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FISH & WILDLIFE DIV. OLYMPIA

State of Washington

DEPARTMENT OF FISH AND WILDLIFE

Mailing Address: 600 Capitol Way N, Olympia, WA 98501-1091 - (206) 902-2200; TDD (206) 902-2207
Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia, WA

September 10, 1997

Mr. Dana Young
2920 24th Avenue SE
Olympia, Washington 98512

Dear Mr. Young:

Enclosed is the final Decision Modifying Initial Order in connection with the denial of your 1996 Hydraulic Permit Approval (HPA).

Your rights to seek administrative reconsideration are set out in the order. Additionally, you have thirty (30) days from the mailing date of this final Order to seek judicial review of the Director's decision. The appeal may be made to Thurston County Superior Court, the superior court of your county of residence, or the superior court of any Washington county in which you have property affected by the decision.

The required contents of the petition are set out in RCW 34.05.546, and additional service requirements in RCW 34.05.542.

Sincerely,

Evan S. Jacoby, Counsel
Fish and Wildlife Legal Services

cc: Gordy Zillges, WDFW Habitat
K. McLeod, AAG
Allen Miller, Attorney

STATE OF WASHINGTON)
COUNTY OF THURSTON)

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding and to that parties' attorney or authorized agent.

Dated at Olympia, Washington this 17th day of September, 1997.

Robin Ayers, Representative - Department of Fish and Wildlife

BEFORE THE WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE

In the Matter of the Denial
of an Hydraulic Project Approval
to:

DANA YOUNG

No. AH 97-016
DECISION MODIFYING INITIAL
ORDER

A hearing was held on this matter on April 30, 1997, pursuant to notice duly given, before Administrative Law Judge Jane Habegger. Subsequently the Administrative Law Judge issued an Initial Order on May 16, 1997, and caused the Initial Order to be served on all parties of record herein. On June 5, 1997, Assistant Attorney General Kathryn McLeod filed a Petition for Administrative Review of Initial Order. On June 12, 1997, the appellant filed a Reply to State's Petition for Review of Initial Order. The Petition and Reply were timely. WAC 10-08-211.

Bern Shanks, Director of Fish and Wildlife, has reviewed the record, including the Findings of Fact, Conclusions of Law, Initial Order, Petition for Administrative Review and Reply, and does now adopt the Findings of Fact as his own with the following exceptions: in the Statement of the Case and Finding of Fact 5, the issue date of the citation is May 24, 1996; in Finding of Fact 4, the appellant's name appeared on a burn permit, not a building permit; in Finding of Fact 13, the appellant has a Masters Degree in Business Administration and a Bachelor's Degree in Fish Management.

The Director adopts Conclusions of Law 1 through 5 as his own. The Director rejects Conclusion of Law 6, and instead concludes:

(6) RCW 75.20.100 requires hydraulic project approval, "before commencing construction or work." The statute is unambiguous. Any person who, "desires to construct any form of hydraulic project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state" is required to have written approval prior to taking action. The appellant is asking for ex post facto hydraulic project approval of the concrete bulkhead. Not only does issuance of an after-the-fact HPA negate the ability of the Department to assess the pre-construction habitat, it decriminalizes an offense the Legislature has specified as a crime. RCW 75.20.100 also provides, "If any person or government agency commences construction on any hydraulic works or projects subject to this section without first having obtained written approval of the department as to the adequacy of the means proposed for the protection of fish life...the person or director of the agency is guilty of a gross misdemeanor." Thus, criminal culpability lies at the time the work is commenced without a permit. This is not to say that a

Dana Young
Decision and Order

subsequent permit may not be issued for previously permitted work in progress. For example, a preliminary permit for culvert installation may need modification if unexpected groundwater conditions are encountered. In such an instance, amendment of the initial permit or issuance of a second permit is appropriate.


The Director adopts Conclusions of Law 7 and 8 as his own.

Having adopted the Findings of Fact and Conclusions of Law as modified herein, the Director makes the following:

ORDER

IT IS HEREBY ORDERED That the application of Dana Young for an Hydraulic Project Approval to construct a concrete bulkhead at Long Lake is denied.

