



State of Washington  
Department of Fish and Wildlife

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Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia WA

April 19, 2010

Gonzaga Environmental Law Clinic  
University Legal Assistance  
Attention: Denny Palmer  
Post Office Box 3528  
Spokane, Washington 98220

Dear Mr. Palmer:

**SUBJECT: DECISION ON INFORMAL APPEAL OF HPA 119236-1 ISSUED TO INVEST NORTHWEST ON JANUARY 20, 2010 FOR PRE-CONSTRUCTED MODULAR FLOATING DOCK ON SPOKANE RIVER (57.0001), TRIBUTARY TO COLUMBIA RIVER IN SPOKANE COUNTY**

On February 19, 2010, the Washington Department of Fish and Wildlife (WDFW) received and accepted your request for a third-party informal appeal of Hydraulic Project Approval (HPA) 119236-1 that was issued to Invest Northwest on January 20, 2010. You requested the appeal on behalf of your clients, the Spokane Falls Chapter of Trout Unlimited and the Spokane Riverkeeper.

The HPA authorizes the installation of a pre-constructed modular floating dock for a single-family residence. Your letter outlines four primary issues of appeal, including the cumulative impacts of dock development and protection of Spokane River redband trout. You ask that the dock authorized by the HPA be removed, and that WDFW withdraw the HPA in consideration of your specific grievances.

**Decision**

WAC 220-110-060 requires dock construction projects to incorporate mitigation measures as necessary to achieve no-net-loss of productive capacity of fish habitat. The HPA requires all of the applicable mitigation measures to protect fish life from the impacts of the dock project. The HPA's existing protective provisions and specifications adequately protect fish life from the known impacts of the dock project. Given the absence of any specific information or evidence showing impacts to fish life, I find that the HPA meets WDFW's mandate under Chapter 77.55 RCW to provide for the protection of fish life from the impact of hydraulic projects.

### **Background**

The project site is located at 11501 East Coyote Rock Drive, Lot 23. This address is located on the south bank of the Spokane River, in the northern part of the city of Spokane Falls. Fish life in the upper Spokane River includes redband, brown, cutthroat, and bull trout; smallmouth bass; largescale sucker; redband shiner; speckled dace; northern pikeminnow; and sculpins. This section of river is managed for the conservation of native trout. The project site has little aquatic vegetation, and the dock is built over substrate that is not appropriate spawning substrate for native trout. This dock is located over relatively shallow water and the float is about 21 feet from shore.

On December 11, 2009, Invest Northwest and its authorized agent, North Idaho Maritime, submitted an application for installing a pre-constructed, modular floating dock for a single-family residence, for use by private pleasure craft. WDFW issued the HPA authorizing this work on January 20, 2010. The dock was installed sometime around this date.

On March 5, 2010, HPA Appeals Coordinator Lisa Wood held an informal appeal hearing through a multi-party conference call. Participating in the telephone hearing were you and Mike Chappell of Gonzaga Environmental Law Clinic (agent for appellants); John Condon and Dennis Thompson of North Idaho Maritime (agent for permittee); Jim Dehaas of Invest Northwest (permittee); Harvey Morrison and Jerry White of the Spokane Falls Chapter of Trout Unlimited (appellant); Rick Eichstaedt and Tyler Solheim of Spokane Riverkeeper (appellant); and Jeff Lawlor, WDFW Area Habitat Biologist who issued the HPA.

### **Argument**

You appealed HPA 119236-1 because your clients believe that the HPA was issued with insufficient regard for cumulative impacts of dock development at Coyote Rocks Estates and without appropriate mitigation measures to protect Spokane River redband trout.

Your letter outlines four primary issues of appeal:

1. Project applicants have violated procedural requirements under RCW 77.55.021.
2. Approval of the Coyote Rocks HPA threatens redband trout populations.
3. Approval of the Coyote Rocks HPA is in violation of state law.
4. Cumulative effect on redband trout habitat resulting from 30 dock installations has not been recognized in issuance of the Coyote Rocks HPA.

You ask that the existing dock be removed, and that WDFW review the issuance of the HPA with consideration of your specific grievances and withdraw the HPA.

### **Analysis**

1. You state that the permittee installed the dock on Lot 23 at the Coyote Rocks development without completing the permitting process. Further, the dock was installed well before the June 16, 2010 through August 31, 2010 work time authorized by Provision

1 of the HPA. Allowing the applicant to construct the dock in violation of RCW 77.55.021 and endorsing that behavior by allowing the illegal dock to remain is contrary to HPA regulations and poor public policy. You ask that WDFW enforce the HPA and require the developer to remove the illegally-installed dock. Failure to do so will encourage other developers to ignore state laws.

RCW 77.15.300 (1) states, "*A person is guilty of unlawfully undertaking hydraulic project activities if the person constructs any form of hydraulic project or performs other work on a hydraulic project and: (a) Fails to have a hydraulic project approval required under Chapter 77.55 RCW for such construction work; or (b) Violates any requirements or conditions of the hydraulic project approval for such construction work.*" The permittee and his agent must follow all of the provisions of the HPA. If the dock was installed without an HPA or without following all of the provisions of the HPA, they are in violation of the HPA and subject to criminal and civil penalties.

