



State of Washington
Department of Fish and Wildlife

Mailing Address: 600 Capitol Way N, Olympia WA 98501-1091, (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia WA

August 24, 2009

Friends of Cannery Cove
Attention: Gerald Elfendahl
7823 Westerly Lane NE
Bainbridge Island, Washington 98110

Dear Mr. Elfendahl:

SUBJECT: DECISION ON THIRD PARTY INFORMAL APPEAL OF HPA 117476-1 ISSUED TO THE CITY OF BAINBRIDGE ISLAND ON JUNE 24, 2009 FOR STRAWBERRY PLANT SHORELINE RESTORATION PROJECT ON EAGLE HARBOR (15.9100), WITHIN PUGET SOUND IN KITSAP COUNTY

On July 24, 2009, the Washington Department of Fish and Wildlife (WDFW) received and accepted your request for a third-party informal appeal of Hydraulic Project Approval (HPA) 117476-1. This HPA was issued to the City of Bainbridge Island on June 24, 1009, for the Strawberry Plant Shoreline Restoration Project.

On August 19, 2009, Lisa Wood, HPA Appeals Coordinator, held the informal appeal hearing at WDFW headquarters in Olympia. Attending the hearing were John Small, Anchor QEA and agent for the permittee; Peter Namtvedt Best, City of Bainbridge Island; Chris Waldbillig, WDFW Area Habitat Biologist (AHB) who wrote the HPA; Teresa Eturaspe, WDFW staff observer; and you.

In discussing the issues below, I have considered verbal testimony from the hearing and written information submitted before the hearing, including your request for appeal.

Background/Project Description

The project site is located in Eagle Harbor, within Puget Sound, on the eastern shore of Bainbridge Island in Kitsap County. The project site has been used for several commercial functions over the years, including a strawberry packing plant, sand and gravel processing facility, boat building yard, housing, and office space. The buildings burned down in 1997. In February 2009, the Department of Natural Resources removed all 110 creosote pilings from the project site. There is currently one small building on the site used as a restroom and storage.

The proposed project includes the following work:

- removing concrete fill, brick, and debris from the intertidal zone;
- removing about 250 feet of shoreline armoring;
- removing about 5500 cubic yards of fill;
- removing about 13,000 square feet of concrete and asphalt paving;
- removing invasive plant species;

- restoring the mouth of the adjacent stream (variously called Weaver or Cannery Creek) and intertidal, fringe marsh, and riparian habitat;
- building a small launch for non-motorized watercraft;
- building an overwater viewing platform in the footprint of former fill; and
- building a new pedestrian bridge over the creek.

Finfish populations in the project area include coho, chinook, chum, and pink salmon; shiner and surf perch; sculpins; flatfish; gunnels; tubesnouts; pipefish; and possibly steelhead and cutthroat trout. Shellfish populations in the project area include oysters, mussels, and clams.

Issues of Appeal

In the arguments you presented in your appeal letter and during the hearing, you expressed the following concerns about the proposed project.

Your main concern is the need to explore other options for this project. There may be a better, less expensive plan for the site. The money would be better spent on another project.

1. The most significant use of the site of the proposed project was as a strawberry cannery. There are also known archaeological resources that have been identified, with the high probability and likelihood of others yet to be surveyed in several areas. The proposed project will carve away more than 300 feet of shoreline. The site should remain undisturbed to maintain the historical value of the site.
2. The project site should remain largely unchanged to preserve water access for the public. The existing ADA-accessible walkways should be retained. The plan for the proposed project gives people no ADA access, only about 15 feet of water access, and a tiny trail. Launching a boat from the proposed beach gravel boat ramp that extends no further waterward than the 10 foot MLLW line will be unsafe and damage the tide flats with footprints.
3. The project site should be used for teaching and recreation, and possibly as a research site. The project site is a healthy place for shellfish now. There is no industrial contamination, only strawberry stems, sand, and gravel.
4. The site's natural features should be enhanced. The presence of artesian wells at the project site was not considered. The existing concrete and asphalt paving filters contaminants from an upland property; removing it will eliminate this filtering. A weeping willow and a maple tree on the western peninsula will be killed by saltwater intrusion into their root zones when the shoreline is moved landward. Cannery Creek is currently impacted by stormwater runoff and impassable culverts.
5. Extensive intertidal excavations will cause siltation of the intertidal area and beds. This is in addition to siltation of the stream by project activities adjacent to it. There is no way to adequately prevent siltation into the bay; this sensitive, low energy estuary will take decades to recover from the excavation. You also question the reliability of hay bales used to control siltation.