DATED at Olympia, Washington this 11 day of September, 1997.


Bern Shanks, Ph.D., Director

NOTICE OF ADMINISTRATIVE RELIEF

Under RCW 34.05.470, you have ten (10) days after the mailing date of this Final Order to file a Petition for Reconsideration. Such Petition must state the specific grounds upon which relief is requested, and should be filed with the Office of the Director of Fish and Wildlife at the letterhead address.

Dana Young
Decision and Order

BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE
HEARINGS

In Re:

The Denial of the Hydraulic Project
Approval of:

Dana Young

Appellant.

DOCKET NO. AH-97-016

INITIAL ORDER

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Jane L. Habegger, Administrative Law Judge, conducted an administrative hearing on April 30, 1997 on this matter. The Appellant appeared and was represented by Allen Miller, Attorney at Law. Kathryn McLeod, Assistant Attorney General, represented the Washington State Department of Fish and Wildlife (department).

STATEMENT OF THE CASE

The Appellant owns waterfront property on Long Lake. The street address of the property is 2433 Mayes Road S.E. In May 1996, the Appellant replaced a wooden bulkhead with a concrete bulkhead. The department issued a citation on June 12, 1996 to the Appellant for failure to receive an hydraulic project approval (HPA) prior to the construction of the new concrete bulkhead. On July 10, 1996 the Appellant signed a Joint Aquatic Resources Permit Application (JARPA) requesting an HPA from the department. The application for bulkhead repair was denied by the department in a letter dated July 29, 1996. The Appellant filed an informal appeal. In a letter dated October 28, 1996 the department affirmed the denial of the HPA and requested that the Appellant complete an application for an

INITIAL DECISION - 1
Docket No. AH-97-016

Exhibit 1

HPA for the removal of the concrete bulkhead and fill before December 1, 1996. The Appellant filed the instant appeal on November 22, 1996.

FINDINGS OF FACT

1. Long Lake is an urban lake located within the boundaries of the city of Lacey, Washington. The department has designated the lake as lacustrine, limnetic, with an unconsolidated bottom, permanently flooded and excavated. This means that the lake is an open body of water with deepwater habitats and relatively steep shorelines. The lake bottom is dominated by small rocks, gravel, sand and silt, and at least thirty percent of the bottom has rooted vegetation. Long Lake has approximately seven miles of shoreline. It is inhabited by the following fish species: rainbow trout, brown bullhead, black cropppy, pumpkin seed sunfish, rock bass, war mouth bass, yellow perch and possibly others. Rainbow trout are planted in the lake. Long Lake is managed heavily by the department to maintain trout and also for the production of bass. Approximately seventy percent of the shoreline of Long Lake is developed.

2. The Appellant owns approximately 65 feet of waterfront property on Long Lake. He purchased the property in December, 1996. In May 1996 prior to purchasing the property, the Appellant replaced an older wood bulkhead on the property with a concrete bulkhead. The subject property was surveyed in April 1994 and again in April 1997 by James A. Pantier and Associates. In the 1997 survey, the surveyor overlaid the 1994 survey over the new survey of the property. This showed an original wood bulkhead located on the waterward side of the newer concrete bulkhead which replaced it. The 1994 survey also showed that the

original wood bulkhead ran nearly the entire length of the Appellant's shoreline while the concrete bulkhead runs thirteen feet short of the southerly property line. The thirteen feet of property which lacks a bulkhead is designed to be used as a boat launch. The 1994 survey shows the ordinary high water mark as appearing on the westerly side of the wood bulkhead. The westerly side of the property is also the waterward side of the property. An area habitat wildlife biologist employed by the department agreed that the ordinary high water mark was waterward of the wood bulkhead.

3. The Appellant maintains that he constructed the new concrete bulkhead to the landward side of the older wood bulkhead and then removed the wood bulkhead after the concrete bulkhead was in place. This testimony is corroborated by the 1997 survey which shows the original wood bulkhead to the water side of the new bulkhead.

