to some aquatic organisms. And
7 this specific issue is discussed in petition issue
8 number four by Ecology in its denial letter. But
9 Ecology gave weight to these other studies because
10 the non-negligible impact on appropriate water
11 quality standards Ecology believes it is required to
12 maintain and protect for all aquatic life uses.
13 Ecology also relied upon studies shown harmful
14 effects to other indigenous species, and Ecology
15 concluded that neither state nor federal law allow
16 them to disregard aquatic life use requirements of
17 some species over others; rather, Ecology concluded
18 that they must consider all aquatic organism other
19 than and including salmonids and the effects.

20 Petitioners here took issue with Ecology's
21 reliance on experimental studies to reach its
22 conclusion that the risk of gas bubble trauma to
23 aquatic life was present. Ecology's counter set
24 forth in the denial letter was that EPA routinely
25 uses experimental studies as do other states in

1 developing water quality standards. Based on all the
2 information that the court reviewed, the court does
3 not find that Ecology's reasoning as to this petition
4 issue and its conclusion, the court does not find it
5 to be arbitrary and capricious, exceeding its
6 statutory authority, Ecology's statutory authority,
7 even though petitioners would reach a different
8 result or the court may reach a different result.

9 Petition issue number three discussed the forebay
10 monitors do not provide credible data necessary for
11 monitoring compliance with water quality standards.
12 Petitioners noted the difficulty in collecting data
13 for monitoring compliance with water quality
14 standards. And Ecology concluded that, apparently,
15 there are difficulties with monitoring compliance,
16 but that wasn't a valid reason Ecology felt to either
17 adjust or eliminate a criterion in water quality
18 standards and they declined to do so. Apparently,
19 there's a group of stakeholders working on the issue
20 to improve monitoring, and that process is an
21 independent one from the water quality criterion
22 themselves. The court does not find that as to
23 petition issue number three that Ecology acted
24 arbitrarily and capriciously in so concluding, or
25 that they exceeded their statutory authority in so

1 concluding.

2 Ecology also found that any change in conditions
3 of the downstream reach that influenced TDG, such as
4 change in barometric pressure, water temperature,
5 degassing rates, incoming gas, total river flow, or
6 tailwater elevation, may cause an increase in TDG
7 above 120 percent, which Ecology did not find
8 acceptable in light of the statutory duties under
9 state and federal law. And again, the court does not
10 find Ecology's reasoning to be arbitrary and
11 capricious or that they exceeded their statutory
12 authority as to petition issue number three.

13 Petition issue number four addressed the 115
14 percent forebay TDG limit, and it was asserted that
15 that does not protect the most sensitive designated
16 use of the Snake and Columbia Rivers, i.e., salmon
17 habitat. This issue is perhaps at the heart. The
18 heart of the matter is the matter of the protection
19 of salmon and the petitioners did claim and argue
20 that the salmonids' habitat is the most sensitive
21 designated use on the Snake and Columbia Rivers.
22 Petitioners did clarify that they acknowledge that
23 other aquatic organisms need to be protected, but
24 salmon are the most sensitive designated protection.
25 Ecology believes it has a statutory duty to protect

1 all aquatic organisms. I'm looking through my notes
2 here.

3 Ecology's denial petition letter and attachment
4 cited the AMT evaluation, *Spill Volume Analysis*, with
5 and without the 115 percent TDG limit. In reviewing
6 this information, Ecology agrees with the salmon
7 distribution information provided by petitioners in
8 their third petition, and Ecology also included 15
9 studies on aquatic life distribution in its
10 literature review. Ecology did not agree that the
11 fact that some organisms sense and avoid water
12 quality limited areas should be used as the only
13 basis to ensure protection which Ecology believes is
14 required under the federal Clean Water Act. Ecology
15 concluded that the fact that some aquatic organisms
16 can not deter or otherwise avoid this water quality
17 limited area should not be disregarded by Ecology.
18 Again, the court does not find that Ecology in so
19 concluding acted arbitrary and capriciously, or that
20 they exceeded their statutory authority.

