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Fish, Wildlife & Parks Division

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**BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF FISH AND WILDLIFE**

In Re:

FRIENDS OF CANNERY COVE, a non-profit
organization

Appellant,

v.

WASHINGTON DEPARTMENT OF FISH AND
WILDLIFE, a Washington State Agency

Respondent.

OAH Docket No. 2009-FW-0005

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND INITIAL ORDER

STATEMENT OF THE CASE

This matter arises out of the Friends of Cannery Cove's objections to a development project proposed by the City of Bainbridge Island. On June 24, 2009, the Department issued a Hydraulic Project Approval ("HPA") for the project (Exhibit 200), and the Friends of Cannery Cove filed a request for an informal appeal challenging it (Exhibit 203).

In his decision on the informal appeal, issued on August 24, 2009 (Exhibit 202), the Assistant Director of the Habitat Program determined that the Friends of Cannery Cove had presented no information or evidence that the HPA failed to adequately protect fish wildlife, so he found that the HPA is valid as written.

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On September 23, 2009, the Friends of Cannery Cove (hereinafter, "Appellant") requested a formal appeal (Exhibit 204), which request the Department forwarded to the Office of Administrative Hearings.

On April 5, 2010, the Office of Administrative Hearings entered an Interlocutory Order Granting, In Part, the Washington Department of Fish and Wildlife and City of Bainbridge Island's Joint Motion to Dismiss, which dismissed all issues in the appeal of the HPA, except the issue of whether Provision 18 of the HPA provides adequate protection for fish life. The Order limited evidence on the remaining issue to expert testimony and supporting evidence.

On April 9, 2010, the Appellant submitted a Rebuttal Brief to Respondent's Reply in Support of Motion to Dismiss, under cover of "Objection to Process." This was accepted as an offer of proof from the Appellant.

On April 20, 2010, after due and proper notice to all parties, an in-person hearing was held before Administrative Law Judge Kimberly A. Boyce ("ALJ"). Present were Gerald Elfendahl, representing the Appellant, Friends of Cannery Cove; Jessica Fogel, Assistant Attorney General, representing the Washington Department of Fish and Wildlife ("WDFW"); and Paul McMurray, City Attorney, representing the City of Bainbridge Island. Also present were Doug Hatfield, Bainbridge Island Resident; Donald Flora, PhD, expert witness for the Appellant; Libby Hudson, Long Range Planning Manager for the City of Bainbridge Island; John Small, Consultant and Team Project Manager; Chris Waldbillig, WDFW Marine Area Habitat Biologist and expert witness for the Respondent; and Randy Carman, WDFW Environmental Specialist and expert witness for the Respondent. The hearing was recorded by a digital recorder.

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Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

FINDINGS OF FACT

The Project and the HPA.

1. On June 24, 2009, WDFW issued a Hydraulic Project Approval ("HPA") for the project at issue, the Strawberry Plan Restoration Project. Exhibit 200. This project is located on the eastern shore of Bainbridge Island in Kitsap County.
2. Among other things, the project site has been a strawberry packing plant, a sand and gravel processing facility and a boat building yard. Buildings on the site burned down in 1997 and, in February of 2009, the Department of Natural Resources removed 110 creosote pilings from the site.
3. The proposed project includes the following: Removal of concrete fill in the intertidal zone, removal of approximately 250 feet of shoreline armoring; removal of 3,000 cubic yards of fill from the site to decrease slopes and accommodate a salt marsh; removal of 13,000 feet of concrete and asphalt paving; restoration of the stream mouth and intertidal, fringe marsh, and riparian habitat; removal of invasive plants; construction of a boat launch for non-motorized hand-carried water craft; construction of an over-water viewing platform at the site of former fill; and construction of a pedestrian bridge. Exhibit 201, p. 4.
4. After issuance of the HPA, a minor modification was made to the project plans. Exhibit 210. Specifically, a property line adjustment was made to the southeast corner of the project and the water craft launch was adjusted so that it has more of a southern orientation. Id. These modifications were undertaken after an adjacent property owner withdrew his support for the project.
5. The modifications described in paragraph 4 were minor. They did not affect the protection of fish life.

6. The Appellant has many objections to the project. Many of them concern what Mr. Elfendahl described as “emotional issues” of history, access and use, which are beyond the scope of the HPA and this appeal.