4. On May 15, 1996 an enforcement officer employed by the department went to the subject property after receiving a referral from another department agent. The Appellant's name appeared on a building permit. The agent took a number of photographs of a concrete bulkhead in the process of being constructed on the property. He observed water from the lake approximately four inches deep touching the concrete bulkhead. The agent telephoned the Appellant to speak to him about the project.

5. On June 12, 1996 a non-traffic citation was issued to the Appellant by a department employed enforcement officer. The citation provides that the Appellant violated RCW 75.20.100 by "*performing work within state waters (Long*

Lake) without obtaining a hydraulic projects approval." The citation was from Thurston County District Court. The Appellant pled guilty and on June 12, 1996 the District Court entered a one-year deferred sentence against him and fined the Appellant \$100.00.

6. On June 27, 1996 an area habitat biologist employed by the department met with the Appellant on his property. She maintains that she found the ordinary high water mark to be located on the concrete bulkhead. She further maintains that the bulkhead is located within the ordinary high water mark. She normally determines the location of the ordinary high water mark by observing the soil and type of vegetation present. She determined that the concrete bulkhead should be removed in order to not cause damage to fish life in the lake and restore a portion of the habitat.

7. The department's preferred method to prevent erosion of a shoreline and to limit an adverse impact on fish life is to use bioengineering. If that does not prevent erosion, then a wood bulkhead may be permitted. The last choice of the department to prevent erosion is the construction of a concrete bulkhead.

8. A bioengineering plan for a piece of property similar to the Appellant's could call for half of the property to be used for fish habitat and half for swimming and recreation. The property would be graded with a slope and a beach is created. In the area created for fish habitat, there would be emergent plant species such as bulrushes, cattails and reeds in the area between the underwater and above water portions of the property. This emergent vegetation provides a food source for fish. It also provides a protected area for fish, especially

small and young fish, and also helps to keep the water cooler. Niches in the shoreline also provide a place for spawning to occur. It is not common to see emergent vegetation in front of a concrete bulkhead.

9. The habitat biologist assigned to Long Lake has seen minimal erosion of the shoreline at Long Lake. She has been in her position for eight years. For between six and one-half and seven years, Long Lake has been within her jurisdiction.

10. A concrete bulkhead has the following detrimental effects to fish life: (1) it hardens the bank; (2) it reduces the amount of vegetation; and (3) it eliminates an irregular shoreline.

11. Immature fish benefit from having an irregular shoreline with nooks and crannies which they can use to hide from predators. These areas also support plant life which the fish may consume. Vegetation near and over the shoreline also acts to lower the water temperature by creating shade.

12. The department takes the absolute position that they do not have the authority to issue an HPA after a project has been constructed. They maintain that the statute only allows for the issuance of permits prior to the construction of an hydraulic project.

13. The Appellant hired a consultant to analyze his shoreline property. The consultant has a masters degree in Fisheries Management as well as a masters degree in Business Administration. He summarized that the impact of the Appellant's construction of a concrete bulkhead was relatively insignificant since the lake was already overdeveloped. It is his opinion that the impact of the

Appellant's bulkhead on the fishery is minuscule in relation to the degree of development on the lake. He proposed that if the Appellant's concrete bulkhead were left in place, to mitigate any adverse impact upon fish life, a large rootwad and bolders could be placed in the water at the north end of the property and riparian vegetation such as western red cedar, western hemlock, hazelnut and oceanspray could be planted on the north end of the bank, and that a couple of conifers could be planted to the south of the middle of the bulkhead.

14. Since 1992 there has been one concrete bulkhead approved by the department on Long Lake. It replaced an existing bulkhead. There have also been two bulkheads removed and not replaced, and one removed and replaced with bioengineering.

15. Certain species of plants can tolerate living submerged in water. Some plant species cannot. Others can tolerate their roots being submerged during part of the year and not during other parts of the year. The latter are known as emergent vegetation.