The exact date that the dock was installed is unclear. You did not provide evidence that the dock was installed before the HPA was issued, or that the HPA was issued after-the-fact. We recognize that the dock has been in place since at least February 18, 2010 when you sent us your request for appeal. It is clear that the dock was installed well before the June 16, 2010 through August 31, 2010 work time authorized by the HPA. WDFW Region 1 enforcement officers are working with Spokane County Prosecutor's Office to investigate the alleged violation. Your request that WDFW require the developer to remove the dock falls outside the authority of WAC 220-110-340, and is not appealable in this venue.

2. You cite WDFW and Avista Corporation studies showing that population levels of redband trout have declined in recent years. The studies show that one of the associated reasons is the increase in competing demands on the river system. The Avista study indicates that the project area contains redband trout habitat, including spawning areas. In 2003, Avista recorded 13 redband trout redds in this reach of the Spokane River. Redband trout spawn in early April, laying eggs in shallow gravel redds along the shoreline, including the project area. The fry emerge in early June. You believe that the HPA exacerbates the redband trout's already stressed habitat situation caused mainly by the dams. You believe that the dock will degrade and disturb habitat, and has no positive effect on species. At the hearing, your clients testified that the dock and its shading will attract predators, especially smallmouth bass, which will consume juvenile redband trout and other fish. Allowing the HPA to stand will contribute to the declining populations of redband trout.

To protect fish life, WAC 220-110-060 requires that certain provisions be made part of HPAs for construction of freshwater docks, piers, and floats and the driving or removal of piling. WAC 220-110-060 states, "*All pier, dock, float, and piling construction projects shall incorporate mitigation measures as necessary to achieve no-net-loss of productive capacity of fish and shellfish habitat. The following technical provisions shall apply to freshwater dock, pier, and float construction projects and the driving or removal of piling:*

*(1) Excavation for and placement of the footings and foundation shall be landward of the ordinary high water line unless the construction site is separated from state waters by use of an approved dike, cofferdam, or similar structure.*

*(2) Alteration or disturbance of the bank and bank vegetation shall be limited to that necessary to construct the project. All disturbed areas shall be protected from erosion, within seven days of completion of the project, using vegetation or other means. The banks shall be revegetated within one year with native or other approved woody species. Vegetative cuttings shall be planted at a maximum interval of three feet (on center), and maintained as necessary for three years to ensure eighty percent survival. Where proposed, planting densities and maintenance requirements for rooted stock will be determined on a site-specific basis. The requirement to plant woody vegetation may be waived for areas where the potential for natural revegetation is adequate, or where other engineering or safety factors preclude them.*

*(3) Removal of existing or temporary structures shall be accomplished so that the structure and associated material does not reenter the watercourse.*

*(4) All piling, lumber, or other materials treated with preservatives shall be sufficiently cured to minimize leaching into the water or bed. The use of wood treated with creosote or pentachlorophenol is not allowed in lakes.*

*(5) Skirting or other structures shall not be constructed around piers, docks, or floats unless specifically approved in the HPA.*

*(6) Floatation for the structure shall be enclosed and contained, when necessary, to prevent the breakup or loss of the floatation material into the water.*

*(7) All work operations shall be conducted in such a manner that causes little or no siltation to adjacent areas. If at any time, fish are observed in distress, a fish kill occurs, or water quality problems develop as a result of a pier, dock, float, or piling project, construction operations shall cease and the permittee or authorized agent shall immediately contact the department.*

*(8) Removal of aquatic vegetation shall be limited to that necessary to gain access to construct the project.*

Provisions 5, 6, 7, 8, 9, 10, 11, and 14 of the HPA address the requirements of WAC 220-110-060. The only requirements not addressed in the provisions are those that do not apply to this dock project. In addition to these protective provisions, the HPA and associated plans include other mitigation measures to help achieve no-net-loss of productive capacity of fish and shellfish habitat:

- Provision 1 of the HPA authorizes the project to be constructed only during the period beginning June 16, 2010 and ending August 31, 2010. This is the period when fish are not spawning or migrating in the project location, and the risk of impacting fish life is considered low.
- According to Mr. Lawlor, the float of the dock is smaller than that of most docks in his area. The plans for the dock show the float as measuring 8 feet by 20 feet, for an area of 160 square feet. In his experience, the average dock size in the area is between 400 and 500 square feet.

- The plans for the dock show the ramp as measuring 3 feet wide by 21 feet long (to the float), for an area of 63 square feet. The average ramp in Mr. Lawlor's assigned area measures about 4 feet wide. In addition, the ramp uses grated decking that allows some light penetration.
- The plans for the dock show the pilings supporting the float as measuring 3 inches in diameter, which is smaller than those of most docks. The plans indicate that the pilings were to be driven in with a hand-held hydraulic post driver.

