

No. 1050411

In the Washington Supreme Court

RON FODE,

Petitioner,

v.

DEPARTMENT OF ECOLOGY,

Respondent,

On Petition for Review

***AMICUS CURIAE* MEMORANDUM OF
NATIONAL FEDERATION OF INDEPENDENT
BUSINESS SMALL BUSINESS LEGAL CENTER, INC.
IN SUPPORT OF PETITION FOR REVIEW**

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Identity and Interest of Amicus Curiae

The National Federation of Independent Business Small Business Legal Center, Inc. (“NFIB Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (“NFIB”), which is the nation’s leading small business association. NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Amicus and its members have an interest in ensuring that the Department of Ecology (“Ecology”) abides by the text of RCW 90.03.605(1)(b), which requires Ecology to give small business owners the necessary assistance to accomplish their purposes before imposing steep penalties. Voluntary compliance, which was the Legislature’s stated goal, is harmonious with this plain reading of the statute. In addition, NFIB’s members will benefit

from Ecology’s adherence to the provisions of the Administrative Procedure Act (“APA”).

Introduction and Summary of Argument

This Court is being asked to decide whether Ron Fode was entitled to technical assistance before being fined for irrigating land without water rights.

RCW 90.03.605(1)(b) provides that, when Ecology determines that there has been a water rights violation, “it shall first attempt to achieve voluntary compliance” by “offer[ing] information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law[.]” The statute clearly places an obligation on Ecology to assist Fode in finding a way to accomplish his purposes—*i.e.* to assist him in finding water rights. The court of appeals, however, held that a warning is sufficient technical assistance under the law to satisfy the statute and begin assessing penalties. *See Fode v. Dep't of Ecology*, No. 40449-8-III, 2025 WL 3676149, at *6 (Wash. Ct. App. Dec. 18, 2025). This holding runs counter to the plain reading of the statute.

In addition, Ecology’s imposition of an “office deadline” that prevented Fode from obtaining the necessary water rights, violated RCW 90.03.290 and the APA. By establishing conditions for reviewing seasonal water rights transfer applications without prior public input on those conditions, Ecology violated both the statute, which states that Ecology has a “duty to investigate” applications complying with the provisions of RCW 90.03.290, and the APA, which provides that an “agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law” is a rule that must go through the rulemaking process. RCW 34.05.010(16).

The Court should grant the petition to determine whether small business owners like Fode are entitled to the fair processes required by law, or whether agencies can bypass their legal obligations and create barriers that prevent those processes.

Argument

I. A Threat of Enforcement is Not Technical Assistance.

The core issue in this case is the interpretation of RCW 90.03.605(1)(b). The question for this Court is whether it creates a substantive obligation for Ecology to help applicants find a lawful method to irrigate their land *and* provide that help in writing, as the text indicates, or whether it is an ink blot, a mere formality that can be satisfied by a threat of enforcement.

This Court has established that, “[w]hen interpreting a statute,” the “fundamental objective is to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wash. 2d 909, 914 (2012) (citing *State v. Budik*, 173 Wash. 2d 727, 733 (2012)). And “[t]he surest indication of legislative intent is the language enacted by the legislature.” *State v. Ervin*, 169 Wash. 2d 815, 820, (2010).

The plain language of the statute is of critical importance. Indeed, “[w]hen possible,” courts should “derive legislative intent *solely* from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and

the statutory scheme as a whole.” *State v. Evans*, 177 Wash. 2d 186, 192 (2013) (emphasis added) (citing *Ervin*, 169 Wash. 2d at 820; *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wash. 2d 1, 9–10 (2002)). If the plain language is clear, it is dispositive: “[p]lain language that is not ambiguous does not require construction.” *Id.* (citing *State v. Delgado*, 148 Wash. 2d 723, 727 (2003); *State v. Wilson*, 125 Wash. 2d 212, 217 (1994)).

The parties dispute the meaning of “technical assistance.” The statute offers no definitions, so we turn to the dictionary to determine plain meaning. *See State v. M.Y.G.*, 199 Wash. 2d 528, 532 (2022) (“[W]hen the legislature does not define a word, courts may resort to the applicable dictionary definition to determine a word’s plain and ordinary meaning unless a contrary intent within the statute appears.” (internal quotation and citations omitted)).

“Technical” is commonly defined as “having special and usually practical knowledge especially of a mechanical or scientific subject.” *Technical*, Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/>

dictionary/technical (visited February 26, 2026).
“Assistance” means “the act of helping or assisting someone or the help supplied.” *Assistance*, Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/assistance> (visited February 26, 2026).

To put it all together, the statute can be rephrased in its plain meaning as “the department shall offer information and *specialized, practical help* to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law.” Given that Fode’s express purpose was to irrigate his land, Ecology had a duty to offer specialized, practical help in writing identifying one or more means to irrigate Fode’s land within the framework of the law. Though the court of appeals held that “Ecology did not have a duty to provide technical assistance by finding water for Mr. Fode's use,” *Fode*, 2025 WL 3676149, at *7, this is exactly what a plain reading of the statute required Ecology to do—to offer specialized help in identifying ways that Fode could irrigate his land.