16. A photograph of a portion of the old wooden bulkhead on the Appellant's property taken by a neighbor several years ago shows a single log bulkhead with vegetation coming right up to the bulkhead.

17. In the JARPA application filed by the Appellant on July 10, 1996 he answered *yes* to question 10a. which asked "*Will any structures be placed waterward of the Ordinary High Water Mark or Line for fresh or tidal waters?*".

18. Concrete cinder block bulkheads are present on the shoreline of Long Lake to the north and south of the Appellant's property.

19. The primary reason that the Appellant replaced the old bulkhead on his property is that it was in disrepair, was slippery and he was concerned that his children might be injured on it.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the persons and subject matter herein pursuant to RCW 75.20.100 and WAC 220-110-350.

2. RCW 75.20.100 provides in pertinent part:

"In the event that any person or government agency desires to construct any form of hydraulic project or perform other work that will use, divert, obstruct, or change the natural flow or bed of any salt or fresh waters of the state, such person or government agency shall, before commencing construction or work thereon and to ensure the proper protection of fish life secure the written approval of the department as to adequacy of the means proposed for the protection of fish life."

Later the statute continues:

"...A complete application for approval shall contain general plans for the overall project, complete plans and specifications of the proposed construction or work within the mean higher high water line for salt water or within the ordinary high water line in fresh water and complete plans and specifications for the proper protection of fish life."

3. The first issue which must be addressed in this decision is whether the department is limited to jurisdiction over hydraulic projects which are located within the ordinary high water mark. The answer to the question is that they are not so limited. The department has jurisdiction over any hydraulic project which, "*will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state.*" The question posed in this case is does the project already completed by the Appellant use, divert, obstruct, or change the

natural flow or bed of Long Lake? If so, an HPA is required. Clearly a project which is located within the ordinary high water mark would fall within the jurisdiction of the department. This is not the exclusive criteria, however, to determine whether an HPA is required.

4. To further define the department's jurisdiction we look to the department's regulations. WAC 220-110-030 (1) provides that a person shall obtain an HPA before conducting an hydraulic project. "Hydraulic project" is defined in WAC 220-110-020 (22) as follows:

"Construction or performance of other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. Hydraulic projects include forest practice activities, conducted pursuant to the forest practices rules (Title 222 WAC), that involve construction or performance of other work in or across the ordinary high water line of: ..."

5. Thus, the pivotal question is not whether the Appellant's bulkhead is within the ordinary high water line, but whether the construction of the bulkhead did use, divert, obstruct or change the natural flow or bed of the lake. Although there is clearly a factual dispute as to the location of the ordinary high water mark on the Appellant's property, the Appellant's own expert witness recognized that the concrete bulkhead would cause some, albeit minimal, impact upon fish life in the lake. The undersigned concludes that the Appellant's concrete bulkhead will cause a change in the natural flow or bed of the lake. Therefore, the department has jurisdiction over this matter. This conclusion is supported by

the fact that when water hits a solid concrete wall, it is likely to cause a stronger wave bouncing off the wall than if the water were hitting an older wood bulkhead such as was present prior to the construction of the concrete bulkhead. It is not necessary to be an expert in the field to reach this conclusion.

6. We disagree with the department's narrow view of their authority to issue permits only prior to the construction of a hydraulic project. In doing so, we recognize that RCW 75.20.100 provides that a permit is required "*before commencing construction or work*". However, it is possible that a construction project could meet the requirements of the department, even though an application for a permit was not filed prior to construction. It is also possible that it could be appropriate for the department to issue a post-construction permit with conditions in some cases. Obviously, it is desirable for the department to have the opportunity to view the site prior to the construction occurring. However, we think that a post-construction application should be approved or denied on the merits of the situation and not solely on the basis that the application was not timely filed.