Disposition of the Issues Under Appeal

After reviewing the written record and information presented to Ms. Wood before and during the August 19, 2009, hearing, my findings are as follows.

In her August 10, 2009, letter accepting your request for appeal and setting the hearing date, on the telephone, and again at the beginning of the appeal hearing, Ms. Wood informed you that only issues pertaining to protection of fish life could be considered during the hearing. However, during the hearing, as you did in your letter, you described several issues that do not pertain to protection of fish life and that are not appealable under Chapter 220-110 WAC. Only one issue you identified, siltation, could have detrimental impacts to fish life.

Several provisions of the HPA address siltation that might be released during the various aspects of constructing the proposed project. These provisions are standard to HPAs for similar projects, are effective in preventing or minimizing erosion and its impacts to fish life, and are worded as follows:

Footbridge Construction:

12. Erosion control methods shall be used to prevent silt-laden water from entering the stream. There may include, but are not limited to, straw bales, filter fabric, temporary sediment ponds, check dams of pea gravel-filled burlap bags or other material, and/or immediate mulching of exposed areas.

13. All waste material such as construction debris, silt, excess dirt or overburden resulting from this project shall be deposited above the limits of flood water in an approved upland disposal site.

Bulkhead and Fill Removal:

18. As indicated in the plans, the existing piling/concrete/rock bulkhead shall be removed from the beach and deposited upland such that it does not enter the waters of the state. The new slope of the beach shall conform to the plans submitted with the JARPA. All disturbed and created areas shall be replanted with appropriate vegetation.

Water Quality:

20. Project activities shall be conducted to minimize siltation of the beach area and bed.

22. All debris, petroleum products, or deleterious material resulting from construction shall be removed from the beach area and bed and prevented from entering waters of the state.

23. Project activities shall not degrade water quality to the detriment of fish life.

Because these provisions have proven successful in preventing sediment impacts in similar projects, and you did not provide any evidence to suggest they would not be effective for this project, I find that the HPA will provide for the protection of fish life.

Except for siltation, you did not identify potential impacts to fish life from the construction of the proposed project in either your letter or your testimony. You provided no information showing that the proposed project or the HPA's provisions do not fully protect fish life from the proposed project's detrimental impacts. Nor did you indicate what relief you sought from the informal appeal process. You expressed your desire for an alternate project, but did not ask that the HPA be withdrawn or modified. In fact, Ms. Wood specifically asked you if you had any concerns about fish life in regards to the proposed project. You stated that the HPA was good, you had no problems with the HPA, and you were sure that the HPA protected fish life. Therefore I find that the HPA is valid as written.

Gerald Elfendahl
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Summary and Conclusions

Under RCW 77.55.021(3)(a) "*protection of fish life is the only ground upon which approval of a permit may be denied or conditioned.*" The provisions in the HPA for controlling erosion and sedimentation are sufficient to properly protect fish life. Historical value of the project site; availability of public access; potential for teaching, recreation, and research; and the natural features you describe cannot be considered when approving or conditioning an HPA, and thus are not appealable issues.

I find that HPA 117476-1 fully protects fish life from the proposed project's impacts. The HPA shall stand as written.

Further Appeal Rights

If you disagree with this decision you may file a written request for formal appeal under WAC 220-110-350(1) (Formal Appeal of Administrative Decisions) within 30 days of the date of this letter. Send your request to WDFW Habitat Program at 600 Capitol Way North, Olympia, WA 98501-1091.

If you have any questions, please contact Lisa Wood, HPA Appeals Coordinator, at (360) 902-2260.