7. In its response to WDFW and the City of Banbridge Island’s Motion to Dismiss, the Appellant admitted that many of its objections to the granting of the HPA do not concern fish life. In its own words, the issues of “whether the property is truly a park, whether Mr. Lund’s “Consent to Heirs” is effective, whether the site is historically important, [and] whether excavating the spit is a good or bad idea” are “tangential issues.”

8. In that response, the Appellant appropriately narrowed its request to a request that the ALJ find only that Provision 18 of the HPA should be revoked. Its stated ground was that there are erroneous facts in the application for the HPA, but the facts cited returned again to the “tangential” issues. However, elsewhere in its response, the Appellant contended that excavation required by Provision 18 of the HPA would destroy the peninsula and the cove, irrevocably harm fish and shellfish and convert the waterfront to a salt marsh. These contentions were supported by the Affidavit of Chuck Shank, who did not appear at the hearing, but whose Affidavit was admitted as Exhibit 105, and credibly rebutted by the testimony of Randy Carman in a Declaration (Exhibit 220) and at the hearing, and by the testimony of Chris Waldbillig in a Declaration, (Exhibit 221) and at the hearing.

9. Provision 18 of the HPA provides:

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 [application for the HPA]. All disturbed and created areas shall be replanted with appropriate vegetation.

Expert Witness Qualifications.

10. **Chuck Shank** is a resident of Port Orchard. He is retired from a career in civil engineering, transportation planning and land surveying. He earned a bachelor's degree in biology from Whitman College in 1968, and had one year of graduate school at the University of the Pacific, Pacific Marine Station, studying marine science. From 1971 to 1973 he worked as a technical writer for the preparation of the National Commission on Water Quality Report for the Puget Sound Region. His responsibility was to define the baseline condition of the physical, chemical and biological characteristics of the near-shore environment of Puget Sound.

11. **Donald F. Flora, PhD** earned a bachelor's degree in Science in forestry and geology from the University of Washington, and a PhD in forestry and economics from Yale University in 1961. He spent most of his career with the U.S. Forest Service and has at times served as technical editor for the *Journal of Forestry*. He has served as a director of the Keep Washington Green Association, a member of the Governor's Council of Economic Advisors, and as the head of forestry research laboratories in the Northwest and Alaska. Dr. Flora has lived on the shoreline of Manzanita Bay, Banbridge Island for over 40 years.

12. **Randy Carman** is an Environmental Specialist at WDFW. He received a bachelor of science degree in Fisheries from the University of Washington School of Fisheries in 1981. He conducted two years of post graduate education in Fisheries at the University of Washington from 1983 to 1985. He joined the Washington Department of Fisheries in 1986. In 1988 he was promoted to a position in which he was responsible for reviewing all proposed marine development activities for King, Snohomish and east King Counties and developing appropriate conditions for HPA's. In 1996 he was promoted to a Fish and Wildlife Biologist with WDFW and in 2006 he was promoted to his current position, in which he serves as WDFW's lead on major Puget Sound protection, cleanup and restoration. For the past five years, Mr. Carman has worked with the Puget

Sound Nearshore Ecosystem Restoration Project, jointly sponsored by WDFW and the U.S. Army Corps of Engineers, on protection and restoration of natural processes and functions in the Puget Sound nearshore.

13. **Chris Waldbillig** is an Area Habitat Biologist at WDFW. He received a bachelor of science degree in Environmental Studies from The Evergreen State College in 2003. He started his employment with WDFW in 1999. In January of 2008, he started his current position in the Habitat Program, Regulatory Services Section as a Fish and Wildlife Biologist 3, Area Habitat Biologist for all marine shorelines of Kitsap and Clallam Counties. He is responsible for implementing the HPA permitting process, providing internal and external technical assistance, and providing review and comment on various environmental documents. He also is responsible for providing internal and external technical assistance within his assigned area that supports organizational efforts to achieve healthy, diverse and sustainable fish and wildlife populations and their supporting habitats. He has issued approximately 233 HPA's since he began this position in 2008.

HPA Provision 18 and the Protection of Fish Life.

14. The project at issue will remove fill that varies in depth on top of native soil¹, and create approximately 0.65 acres of new salt marsh and mud flat, and will remove hard armoring that is retaining the existing fill. The project will result in some reduction in the total length of the shoreline, but that reduction will not result in the net loss of fish life.