7. In this case, the possible adverse effects on fish life must be measured against the habitat which existed immediately prior to the construction of the concrete bulkhead by the Appellant. Previously, the Appellant had an older wood bulkhead. One photograph of a part of that bulkhead was submitted into the record in this proceeding. Even to this untrained eye, the wood bulkhead appears to provide better habitat for fish. It appears closer to a natural setting than the bold and stark concrete bulkhead which the Appellant constructed. The fact that

the Appellant constructed the new bulkhead thirteen feet shorter than the old bulkhead does not mitigate the effects of the project. That portion of the property which now lacks a bulkhead is designed for use as a boat launch. This means that an automobile will be driven, at least on occasion, to the shoreline. This is not an activity which will assist in the development of fish habitat. Moreover, there would be no motivation to use the principles of bioengineering in this location (e.g. large rocks, vegetation, trees and shrubs on the bank) since these things would interfere with the launching of a boat. Thus, we agree with the department that the Appellant's concrete bulkhead has an adverse impact upon fish in Long Lake. The adverse impact is the loss of habitat, vegetation, shading and the like especially valuable to young fish and to reproduction of fish.

8. In addition, the Appellant's argument that he should be issued an HPA fails because he has not proven that the new concrete bulkhead which he constructed was needed to prevent further erosion on an eroding bank. He did not even assert that the bank was eroding prior to the construction of the new bulkhead. On the contrary, he testified that the reason that he wanted to replace the old wood bulkhead was that it was in disrepair, was slippery and he was concerned that his children might be injured on it. The undersigned concludes that there is no evidence that significant erosion of the bank motivated the Appellant to construct the concrete bulkhead. This conclusion is bolstered by the testimony of the habitat biologist assigned to Long Lake. She has seen minimal erosion of the shoreline at Long Lake in the past six and one-half to seven years. WAC 220-110-050(1) clearly provides that bank protection work is restricted to work

necessary to protect eroding banks. This same rule also provides that bio-engineering is the preferred method to use to protect an eroding bank where practicable.

9. For the above stated reasons the department's denial of the request to issue an HPA to the Appellant for a concrete bulkhead is affirmed.

ORDER

The department's decision in this matter is ORDERED AFFIRMED.

NOTICE TO PARTIES:

WAC 220-110-340 (6) provides that the director or the director's designee shall review this initial order and enter a final order as provided in RCW 34.05.464.

ENTERED at Olympia, Washington on the date of mailing.

Jane L. Habegger

Jane L. Habegger
Administrative Law Judge
Office of Administrative Hearings

cc: Appellant
Allen Miller, Attorney
Kathryn McLeod, AAG
Jim Felber, Deputy Chief ALJ

INITIAL DECISION - 11
Docket No. AH-97-016

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SEP 7 2000
GARY L. LOCKE
Governor

OFFICE OF ATTORNEY GENERAL
FISH & WILDLIFE DIVISION



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

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OFFICE OF THE GOVERNOR

September 6, 2000

Mr. Ivan Urnovitz and Mr. Vernon Young
Northwest Mining Association
10 North Post Street, Suite 414
Spokane, Washington 99201-0772

Re: RCW 34.05.330(3) appeal of the June 26, 2000 denial by the Washington Fish and Wildlife Commission ("Commission") of that certain Petition for Reconsideration to Amend or Repeal Provisions of the "Gold & Fish Rule" to Deregulate Gold Panning Activities and Other Purposes ("Petition"), dated May 12, 2000

Dear Mr. Urnovitz and Mr. Young:

Thank you for your letter dated July 25, 2000 and received by my office on July 26, 2000, appealing the Commission's decision to deny the Petition.

Pursuant to RCW 34.05.330(3), I have fully reviewed your appeal of the Petition and the relevant statutes and regulations, and have affirmed the Commission's decision.

It is my policy to intervene in matters presented to me under RCW 34.05.330(3) only when I believe the agency or commission whose decision is at issue has abused its discretion or acted arbitrarily or capriciously. It is also my policy not to second-guess the thoughtful and deliberate decisions of a state agency or commission, so long as those decisions are well founded and proper under the law. This is an extremely high standard of review.

