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No. 1050411

**IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON**

RON FODE,
Petitioner,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,
Respondent.

**MOTION FOR LEAVE OF
PACIFIC LEGAL FOUNDATION
AND WADE & TERESA KING D/B/A KING RANCH
TO FILE AMICI CURIAE BRIEF**

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Pacific Legal Foundation (“PLF”) and Wade and Teresa King, d/b/a King Ranch, by and through undersigned counsel, respectfully move for leave to file the accompanying brief amicus curiae in support of Petitioner’s Petition for Review pursuant to RAP 13.4(h).

IDENTITY AND INTEREST OF AMICI

PLF is a nonprofit public-interest law firm dedicated to defending individual liberty, private property rights, and the constitutional separation of powers. PLF regularly litigates cases involving administrative overreach and violations of procedural safeguards under state administrative procedure acts.

Wade and Teresa King own and operate King Ranch, a multi-generational family cattle ranch in eastern Washington. The Kings have been directly affected by the Department of Ecology’s enforcement practices and are currently subject to an administrative enforcement proceeding seeking substantial civil penalties. Represented by PLF, they have filed a parallel action in superior court to vindicate their right to a jury trial. *See King*

Ranch v. Dep't of Ecology, No. 26-2-00263-13 (Grant Cnty. Super. Ct. filed Mar. 2, 2026). As agricultural producers who depend on reliable access to water rights and face similar compliance and enforcement issues, the Kings have a strong interest in ensuring that statutory limits on agency authority are respected and that unpublished internal policies are not permitted to function as binding rules.

AMICI'S FAMILIARITY WITH THE ISSUES

PLF has substantial experience litigating issues involving administrative enforcement, separation of powers, and rulemaking requirements under state and federal law. PLF attorneys have participated in numerous cases challenging agency actions that exceed statutory authority or bypass procedural safeguards, including cases addressing the distinction between legislative rules and informal agency policies, as well as the constitutional and statutory limits on agency adjudication and enforcement. *See Nat'l Fed'n of Indep. Bus. v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666, at *1 (N.D. Tex. Feb. 3,

2017) (concluding that OSHA had violated federal APA notice and comment requirements); *Chambless Enters., LLC v. Redfield*, 508 F.Supp.3d 101, 118 (W.D. La. 2020) (addressing whether an exception to notice and comment requirements applied to national eviction moratorium); *Peters Bros., Inc. v. Pennsylvania Dep't of Env't Prot.*, 330 A.3d 851 (Pa. Commw. Ct. 2024) (raising question of whether a rolling incorporation of foreign law violates notice and comment requirements under Pennsylvania's "Documents Law").

PLF also represents Wade and Teresa King, agricultural producers currently subject to enforcement proceedings brought by Ecology, in litigation challenging the imposition of civil penalties without a jury trial. *See King Ranch v. Dep't of Ecology*, No. 26-2-00263-13 (Grant Cnty. Super. Ct. filed Mar. 2, 2026). Through that litigation, PLF and the Kings are directly familiar with Ecology's enforcement practices and the issues presented in this case.

Amici applicants are therefore well positioned to assist the Court in evaluating the structural legal questions presented in this case, particularly as they relate to legislative constraints on agency enforcement authority and the proper application of the rulemaking requirements set out by Washington’s Administrative Procedures Act (WAPA), Ch. 34.05 RCW.

ISSUES TO BE ADDRESSED BY AMICI

1. Whether RCW 90.03.605(1)(b) imposes mandatory preconditions on the Department of Ecology’s authority to impose civil penalties, including the requirement that the agency provide written technical assistance identifying lawful means for a regulated party to accomplish its objectives within the framework of the law.

2. Whether an agency may rely on an unpublished internal policy—such as the February 15 “office deadline” at issue here—to foreclose lawful compliance options and thereby expose regulated parties to penalties, or whether such a policy

constitutes a “rule” under RCW 34.05.010(16) that must be adopted through notice-and-comment rulemaking.

NEED FOR ADDITIONAL ARGUMENT

The proposed additional amicus argument is necessary because this case presents structural issues that extend beyond the parties’ immediate dispute and have significant implications for administrative governance across Washington.

First, the parties’ briefing primarily addresses the application of RCW 90.03.605 to the specific facts of this case. Amicus applicants will provide a broader analysis of the statute as a legislative constraint on agency enforcement authority and will explain why treating its requirements as discretionary undermines the separation of powers and the Legislature’s role in defining the scope of delegated authority.

Second, while the parties address whether the February 15 deadline constitutes a “rule,” amicus applicants will provide additional analysis of precedent emphasizing that the definition of a rule turns on an agency directive’s effect rather than its label.

Amicus applicants will also address the due process and fair notice concerns raised when agencies rely on unpublished policies that alter access to statutory benefits and expose regulated parties to sanctions.