21 The final petition issue was petition issue number
22 five, and that was the request that Ecology should
23 amend WAC 173-210A-200(1)(f)(ii) in order to remedy
24 violations of federal and state laws. Petitioners
25 base this request by asserting that there is no

1 aquatic risk near the surface when TDG approaches the
2 120 percent, but Ecology disagreed with this
3 assertion, in large part basing its reliance on the
4 evaluation by the AMT work group and the gas bubble
5 trauma to aquatic life near the surface when TDG
6 approaches the 120 percent bubble. Ecology's
7 literature review found sublethal and lethal effects
8 to aquatic life, not just salmon, at the 120 percent
9 levels. The parties did disagree over the
10 cost-benefit analysis and whether or not that should
11 be a determining factor or not as to whether or not
12 to begin rulemaking. Ecology concluded that the
13 cost-benefit analysis and the small business economic
14 statement were not determinative factors.

15 Petitioners did argue that the court should look
16 at and Ecology should have looked at the fact that
17 Oregon eliminated the 115 percent forebay monitoring
18 requirement, and Ecology's refusal to do so here
19 undermines the Oregon's efforts. Ecology does not
20 agree that Oregon's removal of the 115 percent waiver
21 is more protective of all aquatic organisms that
22 ought to or were considered by Ecology. Ecology's
23 denial also notes that both states have the same TDG
24 criterion, and that is 120 percent of the saturation
25 in the tailrace that limits spill at Bonneville Dam.

1 And then Ecology's denial letter also noted that
2 because Little Goose and Lower Monumental Dams are
3 within Washington's jurisdiction exclusively,
4 Ecology's waiver does not affect them.

5 Finally, Ecology's 105 percent TDG criterion for
6 shallow waters provides further protection for
7 aquatic organisms above the TDG hydrostatic
8 compensation depth is not directly comparable to
9 Washington's, and I indicated earlier Washington does
10 not currently have a criterion specific to the
11 protection of a aquatic organisms in shallow water.

12 And so as I have indicated, I did review all of
13 the bases for Ecology's decision making, and based
14 upon the standard of review here in front of the
15 court, each petition issue the court examined and the
16 reasons set forth by Ecology for the denial of the
17 request that Ecology engage in either a waiver or
18 initiate rulemaking, and so the petitioners request
19 to have this court order Ecology to initiate
20 rulemaking to alter or eliminate the current 115
21 forebay criterion and revise WAC
22 173-201A-200(1)(f)(ii) is hereby denied. And I
23 indicated previously that I did agree with the
24 respondents' argument that the petitioners here had
25 not met their burden of proof, and thus, the court

1 will deny the relief requested by the petitioners
2 here.

3 And I noticed I needed to put on the record, we
4 did have someone joint us in the courtroom. Can you
5 identify yourself, ma'am?

6 MS. GABRIEL: I am Kay Gabriel representing
7 Northwest River Partners.

8 THE COURT: So during the court's ruling she
9 did enter the courtroom. Everyone else is on the
10 telephone, so I did want the parties to know that she
11 was present.

12 Does anyone have any questions? Hello?

13 MS. MARCHIORO: No questions.

14 MS. GINSBERG: No questions, Your Honor.

15 MR. MASHUDA: No questions from petitioners,
16 Your Honor.

17 THE COURT: All right. And I would have
18 preferred to do this orally with you present, but I
19 guess it wasn't possible today. So I appreciate your
20 patience on the phone. Again, I indicated I took
21 detailed notes and typed them up so that I guess, in
22 essence, I've read my ruling to you, and I trust that
23 someone will prepare an order that's consistent with
24 the court's ruling and I will sign that order upon
25 review.

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MS. MARCHIORO: That will be taken care of.
THE COURT: Thank you very much.
MS. MARCHIORO: Thank you, Your Honor.
MS. GINSBERG: Thank you, Your Honor.
MR. MASHUDA: Thank you, Your Honor.

* * * * *

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 25th day of May, 2011.

PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154