The Commission had a proper basis for its decision to deny the Petition for the reasons described below. I have responded to each of your arguments in turn:

1. Hand-held pan exemption: You argued that the Commission failed respond to your point that hand-held pans are not regulated by the states of Idaho or Oregon. Whether or not these states regulate this form of prospecting is immaterial to the Commission's or the Washington Department of Fish and Wildlife's ("WDFW") authority to do so, and therefore that objection is not relevant.

I understand that individual gold pans must each have a very small impact on the environment. However, I am not in a position to judge the cumulative effect of all small scale panning in a particular stream. Because RCW 75.20.330 explicitly includes pans in its definition of methods used for "small scale prospecting and mining," WDFW is authorized to regulate their use.

2. Authority to regulate activities above the ordinary high water line: WDFW is authorized by the former RCW 75.20.100(1) (recently recodified in Chapter 77 RCW) to review and approve or deny "any form of hydraulic project or ... other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state." The statute does not limit this authority to areas below ordinary high water or any other water/land boundary. Accordingly, WDFW is clearly authorized to regulate activity outside the ordinary high water line. WDFW is to base its regulatory decisions on "the proper protection of fish life." It appears from the quoted language in your letter that you misread the statute.

As with gold panning, applying common sense, I understand your point that it is difficult to see how one individual working with a shovel more than 200 feet beyond the ordinary high water line might affect the natural flow or bed of a stream. Similarly applying common sense, however, it is also easy to understand how the cumulative effect of one or several people working along a stream, over time, could materially affect the flow of sediment into a stream and affect fish life.

Please note that the Gold and Fish pamphlet allows exceptions to its restrictions if parties seek a standard Hydraulic Project Approval; thus, activities in the 200 feet beyond the ordinary high water line are not precluded but simply require additional consideration. I urge you to seek an exception if you have an appropriate project in mind.

3. Adequacy of Small Business Economic Impact Statement ("SBEIS"): The statute requiring an SBEIS, RCW 19.85.040, does not require agencies to address secondary impacts of regulations. The SBEIS prepared by WDFW deals with the impacts of the Gold and Fish rule on small commercial prospecting and mining businesses and compares those impacts to effects on large prospecting and mining businesses. The document does not, nor is the agency required to, address the effects of the rule on those who might supply equipment to the parties directly affected. The SBEIS appears to meet the department's legal obligations.

4. Lack of access to documentation justifying rule content: It is my understanding that WDFW has maintained a complete rule-making file, as required by RCW 34.05.370, that includes all materials used or submitted in the course of developing the Gold and Fish pamphlet. This file is available for public review upon request.

5. Applicability of rule to activities above ordinary high water line: As noted above, WDFW is not statutorily limited to applying the Hydraulic Code only to activities within the ordinary high water line. WDFW is authorized by the former RCW 75.20.100(1) (recently recodified in Chapter 77 RCW) to review and approve or deny "any form of hydraulic project or ... other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state." WDFW is to base its decisions on "the proper protection of fish life." The statute does not limit this authority to areas below ordinary high water or any other water/land boundary. In its efforts to "preserve, protect, perpetuate and manage the food fish and shellfish in state waters and offshore waters" (former RCW 75.08.012) WDFW must exercise judgment in determining whether excavation activity (which could include situations where groups are prospecting together and thereby exceed "any individual using a regular shovel") could affect

Mr. Ivan Urnovitz and Mr. Vernon Young
September 6, 2000
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water flow into a streambed or watercourse that could change the natural flow or bed. This is fully within WDFW's jurisdiction.

Thank you for your extensive efforts and profound commitment to preserving micro-scale mining opportunities for Washington's citizens. I urge you to pursue mining methods that can be granted permits or exceptions as provided in the Gold and Fish pamphlet.

Sincerely,



Gary Locke
Governor

cc: Dennis W. Cooper, Code Reviser
Tim Martin, Co-Chief Clerk, House of Representatives
Cindy Zehnder, Co-Chief Clerk, House of Representatives
Tony Cook, Secretary of the Senate
Kelly D. White, Chairman, Washington Fish and Wildlife Commission
Jeff Koenings, Director, WDFW