Because the structural concerns are not fully developed in the parties' briefing, amicus applicants' participation will assist the Court in resolving issues of substantial public importance.

CONCLUSION

For the foregoing reasons, PLF and the Kings respectfully request that the Court grant this motion and accept the accompanying brief amicus curiae.

This document contains 800 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED: April 10, 2026.

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PROOF OF SERVICE

I certify that on this date, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of April, 2026.

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INTRODUCTION

This case presents an important question about the limits of administrative power in Washington: whether an agency may impose civil penalties without complying with the Legislature’s express conditions on its enforcement authority and rely on unpublished internal policies as binding rules without complying with the Administrative Procedure Act.

The Washington Constitution vests legislative power in the Legislature, and agencies possess only the authority the Legislature confers. The decision below departs from those principles. It permits the Department of Ecology (“Ecology”) to impose penalties without providing statutorily required written technical assistance identifying lawful means of compliance, and to foreclose a lawful compliance pathway based on an unpublished “office deadline” that was never adopted through rulemaking.

If allowed to stand, that reasoning would erode statutory limits on agency enforcement and the APA’s core safeguards of

notice and accountability. Review is warranted under RAP 13.4(b)(3) because the decision raises a significant constitutional question of separation of powers and under RAP 13.4(b)(4) because it involves an issue of substantial public interest that should be determined by this Court.

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (“PLF”) and Wade and Teresa King, d/b/a King Ranch, respectfully submit this amici curiae brief in support of Petitioner’s Petition for Review.

PLF is a nonprofit public-interest law firm dedicated to defending individual liberty, private property rights, and the constitutional separation of powers. PLF regularly litigates cases involving administrative overreach and violations of procedural safeguards under state administrative procedure acts.

Wade and Teresa King own and operate King Ranch, a multi-generational family cattle ranch in eastern Washington. The Kings have been directly affected by Ecology’s enforcement practices and are currently subject to an administrative

enforcement proceeding seeking substantial civil penalties. Represented by PLF, they have filed a parallel action in superior court to vindicate their right to a jury trial. *See King Ranch v. Dep't of Ecology*, No. 26-2-00263-13 (Grant Cnty. Super. Ct. filed Mar. 2, 2026). As agricultural producers who depend on reliable access to water rights and face similar compliance and enforcement issues, the Kings have a strong interest in ensuring that statutory limits on agency authority are respected and that unpublished internal policies are not permitted to function as binding rules.

ARGUMENT

I. Interpretation of the sequence-of-enforcement statute, RCW 90.03.605(1)(b), is of substantial public importance

This case presents an important question about the meaning and enforceability of RCW 90.03.605(1)(b)'s "technical assistance" requirement, which the Legislature made a prerequisite to enforcement orders and civil penalties. The answer affects water users statewide.

RCW 90.03.605(1)(b) establishes mandatory prerequisites to enforcement. The Court of Appeals' decision treats those prerequisites as optional, allowing enforcement to proceed even where no meaningful assistance was provided. Review is warranted to ensure that legislative limits on enforcement authority are applied as written.

A. The statute establishes prerequisites to the exercise of penalty authority

In recognition of the complexity of water rights, the Legislature enacted RCW 90.03.605 to structure how Ecology exercises its enforcement authority. The statute provides that when Ecology determines a violation has occurred, it “shall first attempt to achieve voluntary compliance” and “shall offer information and technical assistance ... identifying one or more means to accomplish the person’s purposes within the framework of the law.” RCW 90.03.605(1)(b).

The statute requires these steps to occur in sequence, making technical assistance a mandatory prerequisite to enforcement. RCW 90.03.605(1). The Legislature’s use of the

word “shall” confirms that these obligations are mandatory. *See Erection Co. v. Dep’t of Lab. & Indus. of State of Wash.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

The Legislature’s design reflects a policy judgment: the State should seek to help regulated parties understand and navigate this highly technical regulatory regime, and enforcement actions should be reserved for bad actors who willfully ignore the law. The 2002 Legislature enacted EHB 2993 (codified in relevant part at RCW 90.03.605) expressly to shift the enforcement paradigm away from immediate penalties. The Senate Bill Report explained the purpose: “achieve compliance with water laws by, first, using education and information; then, using information and technical assistance to achieve voluntary compliance; and, if neither of those achieves compliance, taking enforcement action.” Senate Bill Report, 57th Leg., EHB 2993 (2002), at 1.¹

¹<https://tinyurl.com/ynjd6d63>

This history demonstrates the Legislature’s deliberate choice to prioritize assistance over coercion. Ecology itself has implemented the statute in other basins through formal rules that echo this sequence. *See, e.g.*, WAC 173-518-110(1) (requiring technical assistance before enforcement in the Dungeness River basin); WAC 173-505-150 (same for the Chehalis River basin). These regulations confirm what the Legislature intended: a structured, assistance-first process, not a perfunctory notice of violation followed by penalties.