Sincerely,



Greg Hueckel, Assistant Director
Habitat Program

Enclosure

cc: Marc Daily, Technical Applications Division Manager
Pat Chapman, Regulatory Services Coordinator
Lisa Wood, HPA Appeals Coordinator
Stephan A. Kalinowski, Region 6 Habitat Program Manager
Chris Waldbillig, Area Habitat Biologist
John Small, Agent for Permittee
Peter Namtvedt Best, Permittee
Files

WAC 220-110-350

Formal appeal of administrative decisions.

(1) The following procedures shall govern formal appeals of department actions taken under RCW 77.55.021, except as indicated in RCW 77.55.301(5)(a), 77.55.151, 77.55.161 (2), or 77.55.291. Subsection (2) of this section addresses appeals before the hydraulic appeals board. This rule does not apply to any provisions or conditions in pamphlets, or supplemental approvals as defined in WAC 220-110-020 (53)(c) and (96). A person who disagrees with a provision or condition in a pamphlet HPA or its supplemental approval may apply for an individual, written HPA.

(a) A person who is aggrieved or adversely affected by the following department actions may request a formal appeal:

- (i) The denial or issuance of an HPA, or the conditions or provisions made part of an HPA;
- (ii) An order imposing civil penalties; or
- (iii) Any other agency action by the department's habitat program for which an adjudicative proceeding is required under the Administrative Procedure Act, chapter 34.05 RCW.

(b) As required by the Administrative Procedure Act, the department shall inform the permittee, HPA applicant or person subject to civil penalty order of the department, of the opportunity for appeal, the time within which to file a written request for an appeal, and the place to file it.

(c) A request for an appeal shall be in writing and shall be received during office hours by the department within thirty days of the agency action that is being challenged. Requests for appeal shall be mailed to HPA Appeals Coordinator, Department of Fish and Wildlife, Habitat Program, 600 Capitol Way N., Olympia, Washington 98501-1091, or hand-delivered to 1111 Washington Street S.E., Habitat Program, Fifth floor. If there is no timely request for an appeal, the agency action shall be final and unappealable.

(d) The time period for requesting a formal appeal is suspended during consideration of a timely informal appeal. If there has been an informal appeal, the deadline for requesting a formal appeal shall be within thirty days of the date of the department's written decision in response to the informal appeal.

(e) The written request for an appeal shall be plainly labeled as "Request for Formal Appeal" and shall contain the following:

- (i) The name, address, e-mail address (if available) and phone number of the person requesting the appeal;
- (ii) The specific agency action that the person contests, such as denial of an HPA, a particular condition in an HPA, an order imposing civil penalties, etc.;
- (iii) Whether the person is the permittee, HPA applicant, landowner, resident, or other basis for the person's interest in the agency action in question;
- (iv) The date of denial, issuance, or condition of an HPA, if the person is contesting denial, issuance, or conditioning of an HPA;
- (v) Specific relief requested; and
- (vi) The attorney's name, address, e-mail address (if available) and phone number, if the person is represented by legal counsel.

(f) The appeal may be conducted by the director, the director's designee, or by an administrative law judge (ALJ) appointed by the office of administrative hearings. If conducted by an ALJ, the ALJ shall issue an initial order under RCW 34.05.461. The director or the director's designee shall review the initial order and enter a final order as provided by RCW 34.05.464.

(g) All hearings conducted by the director, the director's designee, or an ALJ under subsection (6) of this section, shall comply with the Administrative Procedure Act and the model rules of procedure, chapter 10-08 WAC.

(2) The hydraulic appeals board hears appeals of the following permits:

- (a) Under RCW 77.55.021 for the diversion of water for agricultural irrigation or stock watering purposes or when associated with streambank stabilization to protect farm and agricultural land as defined in RCW 84.34.020;
- (b) Under RCW 77.55.241 for offsite mitigation proposals;
- (c) Under RCW 77.55.141 for single family marine bulkheads or rockwalls;
- (d) Under RCW 77.55.181 for fish habitat enhancement project HPA conditions or denials.

The appeal procedures for the board are found in WAC 259-04-060 and chapter 371-08 WAC.