In addition, the dock is built over substrate that is not appropriate spawning substrate for native trout, including redband trout. A visual survey by Mr. Lawlor showed that the substrate under and in the vicinity of the dock had large (6- to 8-inch diameter) cobble and boulders, but no suitable spawning gravels.

You argued that the project will not have a positive impact on fish species. No statute or rule requires that a hydraulic project improve conditions for fish life or have a positive effect on fish life. In fact, RCW 77.55.231 requires that "*...the department may not impose conditions that attempt to optimize conditions for fish life that are out of proportion to the impact of the proposed project.*"

The science supporting the HPA provisions and the other mitigation measures listed above are described in the 2001 "Over-Water Structures: Freshwater Issues" white paper<sup>1</sup>. This white paper includes a summary of the best available science regarding the impacts that docks and other over-water structures have on various freshwater habitats, and recommends different types of mitigation for these impacts. The white paper's conclusions and recommendations are not applicable to all locations, however. Although you believe that the dock will degrade and disturb habitat and increase predation on fish such as redband trout, you did not provide any specific information or evidence that these impacts would occur. WDFW finds no evidence that such impacts will occur. Therefore, additional mitigation beyond that already required in the HPA is not required. I find that the HPA adequately protects fish life from the known impacts of the dock project.

3. You believe that approval of the HPA violates RCW 90.58.020. You believe that under this statute, which is part of the Shoreline Management Act of 1971, the state gives preference to several prioritized shoreline uses listed in the statute when adopting guidelines for shorelines of statewide significance. You state that WDFW should comply with the Shoreline Management Act and protect the redband trout habitat and the ecology of the shoreline.

The Shoreline Management Act is a law implemented by the Department of Ecology (Ecology). RCW 90.58.020 directs "the department" (meaning Ecology) and local

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<sup>1</sup> Carrasquero, J. *Over-Water Structures: Freshwater Issues* [White paper]. Herrera Environmental Consultants. Submitted to: Washington Department of Fish and Wildlife, Washington Department of Ecology, and Washington Department of Transportation. April 12, 2001. 101 pp.

governments to give preference to certain shoreline uses. WDFW has no authority to consider compliance with the Shoreline Management Act when conditioning or denying an HPA. 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.*" Thus, WDFW's authority for conditioning or denying HPAs is limited to protection of fish life only, and the agency cannot consider compliance with the requirements of other permits.

4. You quote the Coyote Rocks Estates website as describing the development as having 30 waterfront lots for sale, with "private boat docks available for each lot". Issuing an HPA for only one dock at a time ignores the significant, cumulative impacts on redband trout spawning habitat. Your clients believe that the HPA fails to adequately evaluate the cumulative impact of installing 30 docks in such an important redband trout spawning area.

WDFW can deny or condition an HPA based only on protecting fish life from the impacts of the proposed project. The permittees submitted a complete application to install one floating dock, thus the proposed project includes only one dock. No statute or rule allows WDFW to consider structures that have not yet been officially proposed to be constructed in the same or adjacent location when conditioning an HPA. The HPA properly considers the impacts from only the proposed project, not potential future projects.

#### **Summary and Conclusions**

WDFW's mandate under Chapter 77.55 RCW is to provide for the protection of fish life from the impact of hydraulic projects. RCW 77.55.021 (3)(a) states, "*Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned.*" The HPA's existing protective provisions and specifications adequately protect fish life from the known or anticipated impacts of the dock project.

WDFW cannot consider issues such as alleged illegal construction and violations of the Shoreline Management Act when approving or conditioning an HPA, thus, these issues are not appealable. When conditioning or denying a permit for a project, WDFW must consider only the project proposed in the application, not cumulative impacts from potential future projects.

Normally when WDFW makes a determination on an HPA appeal, the proposed project is not yet constructed. In this case, the dock project is already installed and is also subject to enforcement action and legal proceedings. If enforcement action or legal proceedings result in the requirement to remove, replace, or retrofit the existing dock, the permittee or its agent may reapply for a new or modified HPA.

#### **Further Appeal Rights**

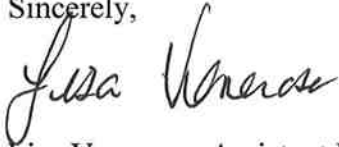
If you disagree with this decision, you may file a written request for formal appeal under the Administrative Procedures Act (Chapter 34.05 RCW) and WAC 220-110-350 (Formal Appeal of Administrative Decisions). WDFW must receive your request within 30 days of

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the date of this letter. Send the written 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,



Lisa Veneroso, Assistant Director  
Habitat Program

Enclosure

cc: John Condon, North Idaho Maritime  
Jim Dehaas, Invest Northwest  
Peter Birch, Deputy Assistant Director  
Pat Chapman, Regulatory Services Coordinator  
Lisa Wood, HPA Appeals Coordinator  
Mark Wachtel, Region 1 Habitat Program Manager  
Jeff Lawlor, Area Habitat Biologist  
Jeff Davis, Habitat Program  
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 77.55.30(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.