B. As a matter of separation of powers, Washington Courts must give full effect to the “technical assistance” precondition

The statute’s requirements are not merely procedural—they are express conditions on the delegation of enforcement authority. When the Legislature authorizes an agency to impose civil penalties, it defines the terms on which that authority may be exercised.

This principle is foundational. Administrative agencies have no inherent authority; their powers are limited to those

delegated by the Legislature. *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). Where the Legislature imposes conditions on the exercise of coercive power, those conditions are binding. Courts should not ask whether compliance was *close enough*; they should ask whether the Legislature's conditions were satisfied in full. If not, the agency has acted beyond its authority.

The separation-of-powers concern is especially acute where, as here, the agency is exercising penalty authority. Civil penalties are a form of coercive governmental power. *See Tull v. United States*, 481 U.S. 412, 422–23, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). The Legislature's decision to condition that power on procedural safeguards reflects a judgment about fairness, notice, and accountability.

Allowing agencies to bypass those safeguards undermines that judgment. This Court has rejected such encroachments, emphasizing the judiciary's duty to “say what the law is” even when doing so constrains another branch. *Wash. State Legis. v.*

Inslee, 198 Wn.2d 561, 567, 498 P.3d 496 (2021). Separation of powers requires courts to enforce statutory limits, not defer to agency convenience. *Id.* at 567–68.

Here, the Court of Appeals’ interpretation renders the technical-assistance precondition a nullity: it allows Ecology to satisfy the statute by pointing to an informally adopted “office deadline” and declaring that no lawful compliance option exists. That approach permits the agency to define the scope of its own statutory obligation. By foreclosing a category of compliance options through internal policy, Ecology can ensure that no “means” of compliance is ever available—converting a mandatory statutory condition into a discretionary determination.

The consequences extend beyond this case. If agencies may redefine statutory preconditions through internal policies, legislatively imposed limits on enforcement authority can be narrowed or avoided without amendment or rulemaking. Statutory safeguards would cease to function as binding

constraints and instead operate as default rules subject to agency revision.

This case thus presents a structural question of statewide importance: whether statutory limits on agency enforcement authority will be treated as binding law or as discretionary guidance.

C. Proper interpretation of the “Technical Assistance” Requirement is of critical importance

The Court of Appeals concluded that Ecology satisfied RCW 90.03.605 by informing Petitioner that he lacked sufficient water rights and must cease irrigation. But that interpretation cannot be reconciled with the statute’s text. The statute requires Ecology to identify “one or more means” by which the regulated party may accomplish its “purpose[s]” within the law. That requirement is substantive. It imposes a duty on the agency to engage with the regulated party, to understand their objectives, and to identify lawful pathways for achieving them.

Merely informing a party that it is in violation and must stop is not assistance. It is enforcement. If such notice were sufficient, the statute’s requirement to provide “technical assistance” would add nothing to the enforcement process. Courts should avoid interpretations that render statutory language superfluous. *See, e.g., Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11–12, 43 P.3d 4 (2002). The Legislature listed education, technical assistance, and enforcement as distinct steps.

The record here illustrates the point. A lawful compliance pathway existed: the ability to *apply* for a seasonal transfer of water rights. *See* RCW 90.03.390; *Fode v. Dep’t of Ecology*, No. 40449-8-III, slip op. at 2 (Wash. Ct. App. Dec. 18, 2025). Ecology was aware of that option, yet it did not “identify[]” this as a “means to accomplish” Petitioner’s “purpose[.]” *See id.* at 6–7 (holding that “technical assistance” was satisfied by informing Fode he lacked water rights and must cease irrigation). Instead, Ecology rejected this proposed pathway because it had

adopted an informal policy (an “office deadline”) to foreclose this option. *See id.* at 2. In doing so, Ecology failed to provide “technical assistance” within the meaning of the statute.

Properly interpreted, RCW 90.03.605(1)(a)–(b) requires Ecology to engage with—and at least consider—a proposed compliance pathway. So even if Petitioner was not entitled to *approval* of a seasonal transfer, he was entitled to have an application meaningfully evaluated through the ordinary administrative process. Ecology cannot pursue enforcement while refusing to consider the very mechanism that could allow compliance.

The Court of Appeals’ conclusion rests on accepting Ecology’s claim that no compliance option was available. But that depends on whether Ecology’s “office deadline” validly foreclosed a seasonal transfer application—or was instead an improperly adopted rule. The two questions are inseparable. The Legislature imposed a structured sequence to prevent arbitrary enforcement and ensure a fair opportunity to comply before

penalties are imposed. If that structure can be bypassed, the Legislature's constraints on enforcement become ineffective. Review is needed to restore that structure and ensure uniform application of RCW 90.03.605.