15. Provisions for the protection of fish life in the HPA, including but not limited to Provision 18, include a timing window that restricts work below the Ordinary High Water Line for the protection of migrating juvenile salmonid from March 1 through July 15. Removal of hard armoring and regrading and return to salt marshes as required by Provision 18 will return the areas to more

¹ Exhibit 218, p. 10.

productive mud flat and salt marsh.

16. The amount of salt marsh will double from 0.2 acres of poorly functioning existing marsh to 0.4 acres of well-functioning marsh.

17. More probably than not, the marsh habitat will be more beneficial to the juvenile salmon than the "vertical environment" and higher energy environment favored by Chuck Shank.

18. While the vertical environment that will be removed and replaced with mud flats and salt marshes provides some habitat for marine algae and some invertebrates, the placement of hard structures into fine-grained substrates displaces and alters existing habitats, changes the prey species communities, and could facilitate the establishment and spread of exotic species.

19. One aspect of Mr. Carmen's analysis contained an error. He first testified that the location of the project ranks as the 186th worst shoreline reach out of 201 reaches on Bainbridge Island according to the Bainbridge Island Nearshore Assessment. In fact, as he acknowledged at the hearing, it ranks as the 46th worst reach. This error did not change his otherwise well-founded and credible opinion that the project will not harm fish life and, in fact, will significantly benefit it.

20. The Appellant's expert witness, Dr. Flora conceded that almost **anything** done at the project site would be better for **fish life** than what is currently there.

21. Compliance with provisions in the HPA will minimize siltation of the beach during the removal of the hard armoring and fill.

22. More likely than not, work on the project will cause minimal and temporary impacts which are entirely mitigated by the benefits to fish life that will result from restoration and creation of a wetland habitat.

23. Based upon observation and study of other areas, such as Manzanita Bay, Fletcher Bay, Blakely Harbor, Eagle Harbor, Port Madison Bay and Murden cove, it is reasonable to predict success of tidal marsh development at the project site.

24. In order to minimize the risks posed by excavation, course sand will be used in the areas above and below the salt marsh location to cover excavated areas. This is an accepted technique for restoration projects, and its success was demonstrated at a project at Seahurst Park near Burien.

25. Not only will there be no net loss of production capacity of fish life, the project will create production capacity.

CONCLUSIONS OF LAW

1. RCW 77.55.021(1) requires any person wishing to undertake a hydraulic project to secure a permit from WDFW. "Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state. RCW 77.55.011(7).

2. **Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned.** RCW 77.55.021(3)(a). The approval shall not be unreasonably withheld. Id.

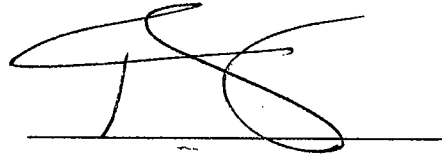
3. The preponderance of the evidence establishes that the HPA was properly granted and conditioned for the protection of fish life.

4. The ALJ has considered all arguments made by the parties. Arguments not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

Now therefore it is ORDERED::

WDFW's granting of the HPA, as conditioned, is **AFFIRMED.**

SERVED on the date of mailing.



Kimberly A. Boyce
Administrative Law Judge

PETITION FOR REVIEW RIGHTS

Any party to this proceeding may file a petition for review of the Initial Order with the Department of Fish and Wildlife within twenty (20) days of the date of service of its Initial Order. RCW 34.05.464 and WAC 10-08-211 and 220-110-350.

The Petition For Review must:

1. Specify the portion of the initial order to which exception is taken;
2. Refer to the evidence of record which is relied upon to support the petition;
and
3. Be filed with the Department of Fish and Wildlife within twenty (20) days of the date of service of the initial order.


A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within (10) days after service of the petition for review, any of the parties may file a reply to that petition with the Department of Fish and Wildlife. WAC 10-08-211. Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed. Id.

Following the review, the Director of the Department of Fish and Wildlife or the Director's designee, will enter a final order. WAC 220-110-550(1)(f). Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10.08.215.

The final decision of the Department of Fish and Wildlife is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598.

Certificate of Service

I assert that true and exact copies of the foregoing Findings of Fact, Conclusions of Law and Initial Order were mailed to the following parties, postage prepaid on the 30th day of April, 2010 at Seattle, Washington.



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