Ecology and the court of appeals read the statute quite differently from this plain reading. According to the court of

appeals, a letter (not addressed to Fode) which “noted that there was a substantial amount of land being irrigated ‘without authorization’” satisfied the written technical assistance requirement. *See id.* at *6 (internal quotation omitted). The court further held that “the only technical assistance Ecology could provide . . . was information that he did not have adequate water rights[.]” *Id.*

There are two problems with this reading. First, information and technical assistance are not synonyms for purposes of the statute. The legislature did not require Ecology to provide “information *or* technical assistance”—rather, “information *and* technical assistance.” RCW 90.03.605(1)(b) (emphasis added). The court of appeals was therefore mistaken to hold that simply providing information could satisfy the technical assistance requirement. Second, a notice of non-compliance is not technical assistance, because it is not assistance at all. Such a notice is not specialized, practical help “identifying one or more means to accomplish a person’s purposes.” Instead, it is the opposite of help, telling someone that he must stop pursuing his purposes. Such a

notice serves as a warning or a threat of enforcement; it is certainly not “assistance.”

The statute itself tells us this: “[i]f education and technical assistance do not achieve compliance the department shall issue a notice of violation.” RCW 90.03.605(1)(c). So just as education and technical assistance are not synonymous, neither are technical assistance and a notice of violation, because they are listed in separate sections of the statute and constitute separate steps of the process. And indeed, the letter Ecology sent to Fode informing him that his plans were not in compliance with the statute had the character of a notice of violation, not technical assistance.¹ Therefore, Ecology misread the statute by treating

¹ The Senate Bill Report on EHB 2993, which was later codified as RCW 90.03.605(1), is even more revealing: “Current law,” that is, the legal requirements for water law enforcement prior to RCW 90.03.605(1), “direct[ed] the Department of Ecology and local water masters to take enforcement action when there is a violation of water law.” The legislature added the requirement for Ecology to pursue voluntary compliance on top of an existing enforcement framework. This shows that technical assistance and notices of noncompliance were never intended to be synonymous, but instead, were enacted separately as distinct steps in a comprehensive process that favors voluntary compliance.

education, technical assistance, and a notice of violation as identical, thereby omitting a crucial step in the process: the provision of technical assistance.

A plain reading of the text of the statute in context reveals that a notice such as the one Ecology provided is—in the most charitable and favorable interpretation—a provision of information. The better understanding is that Ecology skipped its obligation to provide information and technical assistance and instead issued Fode a notice of violation. Neither interpretation puts Ecology in compliance with the statute.

II. The Office Deadline Is an Unpromulgated Rule, Which Deprives the People a Voice in the Rulemaking Process.

The Administrative Procedure Act (“APA”) provides that a rule is an “agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.” RCW 34.05.010(16). A generally applicable order, directive, or regulation, as this Court has held, is one that “applies uniformly to all members of a class . . . [and] applies to all participants in a program,” rather than the

application of a policy “under a single contract or assessment of individual benefits.” *Nw. Pulp & Paper Ass’n v. Dep’t of Ecology*, 200 Wash. 2d 666, 673 (2022) (citing *Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wash.2d 488, 494 (1994); *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wash.2d 640, 648 (1992)). The office deadline at issue here is generally applicable under this metric, as it is Ecology’s policy not to accept applications—regardless of who files—for seasonal water transfers after February 15th. The office deadline was presented to Fode as a categorical bar against consideration of applications after February 15th and thus must be considered generally applicable.

The office deadline likewise “alters . . . [a] qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.” Here, the right to submit an application to be considered for the benefit of a seasonal water rights transfer is governed by the qualifications and requirements of RCW 90.03.390. Similarly, Ecology is charged with a “duty to investigate the application.” RCW 90.03.290(1). Yet, with an unpromulgated office deadline, Ecology has effectively rewritten

the law so that only some applications are investigated. This is precisely what the Court decried in *Hillis v. State, Dep't of Ecology*: “when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions.” 131 Wash. 2d 373, 399 (1997).

Based on the above, Ecology’s office deadline is a rule. And rules, as this Court has long held, must go through rulemaking, or they are invalid. *Id.* at 398. This process is not a technicality or a box-checking exercise that can easily be dispensed with but is instead a substantive opportunity for public participation. Indeed, “[t]he purpose of rulemaking procedures is to ensure that members of the public can participate meaningfully in the development of agency policy that affects them.” William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L.Rev. 781, 791 (1989).

When law is created by administrative agencies instead of through bills drafted and passed by the people’s elected representatives, something critical is lost in the process that must be reintroduced. As this Court put it, “[t]he essential purpose of

... notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.” *Allan v. Univ. of Washington*, 140 Wash. 2d 323, 343, (2000) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)). “The job of the courts is to enforce . . . compromise, not to allow bureaucrats to extend the law beyond what was adopted through the democratic process.” *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wash. 2d 570, 637 (2008) (J.M. Johnson, J., dissenting).

Here, the legislature, which is accountable to the public through elections, clearly established a preference for voluntary compliance over the issuance of fines or penalties. *See* RCW 90.03.605(1)(b). Yet Ecology, without public input, overrode the legislature’s imperatives by inventing an office deadline that allowed the agency to skip directly to enforcement. This is precisely the type of bureaucratic overreach that the APA aimed to prevent. The legislature surely did not envision such a distortion of its intent, and this intent should be restored by invalidating the unpromulgated office deadline.

Conclusion

For these reasons, the Court should grant the petition for review.

This document contains 2,203 words and complies with Washington Rule of Appellate Procedure 18.17.

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Respectfully submitted,

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