II. Review is warranted to clarify whether an agency may impose “office deadlines” that change legal rights for affected individuals and businesses without allowing opportunity for public notice and comment

This case also presents an important APA question: whether an agency may impose binding limits on access to statutory processes through unpublished internal policies and then rely on those limits to justify enforcement. The Court of Appeals' decision permits exactly that. Review is warranted to clarify that agencies may not regulate through informal, binding directives that were adopted behind closed doors.

A. The February 15 deadline alters access to statutory benefits and therefore constitutes a rule

Ecology used its February 15 “office deadline” to refuse acceptance and processing of a seasonal transfer application, thereby eliminating a lawful compliance pathway. That action

affected two statutory interests: (1) the right to pursue a seasonal transfer under RCW 90.03.390, and (2) the right to receive technical assistance under RCW 90.03.605.

Under the APA, a “rule” includes any agency directive of general applicability that “establishes, alters, or revokes” a qualification relating to the enjoyment of statutory benefits. RCW 34.05.010(16). Under that definition, Ecology’s deadline is plainly a “rule.” The deadline imposes a timing restriction, not found in statute, and conditions access to a statutory process on compliance with that restriction. In practical terms, it determines whether a regulated party may pursue a compliance pathway at all. That is a substantive limitation on statutory rights. *See Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997) (holding agency-imposed priorities and prerequisites governing access to application processing constitute rules requiring rulemaking).

Because Ecology’s deadline was not adopted through rulemaking, it is not part of the “framework of the law” and

cannot be invoked to justify withholding technical assistance or imposing penalties. As such, Ecology's deadline also altered Petitioner's rights under RCW 90.03.605.

B. Agency policies with binding effect must be promulgated through rulemaking

The APA requires that agency policies affecting private rights must be developed through transparent, participatory processes. Rulemaking requirements—notice, comment, and publication—are not technicalities; they promote accountability, ensure better rules, and ensure legitimacy. *See Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992). Courts therefore focus on effect: if an agency policy of general applicability constrains regulated parties' options or determines their exposure to liability, it is a rule and must be promulgated through the APA's mandatory procedures.

Courts in other jurisdictions have recognized that agency-imposed cutoff deadlines governing access to statutory benefits constitute rules. In *El Paso Hospital District v. Texas Health & Human Services Commission*, the Texas Supreme Court held that

a data-submission cutoff date was a rule because it altered the regulatory framework and directly affected private rights. 247 S.W.3d 709, 714–15 (Tex. 2008). The cutoff operated not as internal convenience, but as a binding limit on what data—and thus reimbursement—regulated parties could obtain. *Id.* Because it was not adopted through rulemaking, it was invalid. *Id.* at 715. *See also Morton v. Ruiz*, 415 U.S. 199, 232–36, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) (agency may not rely on unpublished eligibility criteria to deny benefits).

The same is true here. Ecology’s “office deadline” functions as a cutoff: it determines whether applications will be accepted and whether a regulated party may pursue lawful compliance to avoid penalties. Washington law applies the same functional test. *See Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997) (agency priorities affecting when and how applications are processed require rulemaking); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 80, 11 P.3d 726

(2000) (agency directives with general effect on public rights trigger APA rulemaking).

C. The Court of Appeals’ reasoning conflicts with *Hillis* and allows agencies to impose binding rules without rulemaking

The Court of Appeals concluded the deadline was not a rule because Ecology has no duty to grant a seasonal transfer application. But this Court rejected that reasoning in *Hillis*. 131 Wn.2d at 377.

In *Hillis*, the Court held that although Ecology retains discretion whether to grant or deny a permit, applicants have a statutory right to have their applications accepted, investigated, and decided. *Id.* at 399. When an agency imposes priorities or prerequisites that affect that right, those policies constitute “qualifications or requirements” and must be adopted through rulemaking. *Id.* The same principle applies here. The relevant right is not approval of a transfer, but access to the statutory process. Ecology’s deadline eliminated that right by preventing

applications from being accepted or processed at all, yet it treated the deadline as binding while denying technical assistance.

The Court of Appeals' reasoning would allow agencies to impose new limits on statutory processes without rulemaking whenever they retain discretion over outcomes, narrowing the APA's protections. That problem is compounded by the court's acceptance of Ecology's inconsistent position: it treats the February 15 deadline as binding when refusing to process applications and denying technical assistance, yet as nonbinding to avoid rulemaking requirements. The APA does not permit such a dual approach.

Review is warranted to reaffirm that agencies may not regulate through informal, binding directives.

CONCLUSION

For the foregoing reasons, this Court should grant review.

CERTIFICATE OF COMPLIANCE

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Respectfully submitted on this 10th day of April, 2026.

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